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**In this Volume English Cases reported up to 1st June, 1924, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.**



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### ELDEST SON.

*See* DESCENT AND DISTRIBUTION ; SETTLEMENTS ; WILLS.

### ELECTION, DOCTRINE OF.

*See* EQUITY ; WILLS.



# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 ( <i>e.g.</i> , [1891] A. C.)	Eng.
A. Jur. Rep. ...	Australian Jurist Reports ...	Aus.
A. L. T. ...	Australian Law Times ...	Aus.
A. R. ...	Ontario Appeals ...	Can.
Act. ...	Acton's Reports, Prize Causes, 2 vols., 1809—1841 ...	Eng.
Ad. & El. ...	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842 ...	Eng.
Adam ...	Adam's Justiciary Reports (Scotland), 1893—(current) ...	Scot.
Add. ...	Addams' Ecclesiastical Reports, 3 vols., 1822—1826 ...	Eng.
Agra ...	Agra High Court ...	Ind.
Agra F. B. ...	Agra High Court, Full Bench ...	Ind.
Alc. & N. ...	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833 ...	Ir.
Alc. Reg. Cas. ...	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841 ...	Ir.
Aleyn ...	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649 ...	Eng.
All. ...	New Brunswick Reports (Allen) ...	Can.
Alta. L. R. ...	Alberta Law Reports ...	Can.
Amb. ...	Ambler's Reports, Chancery, 1 vol., 1716—1783 ...	Eng.
And. ...	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605 ...	Eng.
Andr. ...	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740 ...	Eng.
Anst. ...	Anstruther's Reports, Exchequer, 3 vols., 1792—1797 ...	Eng.
App. Cas. ...	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890 ...	Eng.
App. Ct. Rep. ...	Appeal Court Reports ...	N.Z.
App. D. ...	South African Law Reports, Appellate Division ...	S. Af.
Architects' L. R. ...	Architects' Law Reports, 4 vols., 1904—1909 ...	Eng.
Argus L. R. ...	Argus Law Reports ...	Aus.
Arkley ...	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848 ...	Scot.
Arm. M. & O. ...	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842 ...	Ir.
Arn. ...	Arnold's Reports, Common Pleas, 2 vols., 1838—1839 ...	Eng.
Arn. & H. ...	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841 ...	Eng.
Ashb. ...	Ashburner's Principles of Equity, 1902 ...	Eng.
Asp. M. L. C. ...	Aspinall's Maritime Law Cases, 1870—(current) ...	Eng.
Atk. ...	Atkins' Reports, Chancery, 3 vols., 1736—1754 ...	Eng.
Ayl. Pan. ...	Ayliffe's New Pandect of Roman Civil Law ...	Eng.
Ayl. Par. ...	Ayliffe's Parergon Juris Canonici Anglicani ...	Eng.
B. ...	Barber's Gold Law ...	S. Af.
B. & Ad. ...	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834 ...	Eng.
B. & Ald. ...	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822 ...	Eng.
B. & C. ...	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830 ...	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) ( <i>e.g.</i> , [1918—19] B. & C. R.) ...	Eng.
B. & S. ...	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870 ...	Eng.
B. C. R. ...	British Columbia Reports ...	Can.
B. Dig. ...	Bose's Digest ...	Ind.
B. L. R. ...	Bengal Law Reports ...	Ind.
B. L. R. A. C. ...	Bengal Law Reports, Appeal Cases ...	Ind.
B. L. R. P. C. ...	Bengal Law Reports, Privy Council ...	Ind.
B. L. R. Sup. Vol. ...	Bengal Law Reports, Supp. Vol. ...	Ind.
B. W. C. C. ...	Butterworths' Workmen's Compensation Cases, 1907—(current) ...	Eng.
Bac. Abr. ...	Bacon's Abridgment ...	Eng.
Bail Ct. Cas. ...	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854 ...	Eng.
Bald. ...	Baldon's Select Cases in Chancery (Selden Society, Vol. X.) ...	Eng.
Ball & B. ...	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814 ...	Ir.

Bankr. & Ins. R.	...	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	...	Eng.
Bar. & Arn.	...	Barron and Arnold's Election Cases, 1 vol., 1843—1846	...	Eng.
Bar. & Aust.	...	Barron and Austin's Election Cases, 1 vol., 1842	...	Eng.
Barn. Ch.	...	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	...	Eng.
Barn. K. B.	...	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	...	Eng.
Barnes	...	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	...	Eng.
Batt.	...	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	...	Ir.
Beat.	...	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	...	Ir.
Beav.	...	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	...	Eng.
Beav. & Wal.	...	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	...	Eng.
Beaw.	...	Beawes's <i>Lex Mercatoria</i>	...	Eng.
Bell, C. C.	...	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	...	Eng.
Bell, Ct. of Sess.	...	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	...	Scot.
Bell, Ct. of Sess. fol.	...	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	...	Scot.
Bell, Dict. Dec.	...	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	...	Scot.
Bell, Sc. App.	...	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	...	Scot.
Bellewe	...	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.	...	Eng.
Belt's Sup.	...	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	...	Eng.
Ben.	...	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579	...	Eng.
Benl.	...	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	...	Eng.
Ber.	...	New Brunswick Reports (Berton)	...	Can.
Bing.	...	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	...	Eng.
Bing. N. C.	...	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	...	Eng.
Biss. & Sm.	...	Bisset and Smith's Digest	...	S. Af.
Bitt. Prac. Cas.	...	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	...	Eng.
Bitt. Rep. in Ch.	...	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	...	Eng.
Bl. Com.	...	Blackstone's Commentaries	...	Eng.
Bl. D. & Osb.	...	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	...	Ir.
Bli.	...	Bligh's Reports, House of Lords, 4 vols., 1819—1821	...	Eng.
Bli. N. S.	...	Bligh's Reports, House of Lords, New Series 11 vols., 1827—1837	...	Eng.
Bluett	...	Bluett's Isle of Man Cases	...	I. of M.
Bom.	...	Bombay High Court Reports	...	Ind.
Bom. A. C.	...	Bombay Reports, Appellate Jurisdiction	...	Ind.
Bom. Cr. Ca.	...	Bombay Reports, Crown Cases	...	Ind.
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Bos. & P.	...	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	...	Eng.
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Br. & Col. Pr. Cas.	...	British and Colonial Prize Cases, 3 vols., 1914—1919	...	Eng.
Bract.	...	Bracton De Legibus et Consuetudinibus Angliæ	...	Eng.
Bro. Abr.	...	Sir R. Brooke's Abridgement	...	Eng.
Bro. C. C.	...	W. Brown's Chancery Reports, 4 vols., 1778—1794	...	Eng.
Bro. Ecc. Rep.	...	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	...	Eng.
Bro. N. C.	...	Sir R. Brooke's New Cases, 1 vol., 1515—1558	...	Eng.
Bro. Parl. Cas.	...	J. Brown's Cases in Parliament, 8 vols., 1702—1800	...	Eng.
Bro. Supp. to Mor.	...	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	...	Scot.
Bro. Synop.	...	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	...	Scot.
Brod. & Bing.	...	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	...	Eng.
Brod. & F.	...	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	...	Eng.
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Buch.	...	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	...	S. Af.
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Buchan. ...	...	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	...	...	Scot.
Buck ...	...	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	...	...	Eng.
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Bulst. ...	...	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	...	...	Eng.
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Cass. Dig. ...	...	Cassell's Digest	...	...	Can.
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Cl. & Sc. Dr. Cas.	...	Clark and Scully's Drainage Cases	...	...	...	Can.
Clay.	...	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	...	...	...	Eng.
Clif. & Rick.	...	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	...	...	...	Eng.
Clif. & Steph.	...	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	...	...	...	Eng.
Co. A.	...	Cook's Lower Canada Admiralty Court Cases	...	...	...	Can.
Co. Ent.	...	Coke's Entries	...	...	...	Eng.
Co. Inst.	...	Coke's Institutes	...	...	...	Eng.
Co. L. J.	...	Colonial Law Journal	...	...	...	N.Z.
Co. Litt.	...	Coke on Littleton (1 Inst.)	...	...	...	Eng.
Co. Rep.	...	Coke's Reports, 13 parts, 1572—1616	...	...	...	Eng.
Coch.	...	Nova Scotia Reports (Cochran)	...	...	...	Can.
Cockb. & Rowe	...	Cockburn and Rowe's Election Cases, 1 vol., 1833	...	...	...	Eng.
Coll.	...	Collyer's Reports, Chancery, 2 vols., 1844—1846	...	...	...	Eng.
Coll. Jurid.	...	Collectanea Juridica, 2 vols.	...	...	...	Eng.
Colles	...	Colles' Cases in Parliament, 1 vol., 1697—1713	...	...	...	Eng.
Colt.	...	Coltman's Registration Cases, 1 vol., 1879—1885	...	...	...	Eng.
Com.	...	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	...	...	...	Eng.
Com. Cas.	...	Commercial Cases, 1895—(current)	...	...	...	Eng.
Com. Dig.	...	Comyns' Digest	...	...	...	Eng.
Comb.	...	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1693	...	...	...	Eng.
Con. & Law.	...	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	...	...	...	Ir.
Cong. Dig.	...	Congdon's Digest	...	...	...	Can.
Cooke & Al.	...	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	...	...	...	Ir.
Cooke, Pr. Cas.	...	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	...	...	...	Eng.
Cooke, Pr. Reg.	...	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	...	...	...	Eng.
Coop. G.	...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	...	...	...	Eng.
Coop. Pr. Cas.	...	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	...	...	...	Eng.
Coop. temp. Brough.	...	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834	...	...	...	Eng.
Coop. temp. Cott.	...	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	...	...	...	Eng.
Cor.	...	Coryton's Reports	...	...	...	Ind.
Corb. & D.	...	Corbett and Daniell's Election Cases, 1 vol., 1819	...	...	...	Eng.
Correspondances Jud.	...	Correspondances Judiciaires	...	...	...	Can.
Couper	...	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885	...	...	...	Scot.
Cout.	...	Coutlees' Unreported Cases	...	...	...	Can.
Cout. Dig.	...	Coutlees' Digest	...	...	...	Can.
Cowp.	...	Cowper's Reports, King's Bench, 2 vols., 1774—1778	...	...	...	Eng.
Cox & Atk.	...	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	...	...	...	Eng.
Cox, C. C.	...	E. W. Cox's Criminal Law Cases, 1843—(current)	...	...	...	Eng.
Cox, Eq. Cas.	...	S. C. Cox's Equity Cases, 2 vols., 1745—1797	...	...	...	Eng.
Cox, M. & H.	...	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852	...	...	...	Eng.
Cr. & J.	...	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	...	...	...	Eng.
Cr. & M.	...	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	...	...	...	Eng.
Cr. & Ph.	...	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841	...	...	...	Eng.
Cr. App. Rep.	...	Cohen's Criminal Appeal Reports, 1908—(current)	...	...	...	Eng.
Cr. M. & R.	...	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	...	...	...	Eng.
Craw. & D.	...	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	...	...	...	Ir.
Craw. & D. Abr. O.	...	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	...	...	...	Ir.
Cress. Insolv. Cas.	...	Cresswell's Insolvency Cases, 1 vol., 1827—1829	...	...	...	Eng.
Cripps' Church Cas.	...	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	...	...	...	Eng.
Cro. Car.	...	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	...	...	...	Eng.
Cro. Eliz.	...	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	...	...	...	Eng.
Cro. Jac.	...	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625	...	...	...	Eng.
Cru. Dig.	...	Cruise's Digest of the Law of Real Property, 7 vols.	...	...	...	Eng.
Cunn.	...	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	...	...	...	Eng.
Curt.	...	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844	...	...	...	Eng.
D.	...	Duxbury's Reports of the High Court of the South African Republic	...	...	...	S. Af.
D. O. A.	...	Dorion's Queen's Bench Reports	...	...	...	Can.
D. L. R.	...	Dominion Law Reports	...	...	...	Can.
Dal.	...	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574	...	...	...	Eng.
Dalr.	...	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	...	...	...	Scot.

Dan. ...	...	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823 ...	Eng.
Dan. & Ll. ...	...	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829 ...	Eng.
Dav. & Mer. ...	...	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844 ...	Eng.
Dav. Ir. ...	...	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611 ...	Ir.
Dav. Pat. Cas. ...	...	Davies' Patent Cases, 1 vol., 1785—1815 ...	Eng.
Day ...	...	Day's Election Cases, 1 vol., 1892—1893 ...	Eng.
Dea. & Sw. ...	...	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857 ...	Eng.
Deac. ...	...	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840 ...	Eng.
Deac. & Ch. ...	...	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835 ...	Eng.
Dears. & B. ...	...	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858 ...	Eng.
Dears. C. C. ...	...	Dearsley's Crown Cases Reserved, 1 vol., 1852—1856 ...	Eng.
Deas & And. ...	...	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832 ...	Scot.
De G. ...	...	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848 ...	Eng.
De G. & J. ...	...	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859 ...	Eng.
De G. & Sm. ...	...	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852 ...	Eng.
De G. F. & J. ...	...	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862 ...	Eng.
De G. J. & Sm. ...	...	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865 ...	Eng.
De G. M. & G. ...	...	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857 ...	Eng.
Delane ...	...	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
Den. ...	...	Denison's Crown Cases Reserved, 2 vols., 1844—1852 ...	Eng.
Dick. ...	...	Dickens' Reports, Chancery, 2 vols., 1559—1798 ...	Eng.
Dirl. ...	...	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1605—1677 ...	Scot.
Dods. ...	...	Dodson's Reports, Admiralty, 2 vols., 1811—1822 ...	Eng.
Donnelly ...	...	Donnelly's Reports, Chancery, 1 vol., 1836—1837 ...	Eng.
Doug. El. Cas. ...	...	Douglas' Election Cases, 4 vols., 1774—1776 ...	Eng.
Doug. K. B. ...	...	Douglas' Reports, King's Bench, 4 vols., 1778—1785 ...	Eng.
Dow ...	...	Dow's Reports, House of Lords, 6 vols., 1812—1818 ...	Eng.
Dow & Cl. ...	...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832 ...	Eng.
Dow. & L. ...	...	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849 ...	Eng.
Dow. & Ry. K. B. ...	...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827 ...	Eng.
Dow. & Ry. M. C. ...	...	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827 ...	Eng.
Dow & Ry. N. P. ...	...	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823 ...	Eng.
Dowl. ...	...	Dowling's Practice Reports, 9 vols., 1830—1841 ...	Eng.
Dowl. N. S. ...	...	Dowling's Practice Reports, New Series, 2 vols., 1841—1843 ...	Eng.
Dr. & Wal. ...	...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841 ...	Ir.
Dr. & War. ...	...	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843 ...	Ir.
Dra. ...	...	Draper's King's Bench Reports ...	Can.
Drew. ...	...	Drewry's Reports, Chancery, 4 vols., 1852—1859 ...	Eng.
Drew. & Sm. ...	...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865 ...	Eng.
Drinkwater ...	...	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 ...	Eng.
Drury temp. Nap. ...	...	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859 ...	Ir.
Drury temp. Sug. ...	...	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—1844 ...	Ir.
Dugd. Orig. ...	...	Dugdale's Origines Juridicales ...	Eng.
Dunl. (Ct. of Sess.) ...	...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862 ...	Scot.
Dunning ...	...	Dunning's Reports, King's Bench, 1 vol., 1753—1754 ...	Eng.
Durie ...	...	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642 ...	Scot.
Dyer ...	...	Dyer's Reports, King's Bench, 3 vols., 1513—1581 ...	Eng.
E. & A. ...	...	Upper Canada Error and Appeal ...	Can.
E. & B. ...	...	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858 ...	Eng.
E. & E. ...	...	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861 ...	Eng.
E. B. & E. ...	...	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860 ...	Eng.
E. D. C. ...	...	Reports of the Eastern Districts Court (Cape) from 1880 ...	S. Af.
E. D. L. ...	...	South African Law Reports, Eastern Districts Local Division ...	S. Af.
E. L. R. ...	...	Eastern Law Reporter ...	Can.
E. R. (or Eng. Rep.) ...	...	English Reports ...	Eng.
E. R. ...	...	Ontario Election Reports ...	Can.
Eag. & Y. ...	...	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825 ...	Eng.
East ...	...	East's Reports, King's Bench, 16 vols., 1800—1812 ...	Eng.
East, P. C. ...	...	East's Pleas of the Crown ...	Eng.
Ecc. & Ad. ...	...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855 ...	Eng.

xviii      **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

Eden	...	Eden's Reports, Chancery, 2 vols., 1757—1766	Eng.
Edgar	...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	Scot.
Edw.	...	Edwards' Reports, Admiralty, 1 vol., 1803—1812	Eng.
Elchies	...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	Scot.
Emden's B. C.	...	Emden's Building Contracts, Building Leases and Building Statutes	Eng.
Eng. Pr. Cas.	...	Roscoe's English Prize Cases, 2 vols., 1745—1858	Eng.
Eq. Cas. Abr.	...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	Eng.
Eq. Rep.	...	Equity Reports, 3 vols., 1853—1855	Eng.
Esp.	...	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	Eng.
Ex. D.	...	Law Reports, Exchequer Division, 5 vols., 1875—1880	Eng.
Exch.	...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	Eng.
Exch. C. R.	...	Exchequer Court Reports	Can.
F. (Ct. of Sess.)	...	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	Scot.
F.	...	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	S. Af.
F. & F.	...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	Eng.
F. N. D.	...	Finnemore's Notes and Digest of Natal Cases, 1863—1867	S. Af.
Fac. Coll.	...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	Scot.
Falc.	...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	Scot.
Falc. & Fitz.	...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	Eng.
Fenton	...	Fenton, Important Judgments	N.Z.
Ferg.	...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	Scot.
Fitz. Nat. Brev.	...	Fitzherbert's Natura Brevium	Eng.
Fitz-G.	...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	Eng.
Fl. & K.	...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	Ir.
Fonbl.	...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	Eng.
For.	...	Forrest's Reports, Exchequer, 1 vol., 1800—1801	Eng.
Forb.	...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	Scot.
Fort. De Laud.	...	Fortesque, De Laudibus Legum Angliæ	Eng.
Fortes. Rep.	...	Fortescue's Reports, fol., 1 vol., 1692—1736	Eng.
Fost.	...	Foster's Crown Cases, 1 vol., 1708—1760	Eng.
Fount.	...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	Scot.
Fox & S. Ir.	...	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	Ir.
Fox & S. Reg.	...	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	Eng.
Fras.	...	Fraser (Simon), Election Cases, 2 vols., 1793	Eng.
Freem. Ch.	...	Freeman's Reports, Chancery, 1 vol., 1660—1706	Eng.
Freem. K. B.	...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	Eng.
G.	...	Gregorowski's Reports of the High Court of the Orange Free State from 1883	S. Af.
G. & R.	...	Nova Scotia Reports (Geldert & Russell)	Can.
G. I. Dig.	...	General Index Digest	Can.
Gal. & Dav.	...	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	Eng.
Gale	...	Gale's Reports, Exchequer, 2 vols., 1835—1836	Eng.
Gaz. L. R.	...	New Zealand Gazette Law Reports	N.Z.
Geld. Dig.	...	Geldert's Digest	Can.
Gib. Cod.	...	Gibson's Codex Juris Ecclesiastici Anglicani	Eng.
Giff.	...	Giffard's Reports, Chancery, 5 vols., 1857—1865	Eng.
Gilb.	...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	Eng.
Gilb. C. P.	...	Gilbert's History and Practice of the Court of Common Pleas	Eng.
Gilb. Ch.	...	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	Eng.
Gilm. & F.	...	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	Scot.
Gl. & J.	...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	Eng.
Glanv.	...	Glanville, De Legibus et Consuetudinibus Regni Angliæ	Eng.
Glanv. El. Cas.	...	Glanville's Election Cases, 1 vol., 1623—1624	Eng.
Glascoc	...	Glascoc's Reports (Ireland), 1 vol., 1831—1832	Ir.
Godb.	...	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	Eng.
Gouldsb.	...	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
Gow	...	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.

Gr. ...	Upper Canada Chancery (Grant) ...	Can.
Griffin's Patent Cases ...	Griffin's Patent Cases, 1884—1887 ...	Eng.
Gwill. ...	Gwillim's Tithe Cases, 4 vols., 1224—1824 ...	
H. ...	Hertzog's Reports of the High Court of the South African Republic, 1893 ...	S. Af.
H. & C. ...	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866 ...	Eng.
H. & N. ...	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862 ...	Eng.
H. & Tw. ...	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850 ...	Eng.
H. & W. ...	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841 ...	Eng.
H. B. R. (preceded by date) ...	Hansell's Reports of Bankruptcy and Companies' Winding Up Cases, 3 vols., 1915—1917 ( <i>e.g.</i> , [1915] H. B. R.) ...	Eng.
H. C. ...	Reports of the High Court of Griqualand West ...	S. Af.
H. E. C. ...	Hodgin's Election Reports ...	Can.
H. L. Cas. ...	Clark's Reports, House of Lords, 11 vols., 1847—1866 ...	Eng.
Hag. Adm. ...	Haggard's Reports, Admiralty, 3 vols., 1822—1838 ...	Eng.
Hag. Con. ...	Haggard's Consistorial Reports, 2 vols., 1789—1821 ...	Eng.
Hag. Ecc. ...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833 ...	Eng.
Halles ...	Halles's Decisions, Court of Session (Scotland), 2 vols., 1766—1791 ...	Scot.
Halc, C. L. ...	Hale's Common Law ...	Eng.
Hale, P. C. ...	Hale's Pleas of the Crown, 2 vols. ...	Eng.
Han. ...	New Brunswick Reports (Hannay) ...	Can.
Harr. & Ruth. ...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866 ...	Eng.
Har. & W. ...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836 ...	Eng.
Harc. ...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691 ...	Scot.
Hard. ...	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669 ...	Eng.
Hare ...	Hare's Reports, Chancery, 11 vols., 1841—1853 ...	Eng.
Hawk. P. C. ...	Hawkins's Pleas of the Crown, 2 vols. ...	Eng.
Hay ...	Hay's Reports ...	Ind.
Hay & Marr. ...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779 ...	Eng.
Hayes ...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832 ...	Ir.
Hayes & Jo. ...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834 ...	Ir.
Hem. & M. ...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865 ...	Eng.
Het. ...	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631 ...	Eng.
Hob. ...	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625 ...	Eng.
Hodg. ...	Hodges' Reports, Common Pleas, 3 vols., 1835—1837 ...	Eng.
Hog. ...	Hogan's Reports, Itolls Court (Ireland), 2 vols., 1816—1834 ...	Ir.
Holt, Adm. ...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867 ...	Eng.
Holt, Eq. ...	W. Holt's Equity Reports, 2 vols., 1845 ...	Eng.
Holt, K. B. ...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710 ...	Eng.
Holt, N. P. ...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817 ...	Eng.
Horne, Ct. of Sess. ...	Horne's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744 ...	Scot.
Hong Kong L. R. ...	Hong Kong Reports ...	Hong Kong
Hop. & Colt. ...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878 ...	Eng.
Hop. & Ph. ...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867 ...	Eng.
Horn & H. ...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839 ...	Eng.
Hov. Supp. ...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817 ...	Eng.
How. C. ...	Howard's Chancery Practice ...	Ir.
How. C. S. ...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland ...	Ir.
How. E. E. ...	Howard's Equity Exchequer ...	Ir.
How. P. L. ...	Howard on the Popery Laws ...	Ir.
Hud. & B. ...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831 ...	Ir.
Hudson's B. C. ...	Hudson on Building Contracts, 2 vols. ...	Eng.
Hume ...	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822 ...	Scot.
Hut. ...	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638 ...	Eng.
Hy. Bl. ...	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796 ...	Eng.
Hyde ...	Hyde's Reports ...	Ind.
I. C. L. R. ...	Irish Common Law Reports, 17 vols., 1849—1866 ...	Ir.
I. Ch. R. ...	Irish Chancery Reports, 17 vols., 1850—1867 ...	Ir.
I. Eq. R. ...	Irish Equity Reports, 13 vols., 1838—1851 ...	Ir.
I. L. R. ...	Irish Law Reports, 13 vols., 1838—1851 ...	Ir.
I. L. R. (Vol.) All. ...	Indian Law Reports, Allahabad ...	Ind.
I. L. R. (Vol.) Bom. ...	Indian Law Reports, Bombay ...	Ind.
I. L. R. (Vol.) Calc. ...	Indian Law Reports, Calcutta ...	Ind.
I. L. R. (Vol.) Lah. ...	Indian Law Reports, Lahore ...	Ind.

I. L. R. (Vol.) Mad.	...	Indian Law Reports, Madras	...	...	...	...	...	Ind.
I. L. T.	...	Irish Law Times, 1867—(current)	...	...	...	...	...	Ir.
I. L. T. Jo.	...	Irish Law Times Journal, 1867—(current)	...	...	...	...	...	Ir.
I. R. (preceded by date)	...	Irish Reports, since 1893 ( <i>e.g.</i> [1894] 1 I. R.)	...	...	...	...	...	Ir.
I. R. (Vol.) C. L.	...	Irish Reports, Common Law, 11 vols., 1866—1877	...	...	...	...	...	Ir.
I. R. Eq.	...	Irish Reports, Equity, 11 vols., 1866—1877	...	...	...	...	...	Ir.
I. R., R. & L.	...	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	...	...	...	...	...	Ir.
Ind. Awards	...	Industrial Awards Recommendations	...	...	...	...	...	N.Z.
Ind. Jur. N. S.	...	Indian Jurist, New Series	...	...	...	...	...	Ind.
Ind. Jur. O. S.	...	Indian Jurist, Old Series	...	...	...	...	...	Ind.
Ir. Cir. Rep.	...	Reports of Irish Circuit Cases, 1 vol., 1841—1843	...	...	...	...	...	Ir.
Ir. Jur.	...	Irish Jurist, 18 vols., 1849—1866	...	...	...	...	...	Ir.
Ir. L. Rec. 1st ser.	...	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	...	...	...	...	...	Ir.
Ir. L. Rec. N. S.	...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	...	...	...	...	...	Ir.
Irv.	...	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	...	...	...	...	...	Scot.
J. Bridg.	...	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	...	...	...	...	...	Eng.
J. D. R.	...	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	...	...	...	...	...	S. Af.
J. P.	...	Justice of the Peace, 1837—(current)	...	...	...	...	...	Eng.
J. P. Jo.	...	Justice of the Peace (Weekly Notes of Cases)	...	...	...	...	...	Eng.
J. R.	...	Jurist Reports	...	...	...	...	...	N.Z.
J. R. N. S.	...	Jurist Reports, New Series	...	...	...	...	...	N.Z.
J. Shaw, Just.	...	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	...	...	...	...	...	Scot.
Jac.	...	Jacob's Reports, Chancery, 1 vol., 1821—1823	...	...	...	...	...	Eng.
Jac. & W.	...	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	...	...	...	...	...	Eng.
James	...	Nova Scotia Reports (James)	...	...	...	...	...	Can.
Jebb & B.	...	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	...	...	...	...	...	Ir.
Jebb & S.	...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	...	...	...	...	...	Ir.
Jebb, C. C.	...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	...	...	...	...	...	Ir.
Jebb, Cr. & Pr. Cas.	...	Jebb's Crown and Presentment Cases	...	...	...	...	...	Ir.
Jenk.	...	Jenkins' Reports, 1 vol., 1220—1623	...	...	...	...	...	Eng.
Jo. & Car.	...	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	...	...	...	...	...	Eng.
Jo. & Lat.	...	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	...	...	...	...	...	Ir.
Jo. Ex. Ir.	...	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	...	...	...	...	...	Ir.
John.	...	Johnson's Reports, Chancery, 1 vol., 1858—1860	...	...	...	...	...	Eng.
John. & H.	...	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	...	...	...	...	...	Eng.
Jur.	...	Jurist Reports, 18 vols., 1837—1854	...	...	...	...	...	Eng.
Jur. N. S.	...	Jurist Reports, New Series, 12 vols., 1855—1867	...	...	...	...	...	Eng.
K.	...	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	...	...	...	...	...	S. Af.
K. & G.	...	Keane and Grant's Registration Cases, 1 vol., 1854—1862	...	...	...	...	...	Eng.
K. & J.	...	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	...	...	...	...	...	Eng.
K. B. (preceded by date)	...	Law Reports, King's Bench Division, since 1900 ( <i>e.g.</i> , [1901] 2 K. B.)	...	...	...	...	...	Eng.
Kames, Dict. Dec.	...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	...	...	...	...	...	Scot.
Kames, Rem. Dec.	...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	...	...	...	...	...	Scot.
Kames, Sel. Dec.	...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	...	...	...	...	...	Scot.
Kay	...	Kay's Reports, Chancery, 1 vol., 1853—1854	...	...	...	...	...	Eng.
Keb.	...	Keble's Reports, fol., 3 vols., 1661—1677	...	...	...	...	...	Eng.
Keen	...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	...	...	...	...	...	Eng.
Keil.	...	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	...	...	...	...	...	Eng.
Kel.	...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	...	...	...	...	...	Eng.
Kel. W.	...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	...	...	...	...	...	Eng.
Keny.	...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	...	...	...	...	...	Eng.
Keny. Ch.	...	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	...	...	...	...	...	Eng.
Kerr	...	New Brunswick Reports (Kerr)	...	...	...	...	...	Can.
Kilkerran	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	...	...	...	...	...	Scot.
Kn. & Omb.	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	...	...	...	...	...	Eng.
Knapp	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	...	...	...	...	...	Eng.
Knox	...	Knox's Reports	...	...	...	...	...	Aus.
Konst. & W. Rat. App.	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	...	...	...	...	...	Eng.
Konst. Rat. App.	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	...	...	...	...	...	Eng.

L. & G. temp. Plunk.	...	Lloyd and Goold's Reports temp. Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
L. & G. temp. Sugd.	...	Lloyd and Goold's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb.	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	Eng.
L. C. & M. Gaz.	...	Local Courts and Municipal Gazette	Can.
L. C. J.	...	Lower Canada Jurist	Can.
L. C. L. J.	...	Lower Canada Law Journal	Can.
L. C. R.	...	Lower Canada Reports	Can.
L. G. R.	...	Local Government Reports, 1902—(current)	Eng.
L. J. Adm.	...	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bcy.	...	Law Journal, Bankruptcy, 1832—1880	Eng.
L. J. C. C.	...	Law Journal (County Courts Reporter), 1912—(current)	Eng.
L. J. C. P.	...	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch.	...	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl.	...	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex.	...	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq.	...	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q. B.	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C.	...	Law Journal, Magistrates' Cases, 1831—1896	Eng.
L. J. N. C.	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S.	...	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P.	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M.	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	Eng.
L. J. P. C.	...	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A.	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo.	...	Law Journal Newspaper, 1866—(current)	Eng.
L. L. R.	...	Leader Law Reports	S. Af.
L. M. & P	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
L. N.	...	Legal News	Can.
L. R. A. & E.	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	Eng.
L. R. C. C. R.	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	Eng.
L. R. C. P.	...	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq.	...	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
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L. R. H. L.	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App.	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp.	...	Law Reports, India Appeals, Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir.	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	Ir.
L. R. P. & D.	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	Eng.
L. R. P. C.	...	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B.	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	Eng.
L. R. Q. B.	...	Quebec Reports, Queen's Bench	Can.
L. R. Sc & Div.	...	Law Reports, Scotch and Divorce Appeals, House of Lords, 2 vols., 1866—1875	Eng.
L. T.	...	Law Times Reports, 1859—(current)	Eng.
L. T. Jo.	...	Law Times Newspaper, 1843—(current)	Eng.
L. T. O. S.	...	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
L. Th.	...	La Themis	Can.
L.ane	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
L.at.	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	Eng.
L.aws. Reg. Cas.	...	Lawson's Registration Cases, 1895—(current)	Eng.
L.d. Raym.	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
L.e. & Ca.	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	Eng.
L.each	...	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
L.ee	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	Eng.
L.ee temp. Hard.	...	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.
L.eg. Rep.	...	Legal Reporter	Ir.
L.egge	...	Legge's Reports	Aus.
L.eon.	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	Eng.
L.evinz.	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	Eng.
L.evin. C. C.	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	Eng.
L.ey	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	Eng.

Lib. Ass.	...	...	Liber Assisarum, Year Books, 1—51 Edw. III.	...	Eng.
Lilly	...	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	Eng.
Litt.	...	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	Eng.
Lloyd, L. R.	...	...	Lloyd's List Law Reports, 1919—(current)	...	Eng.
Lloyd, Pr. Cas.	...	...	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	...	Eng.
Lofft	...	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	...	Eng.
Long. & T.	...	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	...	Ir.
Lords Journals	...	...	Journals of the House of Lords	...	Eng.
Lud. E. C.	...	...	Luder's Election Cases, 3 vols., 1784—1787	...	Eng.
Lumley, P. L. C.	...	...	Lumley's Poor Law Cases, 2 vols., 1834—1842	...	Eng.
Lush.	...	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	Eng.
Lut.	...	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	...	Eng.
Lut. Reg. Cas.	...	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	Eng.
Lynd.	...	...	Lyndwood, Provinciale, fol., 1 vol.	...	Eng.
M.	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	S. Af.
M. & S.	...	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	Eng.
M. & W.	...	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	...	Eng.
M. C. R.	...	...	Montreal Condensed Reports	...	Can.
M. H. C. R.	...	...	Madras High Court Reports	...	Ind.
M. L. R. (Vol.) K. B. or Q. B.	...	...	Montreal Law Reports, King's Bench or Queen's Bench	...	Can.
M. L. R. (Vol.) S. C.	...	...	Montreal Law Reports, Superior Court	...	Can.
M. M. Cas.	...	...	Martin's Reports of Mining Cases	...	Can.
Mac.	...	...	Macassey's New Zealand Reports	...	N.Z.
Mac. & G.	...	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	...	Eng.
Mac. & H.	...	...	Ma rae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	...	Eng.
M'Cle.	...	...	M'Clelland's Reports, Exchequer, 1 vol., 1824	...	Eng.
M'Cle. & Yo.	...	...	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	...	Eng.
Macfarlane	...	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	...	Scot.
Macf. & Rob.	...	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	...	Scot.
Macph. (Ct. of Sess.)	...	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	...	Scot.
Macq.	...	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	...	Scot.
Macr.	...	...	Macrory's Patent Cases, 2 parts, 1847—1856	...	Eng.
Mad.	...	...	Madras High Court Reports	...	Ind.
Madd.	...	...	Maddock's Reports, Chancery, 6 vols., 1815—1821	...	Eng.
Madd. & G.	...	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	Eng.
Madox	...	...	Madox's Formulæ Anglicanum	...	Eng.
Madox, Exch.	...	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	Eng.
Mag.	...	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	Eng.
Man. & G.	...	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	...	Eng.
Man. & Ry. K. B.	...	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	Eng.
Man. & Ry. M. C.	...	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	Eng.
Man. L. J.	...	...	Manitoba Law Journal	...	Can.
Man. L. R.	...	...	Manitoba Law Reports	...	Can.
Man. R. temp. Wood	...	...	Manitoba Reports temp. Wood	...	Can.
Mans.	...	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	Eng.
Mar. L. C.	...	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	Eng.
March	...	...	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	...	Eng.
Marr.	...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	Eng.
Marsh.	...	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	Eng.
Marsh.	...	...	Marshall's Reports	...	Ind.
Mayn.	...	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	...	Eng.
Meg.	...	...	Megone's Companies Acts Cases, 2 vols., 1889—1891	...	Eng.
Men.	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	S. Af.
Mer.	...	...	Merivale's Reports, Chancery, 3 vols., 1815—1817	...	Eng.
Milw.	...	...	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	...	Ir.
Mod. Rep.	...	...	Modern Reports, 12 vols., 1669—1755	...	Eng.
Mol.	...	...	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831	...	Ir.
Mont.	...	...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	...	Eng.
Mont. & A.	...	...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	...	Eng.



Mont. & B.	...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	Eng.
Mont. & Ch.	...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	Eng.
Mont. & M.	...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	Eng.
Mont. D. & De G.	...	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	Eng.
Moo. & P.	...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S.	...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App.	...	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	Eng.
Moo. P. C. C.	...	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. C. C. N. S.	...	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M.	...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	Eng.
Mood. & R.	...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. C. C.	...	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P.	...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	Eng.
Moore, K. B.	...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict.	...	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr.	...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos.	...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep.	...	Municipal Reports	Can.
Murd. Epit.	...	Murdoch's Epitome	Can.
Murp. & H.	...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr.	...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr.	...	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K.	...	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. A. C.	...	Native Appeal Cases	S. Af.
N. & S.	...	Nichols and Stop's Reports (Tasmania)	Tasmania.
N. B. Dig.	...	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep.	...	New Brunswick Equity Reports	Can.
N. B. R.	...	New Brunswick Reports	Can.
N. B. R. (All.)	...	New Brunswick Reports (Allen)	Can.
N. B. R. (Ber.)	...	New Brunswick Reports (Berton)	Can.
N. B. R. (Carl.)	...	New Brunswick Reports (Carleton)	Can.
N. B. R. (Chip.)	...	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.)	...	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr)	...	New Brunswick Reports (Kerr)	Can.
N. B. R. (P. & B.)	...	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.)	...	New Brunswick Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.)	...	New Brunswick Reports (Pugsley)	Can.
N. B. R. (Tru.)	...	New Brunswick Reports (Trueman)	Can.
N. L. R.	...	Natal Law Reports	S. Af.
N. S. R.	...	Nova Scotia Reports	Can.
N. S. R. (Coch.)	...	Nova Scotia Reports (Cochran)	Can.
N. S. R. (G. & R.)	...	Nova Scotia Reports (Geldert & Russell)	Can.
N. S. R. (James)	...	Nova Scotia Reports (James)	Can.
N. S. R. (Old.)	...	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & C.)	...	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.)	...	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.)	...	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad.	...	New South Wales Reports, Admiralty	Aus.
N. S. W. B.	...	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas.	...	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq.	...	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtrn. Cas.	...	New South Wales Industrial Arbitration Cases	Aus.
N. S. W. L. R.	...	New South Wales Law Reports	Aus.
N. S. W. Land App. Cts.	...	New South Wales Land Appeal Courts	Aus.
N. S. W. S. C. R. (Eq.)	...	New South Wales Supreme Court Reports (Equity)	Aus.
N. S. W. S. C. R. (L.)	...	New South Wales Supreme Court Reports (Law)	Aus.
N. S. W. S. C. R. N. S.	...	New South Wales Supreme Court Reports, New Series	Aus.
N. S. W. W. N.	...	New South Wales Weekly Notes	Aus.
N. W.	...	North-Western Provinces High Court Reports	Ind.
N. W. T. R.	...	North-West Territories Reports	Can.
N. Z. Jur.	...	New Zealand Jurist	N.Z.
N. Z. Jur. Mining Law	...	New Zealand Jurist Mining Law	N.Z.
N. Z. Jur. N. S.	...	New Zealand Jurist, New Series	N.Z.
N. Z. L. R.	...	New Zealand Law Reports, 1883—(current)	N.Z.
N. Z. L. R. C. A.	...	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
Nels.	...	Nelson's Reports, Chancery, 1 vol., 1625—1693	Eng.
Nev. & M. K. B.	...	Neville and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
Nev. & M. M. C.	...	Neville and Manning's Magistrates' Cases, 3 vols., 1832—1836	Eng.
Nev. & P. K. B.	...	Neville and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. C.	...	Neville and Perry's Magistrates' Cases, 1 vol., 1836—1837	Eng.
New Mag. Cas.	...	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850	Eng.

# xxiv      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

New Pract. Cas.	...	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.
New Rep.	...	New Reports, 6 vols., 1862—1865	Eng.
New Sess. Cas.	...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851	Eng.
Nfld. L. R.	...	Newfoundland Reports	Nfld.
Nolan	...	Nolan's Magistrates' Cases, 1 vol., 1791—1793	Eng.
Notes of Cases	...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850	Eng.
Noy	...	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649	Eng.
O. B. & F.	...	Ollivier Bell and Fitzgerald's Reports	N.Z.
O. B. S. P.	...	Old Bailey Session Papers	Eng.
O. Bridg.	...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666	Eng.
O. F. S.	...	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R.	...	Ontario Law Reports	Can.
O'M. & H.	...	O'Malley and Hardcastle's Election Cases, 1869—(current)	Eng.
O. P. D.	...	South African Law Reports, Orange Free State Provincial Division	S. Af.
O. R.	...	Ontario Reports	Can.
O. R.	...	Official Reports of the South African Republic, 1894—1899	S. Af.
O. R. C.	...	Reports of the High Court of the Orange River Colony	S. Af.
O. S.	...	Upper Canada Queen's Bench, Old Series	Can.
O. W. N.	...	Ontario Weekly Notes	Can.
O. W. R.	...	Ontario Weekly Reporter	Can.
Old.	...	Nova Scotia Reports (Oldrights)	Can.
Ont. Dig.	...	Digest of Ontario Case Law, 4 vols., 1823—1900	Can.
Owen	...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	Eng.
P. (preceded by date)	...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 ( <i>e.g.</i> , [1891] P.)	Eng.
P. & B.	...	New Brunswick Reports (Pugsley and Burbidge)	Can.
P. & T.	...	New Brunswick Law Reports (Pugsley and Trueman)	Can.
P. Cas.	...	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922	Eng. & Col.
P. D.	...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890	Eng.
P. E. I.	...	Prince Edward Island Reports	Can.
P. R.	...	Ontario Practice	Can.
P. Wms.	...	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735	Eng.
Palm.	...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629	Eng.
Park.	...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717	Eng.
Pat. App.	...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Pater. App.	...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake	...	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	Eng.
Peake, Add. Cas.	...	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812	Eng.
Peck.	...	Peckwell's Election Cases, 2 vols., 1803—1806	Eng.
Pelham	...	Pelham (S. A.) Reports	Aus.
Per. & Dav.	...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn.	...	Perry and Knapp's Election Cases, 1 vol., 1833	Eng.
Per. C. S.	...	Perrault's Conseil Supérieur	Can.
Per. P.	...	Perrault's Prévosté de Québec, 1726—1756	Can.
Ph.	...	Phillips' Reports, Chancery, 2 vols., 1841—1849	Eng.
Phil. El. Cas.	...	Phillips' Election Cases, 1 vol., 1780	Eng.
Phillim.	...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821	Eng.
Phillim. Eccl. Jud.	...	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip.	...	Phipson's Digest of Natal Reports, 1858—1859	S. Af.
Pig. & R.	...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845	Eng.
Pitc.	...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624	Scot.
Plowd.	...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	Eng.
Poll.	...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682	Eng.
Poph.	...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627	Eng.
Pow. R. & D.	...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.
Prec. Ch.	...	Precedents in Chancery, fol., 1 vol., 1689—1722	Eng.
Price	...	Price's Reports, Exchequer, 13 vols., 1814—1824	Eng.
Price	...	Price's Mining Commissioners' Cases	Can.
Pug.	...	New Brunswick Reports (Pugsley)	Can.
Py. R.	...	Pykes' Lower Canada Reports	Can.
Q. B.	...	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	Eng.
Q. B. (preceded by date)	...	Law Reports, Queen's Bench Division, 1891—1901 ( <i>e.g.</i> , [1891] 1 Q. B.)	Eng.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Q. B. D. ...	...	Law Reports, Queen's Bench Division, 25 vols., 1875—1890 ...	Eng.
Q. J. P. ...	...	Queensland Justice of Peace Reports ...	Aus.
Q. L. J. ...	...	Queensland Law Journal and Reports, 11 vols., 1879—1901 ...	Aus.
Q. L. R. ...	...	Quebec Law Reports ...	Can.
Q. L. R. (Beor)	...	Queensland Law Reports by Beor, 1878—1878 ...	Aus.
Q. P. R. ...	...	Quebec Practice Reports ...	Can.
Q. R. (Vol.) K. B. or Q. B.	...	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current) ...	Can.
Q. R. (Vol.) S. C.	...	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current) ...	Can.
Q. S. C. R.	...	Queensland Supreme Court Reports, 5 vols., 1860—1881 ...	Aus.
Q. S. R. ...	...	Queensland State Reports ...	Aus.
Q. W. N.	...	Weekly Notes, Queensland ...	Aus.
R.	...	The Reports, 15 vols., 1893—1895 ...	Eng.
R.	...	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878 ...	S. Af.
R. (Ct. of Sess.)...	...	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898 ...	Scot.
R. A. C. ...	...	Ramsay, Appeal Cases ...	Can.
R. & C. ...	...	Nova Scotia Reports (Russell & Chesley) ...	Can.
R. & G.	...	Nova Scotia Reports (Russell and Geldert) ...	Can.
R. C.	...	La Revue Critique de Législation et de Jurisprudence de Canada ...	Can.
R. de J. ...	...	Revue de Jurisprudence ...	Can.
R. de L. ...	...	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848 ...	Can.
R. E. D.	...	New South Wales, Reserved and Equity Decisions ...	Aus.
R. E. D.	...	Ritchie's Equity Decisions (Russell) ...	Can.
R. J. R. Q.	...	Quebec Revised Reports ...	Can.
R. L. N. S.	...	Revue Légale, New Series, 1895—(current) ...	Can.
R. L. O. S.	...	Revue Légale, Old Series, 21 vols., 1869—1892 ...	Can.
R. P. C. ...	...	Reports of Patent Cases, 1884—(current) ...	Eng.
R. R.	...	Revised Reports ...	Eng.
Rast.	...	Rastell's Entries ...	Eng.
Rayn.	...	Rayner's Tithe Cases, 3 vols., 1575—1782 ...	Eng.
Real Prop. Cas.	...	Real Property Cases, 2 vols., 1843—1847 ...	Eng.
Rep. Ch.	...	Reports in Chancery, fol., 3 vols., 1615—1710 ...	Eng.
Rep. in C. of A.	...	Reports in Courts of Appeal ...	N.Z.
Res. & Eq. Jud.	...	New South Wales Reserved and Equity Judgments ...	Aus.
Reserv. Cas.	...	Reserved Cases ...	Ir.
Rick. & M.	...	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889 ...	Eng.
Rick. & S.	...	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894 ...	Eng.
Ridg. L. & S.	...	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795 ...	Ir.
Ridg. Parl. Rep.	...	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796 ...	Ir.
Ridg. temp. H.	...	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746 ...	Eng.
Ritch. Eq. Rep.	...	Ritchie's Equity Reports ...	Can.
Rob. Eccl.	...	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853 ...	Eng.
Rob. L. & W.	...	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851 ...	Eng.
Robert. App.	...	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727 ...	Scot.
Robin. App.	...	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841 ...	Scot.
Roll. Abr.	...	Rolle's Abridgment of the Common Law, fol., 2 vols. ...	Eng.
Roll. Rep.	...	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625 ...	Eng.
Rom.	...	Romilly's Notes of Cases in Equity, 1 part, 1772—1787 ...	Eng.
Roscoe's B. C.	...	Roscoe, Digest of Building Cases ...	Eng.
Rose	...	Rose's Reports, Bankruptcy, 2 vols., 1810—1816 ...	Eng.
Ross, L. O.	...	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols. ...	Eng.
Rowe	...	Rowe's Reports (England and Ireland), 1 vol., 1798—1823 ...	Eng.
Rul. Cas.	...	Campbell's Ruling Cases, 25 vols. ...	Eng.
Russ.	...	Russell's Reports, Chancery, 5 vols., 1824—1829 ...	Eng.
Russ. & M.	...	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833 ...	Eng.
Russ. & Ry.	...	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823 ...	Eng.
Rus. E. R.	...	Russell's Election Reports ...	Can.
Ry. & Can. Cas.	...	Railway and Canal Cases, 7 vols., 1835—1854 ...	Eng.
Ry. & Can. Tr. Cas.	...	Railway and Canal Traffic Cases, 1855—(current) ...	Eng.
Ry. & M.	...	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826 ...	Eng.
Ryde & K. Rat. App.	...	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904 ...	Eng.
Ryde, Rat. App.	...	Ryde's Rating Appeals, 3 vols., 1871—1893 ...	Eng.
S.	...	Searle's Reports of the Supreme Court of the Cape of Good Hope ...	S. Af.
S. A. L. J.	...	South African Law Journal ...	S. Af.

xxvi      **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

S. A. L. R. ... ..	South Australian Law Reports ... ..	Aus.
S. A. L. R. ... ..	South African Law Reports ... ..	S. Af.
S. A. R. ... ..	Reports of the High Court of the South African Republic, 1881—1892 ... ..	S. Af.
S. A. S. R. ... ..	South Australian State Reports, since 1921 ( <i>e.g.</i> , [1921] S. A. S. R.) ... ..	Aus.
S. C. ... ..	Reports of the Supreme Court of the Cape of Good Hope from 1880 ... ..	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	Court of Session Cases (Scotland) (House of Lords), since 1906 ( <i>e.g.</i> , [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date)	Court of Justiciary Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C. (J.))	Scot.
S. C. R. ... ..	Canada, Supreme Court Reports ... ..	Can.
S. L. T. ... ..	Scots Law Times, 1893 (current) ... ..	Scot.
S. Q. R. ... ..	Queensland State Reports ... ..	Aus.
S. R. ... ..	Reports of the High Court of Southern Rhodesia ... ..	S. Af.
S. R. C. ... ..	Stuart's Lower Canada Reports ... ..	Can.
S. R. N. S. W. ... ..	New South Wales, State Reports ... ..	Aus.
S. R. Q. ... ..	Queensland Reports, Supreme Court ... ..	Aus.
S. V. A. R. ... ..	Stuart's Vice-Admiralty Reports ... ..	Can.
Saint ... ..	Saint's Digest of Registration Cases, 1843—1906, 1 vol. ... ..	Eng.
Salk. ... ..	Salkeld's Reports, King's Bench, 3 vols., 1689—1712 ... ..	Eng.
Sask. L. R. ... ..	Saskatchewan Law Reports ... ..	Can.
Sau. & Sc. ... ..	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840 ... ..	Ir.
Saund. ... ..	Saunders's Reports, King's Bench, 2 vols., 1666—1672 ... ..	Eng.
Saund. & A. ... ..	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904 ... ..	Eng.
Saund. & B. ... ..	Saunders and Bidder's Locus Standi Reports, 1905—(current) ... ..	Eng.
Saund. & C. ... ..	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ... ..	Eng.
Saund. & M. ... ..	Saunders and Macrae's County Courts and Insolvency Cases ('County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858 ... ..	Eng.
Sav. ... ..	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ... ..	Eng.
Say. ... ..	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756 ... ..	Eng.
Sc. Jur. ... ..	Scottish Jurist, 46 vols., 1829—1873 ... ..	Scot.
Sc. L. R. ... ..	Scottish Law Reporter, 1865—(current) ... ..	Scot.
Sc. R. R. ... ..	Scots Revised Reports ... ..	Scot.
Sch. & Lef. ... ..	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806 ... ..	Ir.
Scott ... ..	Scott's Reports, Common Pleas, 8 vols., 1834—1840 ... ..	Eng.
Scott, N. R. ... ..	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ... ..	Eng.
Sea. & Sm. ... ..	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860 ... ..	Eng.
Sel. Cas. Ch. ... ..	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.) ... ..	Eng.
Selwyn's N. P. ... ..	Selwyn's Abridgement of the Law of Nisi Prius ... ..	Eng.
Sess. Cas. K. B. ... ..	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747 ... ..	Eng.
Sett. & Rem. ... ..	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742 ... ..	Eng.
Sh. (Ct. of Sess.) ... ..	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838 ... ..	Scot.
Sh. & MacI. ... ..	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838 ... ..	Scot.
Sh. Dig. ... ..	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868 ... ..	Scot.
Sh. Just. ... ..	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831 ... ..	Scot.
Sh. Sc. App. ... ..	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824 ... ..	Scot.
Sh. Teind Ct. ... ..	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831 ... ..	Scot.
Shep. Touch. ... ..	Sheppard's Touchstone of Common Assurances ... ..	Eng.
Show. ... ..	Shower's Reports, King's Bench, 2 vols., 1678—1695 ... ..	Eng.
Show. Parl. Cas. ... ..	Shower's Cases in Parliament, fol., 1 vol., 1694—1699 ... ..	Eng.
Sid. ... ..	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670 ... ..	Eng.
Sim. ... ..	Simons' Reports, Chancery, 17 vols., 1826—1852 ... ..	Eng.
Sim. & St. ... ..	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ... ..	Eng.
Sim. N. S. ... ..	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ... ..	Eng.
Skin. ... ..	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ... ..	Eng.
Sm. & Bat. ... ..	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825 ... ..	Ir.
Sm. & G. ... ..	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ... ..	Eng.
Smith, K. B. ... ..	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ... ..	Eng.
Smith, L. C. ... ..	Smith's Leading Cases, 2 vols. ... ..	Eng.
Smith, Reg. Cas. ... ..	C. L. Smith's Registration Cases, 1895—(current) ... ..	Eng.
Smythe ... ..	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840 ... ..	Ir.
Sol. Jo. ... ..	Solicitors' Journal, 1856—(current) ... ..	Eng.

Spence ... ..	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks ... ..	Spinks' Prize Court Cases, 2 parts, 1854—1856 ...	Eng.
St. R. Qd. (preceded by date) ... ..	Queensland State Reports, since 1902 ( <i>e.g.</i> , [1902] St. R. Qd.)	Aus.
Stair Rep. ... ..	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681 ...	Scot.
Stark. ... ..	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823 ...	Eng.
State Tr. ... ..	State Trials, 34 vols., 1163—1820 ...	Eng.
State Tr. N. S. ... ..	State Trials, New Series, 8 vols., 1820—1858 ...	Eng.
Stewart ... ..	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton ... ..	Stockton's Vice-Admiralty Report and Digest ...	Can.
Story ... ..	Story's Commentaries on Equity Jurisprudence ...	Eng.
Stra. ... ..	Strange's Reports, 2 vols., 1716—1747 ...	Eng.
Stu. M. & P. ... ..	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853 ...	Scot.
Stuart ... ..	Sessions Cases (Stuart) ...	Scot.
Stuart, Adm. ... ..	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S. ... ..	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874 ...	Can.
Stuart, K. B. ... ..	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835 ...	Can.
Sty. ... ..	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	Eng.
Sw. ... ..	Swabey's Reports, Admiralty, 1 vol., 1855—1859 ...	Eng.
Sw. & Tr. ... ..	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865 ...	Eng.
Swan. ... ..	Swanston's Reports, Chancery, 3 vols., 1818—1821 ...	Eng.
Swin. ... ..	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme ... ..	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M. ... ..	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851 ...	Eng.
T. H. ... ..	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909 ...	S. Af.
T. Jo. ... ..	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685 ...	Eng.
T. L. ... ..	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current) ...	S. Af.
T. L. R. ... ..	The Times Law Reports, 1884—(current) ...	Eng.
T. P. ... ..	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. P. D. ... ..	South African Law reports, Transvaal Provincial Division ...	S. Af.
T. Raym. ... ..	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683 ...	Eng.
T. S. ... ..	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	S. Af.
Taml. ... ..	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830 ...	Eng.
Tas. L. R. ... ..	Tasmanian Law Reports ...	Aus.
Taunt. ... ..	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas. ... ..	Tax Cases, 1875—(current) ...	Eng.
Tay. ... ..	Taylor's King's Bench Reports ...	Can.
Temp. Wood ... ..	Manitoba Reports <i>temp.</i> Wood ...	Can.
Term Rep. ... ..	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R. ... ..	Territories Law Reports ...	Can.
Thom. ... ..	Nova Scotia Reports (Thomson) ...	Can.
Toth. ... ..	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	Eng.
Town. St. Tr. ... ..	Townsend, Modern State Trials ...	Eng.
Trem. P. C. ... ..	Tremaine Pleas of the Crown, 1 vol., 1667 ...	Eng.
Trist. ... ..	Tristram's Consistory Judgments, 1 vol., 1872—1890 ...	Eng.
Tru. ... ..	New Brunswick Reports (' <i>l'rueman</i> ) ...	Can.
Tudor, L. C. Merc. Law. ... ..	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Tudor, L. O. Real. Prop. ... ..	Tudor's Leading Cases on Real Property ...	Eng.
Turn. & R. ... ..	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr. ... ..	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835 ...	Eng.
Tyr. & Gr. ... ..	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836 ...	Eng.
U. C. Jur. ... ..	Upper Canada Jurist ...	Can.
U. C. L. J. N. S. ... ..	Canada Law Journal, New Series, 1865—(current) ...	Can.
U. C. L. J. O. S. ... ..	Canada Law Journal, Old Series, 10 vols., 1855—1864 ...	Can.
U. C. R. ... ..	Upper Canada Reports, Queen's Bench ...	Can.
Udal ... ..	Fiji Law Reports (Udal) ...	Fiji.
V. L. R. ... ..	Victorian Law Reports ...	Aus.
V. R. ... ..	Victorian Reports ...	Aus.
V. R. (Adm.) ... ..	Victorian Reports (Admiralty) ...	Aus.
V. R. (Eq.) ... ..	Victorian Reports (Equity) ...	Aus.
V. R. (Law) ... ..	Victorian Reports (Law) ...	Aus.
Vaugh. ... ..	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673 ...	Eng.
Vent. ... ..	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691 ...	Eng.

# xxviii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Vern. ...	...	Vernon's Reports, Chancery, 2 vols., 1680—1719 ...	Eng.
Vern. & Scr. ...	...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788 ...	Ir.
Ves. ...	...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817 ...	Eng.
Ves. & B. ...	...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814 ...	Eng.
Ves. Sen. ...	...	Vesey Sen.'s Reports, 2 vols., 1747—1756 ...	Eng.
Vin. Abr. ...	...	Viner's Abridgment of Law and Equity, fol., 22 vols. ...	Eng.
Vin. Supp. ...	...	Supplement to Viner's Abridgment of Law and Equity, 6 vols. ...	Eng.
W. ...	...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857 ...	S. Af.
W. A. L. R. ...	...	West Australian Law Reports ...	Aus.
W. A'B. & W. ...	...	Webb, A'Beckett and Williams' Victorian Reports ...	Aus.
W. & W. ...	...	Wyatt and Webb ...	Aus.
W. C. C. ...	...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907 ...	Eng.
W. H. C. ...	...	South African Law Reports, Witwatersrand High Court ...	S. Af.
W. Jo. ...	...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640 ...	Eng.
W. L. D. ...	...	South African Law Reports, Witwatersrand Local Division ...	S. Af.
W. L. R. ...	...	Western Law Reporter ...	Can.
W. L. T. ...	...	Western Law Times ...	Can.
W. N. (preceded by date)	...	Law Reports, Weekly notes, 1866—(current) ( <i>e.g.</i> , [1866] W. N.)	Eng.
W. N. ...	...	Calcutta Weekly Notes ...	Ind.
W. R. ...	...	Weekly Reporter, 54 vols., 1852—1906 ...	Eng.
W. R. ...	...	Sutherland's Weekly Reporter ...	Ind.
W. R. ...	...	Weekly Reporter, reporting cases in the Cape Provincial Division ...	S. Af.
W. W. & A'B. ...	...	Wyatt, Webb and A'Beckett ...	Aus.
W. W. R. ...	...	Western Weekly Reports ...	Can.
Wallis by Lyne ...	...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791 ...	Ir.
Web. Pat. Cas. ...	...	Webster's Patent Cases, 2 vols., 1802—1855 ...	Eng.
Weish, Reg. Cas. ...	...	Weish's Registry Cases (Ireland), 1 vol., 1832—1840 ...	Ir.
Went. Off. Ex. ...	...	Wentworth's Office and Duty of Executors ...	Eng.
West ...	...	West's Reports, House of Lords, 1 vol., 1839—1841 ...	Eng.
West temp. Hard. ...	...	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740 ...	Eng.
West. Tithe Cas. ...	...	Western's London Tithe Cases, 1 vol., 1592—1822 ...	Eng.
White ...	...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893 ...	Scot.
White & Tud. L. C. ...	...	White and Tudor's Leading Cases in Equity, 2 vols. ...	Eng.
Wight. ...	...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811 ...	Eng.
Will. Woll. & Dav. ...	...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837 ...	Eng.
Will. Woll. & H. ...	...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839 ...	Eng.
Willes ...	...	Willes' Reports, Common Pleas, 1 vol., 1737—1758 ...	Eng.
Wilm. ...	...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770 ...	Eng.
Wils. ...	...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774 ...	Eng.
Wils. & S. ...	...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835 ...	Scot.
Wils. Ch. ...	...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819 ...	Eng.
Wils. Ex. ...	...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817 ...	Eng.
Win. ...	...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625 ...	Eng.
Wm. Bl. ...	...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779 ...	Eng.
Wm. Rob. ...	...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850 ...	Eng.
Wms. Saund. ...	...	Williams' Notes to Saunders' Reports, 2 vols. ...	Eng.
Wolf. & B. ...	...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864 ...	Eng.
Wolf. & D. ...	...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858 ...	Eng.
Woll. ...	...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841 ...	Eng.
Wood ...	...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1708 ...	Eng.
Y. A. D. ...	...	Young's Vice-Admiralty Reports ...	Can.
Y. & C. Ch. Cas. ...	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843 ...	Eng.
Y. & C. Ex. ...	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841 ...	Eng.
Y. & J. ...	...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830 ...	Eng.
Y. B. ...	...	Year Books ...	Eng.
Yelv. ...	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613 ...	Eng.
You. ...	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832 ...	Eng.

# ABBREVIATIONS

## USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xv.—xxx., *ante*.)

A.-G.	.	.	.	.	for Attorney-General.
Act.	.	.	.	.	„ Actiengesellschaft.
Admly.	.	.	.	.	„ Admiralty.
Affd.	.	.	.	.	„ Affirmed.
Affg.	.	.	.	.	„ Affirming.
Akt.	.	.	.	.	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon.	.	.	.	.	„ Anonymous.
Apld.	.	.	.	.	„ Applied.
Appct.	.	.	.	.	„ Applicant.
Appln.	.	.	.	.	„ Application.
Appln.	.	.	.	.	„ Application to Register a Trade Mark.
Applt.	.	.	.	.	„ Appellant.
Apprvd.	.	.	.	.	„ Approved.
Arbn.	.	.	.	.	„ Arbitration.
Archbp.	.	.	.	.	„ Archbishop.
Art.	.	.	.	.	„ Article.
Assce.	.	.	.	.	„ Assurance.
Assocn.	.	.	.	.	„ Association.
B. C.	.	.	.	.	„ Borough Council.
Bkpcy.	.	.	.	.	„ Bankruptcy.
Bkpt.	.	.	.	.	„ Bankrupt.
Bldg. Soc.	.	.	.	.	„ Building Society.
Bp.	.	.	.	.	„ Bishop.
C. A.	.	.	.	.	„ Court of Appeal.
C. & S. L. Ry. Co.	.	.	.	.	„ City & South London Railway Co.
C. C. A.	.	.	.	.	„ Court of Criminal Appeal.
C. C. R.	.	.	.	.	„ County Court Rules.
C. C. R.	.	.	.	.	„ Court of Crown Cases Reserved.
C. L. P. Act.	.	.	.	.	„ Common Law Procedure Act.
C. L. Ry. Co.	.	.	.	.	„ Central London Railway Co.
C. O. R.	.	.	.	.	„ Crown Office Rules.
C. S. U. C.	.	.	.	.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	.	.	.	.	„ <i>Capias ad satisfaciendum</i> .
Cale. Ry. Co.	.	.	.	.	„ Caledonian Railway Co.
Ch.	.	.	.	.	„ Chancery.
Ch. Div.	.	.	.	.	„ Chancery Division.
Co.	.	.	.	.	„ Company.
Co-op. Assocn.	.	.	.	.	„ Co-operative Supply Association.
Comrs.	.	.	.	.	„ Commissioners.
Consd.	.	.	.	.	„ Considered.
Corpn.	.	.	.	.	„ Corporation.
Ct.	.	.	.	.	„ Court.
Ct. of Ch.	.	.	.	.	„ Court of Chancery.
Ct. of Eq	.	.	.	.	„ Court of Equity.
Ct. of R.	.	.	.	.	„ Court of Review.
D. C.	.	.	.	.	„ Divisional Court.
Dbtd.	.	.	.	.	„ Doubted.
Deft.	.	.	.	.	„ Defendant.

Distd. . . . .	for Distinguished.
Div. Ct. . . . .	„ Divisional Court.
Eccl. Comrs. . . . .	„ Ecclesiastical Commissioners.
Eccl. Ct. . . . .	„ Ecclesiastical Court.
Ex. Ch. . . . .	„ Exchequer Chamber.
<i>Ex p.</i> . . . . .	„ <i>Ex parte</i> .
Exch. . . . .	„ Exchequer.
Exor. . . . .	„ Executor.
Exorship. . . . .	„ Executorship.
Expld. . . . .	„ Explained.
Extd. . . . .	„ Extended.
Extrix. . . . .	„ Executrix.
<i>Fi. fa.</i> . . . . .	„ <i>Fieri facias</i> .
Folld. . . . .	„ Followed.
G. & S. W. Ry. Co. . . . .	„ Glasgow & South Western Railway Co.
G. O. Ry. Co. . . . .	„ Great Central Railway Co.
G. E. Ry. Co. . . . .	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co. . . . .	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co. . . . .	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co. . . . .	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland . . . . .	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co. . . . .	„ Great Western Railway Co.
Govt. . . . .	„ Government.
Grdns. . . . .	„ Guardians or Guardians of the Poor.
H. C. of A. . . . .	„ High Court of Australia.
H. L. . . . .	„ House of Lords.
I. R. Comrs. . . . .	„ Inland Revenue Commissioners.
Insee. . . . .	„ Insurance.
JJ. . . . .	„ Justices.
Jud. Act . . . . .	„ Judicature Act.
K. B. Div. . . . .	„ King's Bench Division.
L. & B. Ry. Co. . . . .	„ London & Brighton Railway Co.
L. & N. E. Ry. Co. . . . .	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co. . . . .	„ London & North Western Railway Co.
L. & S. W. Ry. Co. . . . .	„ London & South Western Railway Co.
L. & Y. Ry. Co. . . . .	„ Lancashire & Yorkshire Railway Co.
L. B. . . . .	„ Local Board.
L. B. & S. C. Ry. Co. . . . .	„ London, Brighton & South Coast Railway Co.
L. C. . . . .	„ Lord Chancellor.
L. C. & D. Ry. Co. . . . .	„ London, Chatham & Dover Railway Co.
L. C. C. . . . .	„ London County Council.
L. Elec. Ry. Co. . . . .	„ London Electric Railway Co.
L. G. Board . . . . .	„ Local Government Board.
L.J. . . . .	„ Lord Justice.
L.JJ. . . . .	„ Lords Justices.
L. M. & S. Ry. Co. . . . .	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co. . . . .	„ London, Tilbury & Southend Railway Co.
M. S. Act . . . . .	„ Merchant Shipping Act.
M. S. & L. Ry. Co. . . . .	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags. . . . .	„ Magistrates.
Mentd. . . . .	„ Mentioned.
Met. Dist. Ry. Co. . . . .	„ Metropolitan District Railway Co.
Met. Ry. Co. . . . .	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co. . . . .	„ Midland Great Western Railway Co.
Mid. Ry. Co. . . . .	„ Midland Railway Co.
Mtge. . . . .	„ Mortgage.
Mtgee. . . . .	„ Mortgagee.
Mtgor. . . . .	„ Mortgagor.
N. B. Ry. Co. . . . .	„ North British Railway Co.
N. E. Ry. Co. . . . .	„ North Eastern Railway Co.
N. F. . . . .	„ Not Followed.
N. P. . . . .	„ Nisi Prius.
Ord. . . . .	„ Order.
Overd. . . . .	„ Overruled.



# ABBREVIATIONS.

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P. C.	.	.	.	.	.	for Privy Council.
Petn.	.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	.	„ <i>Quare</i> .
R. C.	.	.	.	.	.	„ Rural Council.
R. D. C.	.	.	.	.	.	„ Rural District Council.
R. S. A.	.	.	.	.	.	„ Rural Sanitary Authority.
R. S. C.	.	.	.	.	.	„ Revised Statutes of Canada.
R. S. C.	.	.	.	.	.	„ Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	.	„ Referred.
Regn. of Trade Mk.	.	.	.	.	.	„ Registration of Trade Mark.
Regr. of Trade Mks.	.	.	.	.	.	„ Registrar of Trade Marks.
Resp.	.	.	.	.	.	„ Respondent.
Restg.	.	.	.	.	.	„ Restoring.
Revsd.	.	.	.	.	.	„ Reversed.
Revsd.	.	.	.	.	.	„ Reversing.
Ry. Co.	.	.	.	.	.	„ Rail. Co. or Railway Co.
S. C.	.	.	.	.	.	„ Same Case.
S. C. (name of colony following)	.	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	.	„ Settled Estates.
S. E. & C. Ry. Co.	.	.	.	.	.	„ South Eastern & Chatham Railway Co.
S. E. Ry. Co.	.	.	.	.	.	„ South Eastern Railway Co.
S. P.	.	.	.	.	.	„ Same Point.
S.S.	.	.	.	.	.	„ Steamship.
Sched.	.	.	.	.	.	„ Schedule.
<i>Sci. fa.</i>	.	.	.	.	.	„ <i>Scire facias</i> .
Sect.	.	.	.	.	.	„ Section.
Set. Land Act	.	.	.	.	.	„ Settled Land Act.
Settlmt.	.	.	.	.	.	„ Settlement.
Soc.	.	.	.	.	.	„ Society.
Soc. Anon.	.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	.	„ United States of America.
Union Assmt. Com.	.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	.	„ Workmen's Compensation Act.



## MEANING OF TERMS

### USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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<i>Licence to Enter</i> . . . . .	„ MINES ; REAL PROPERTY.	<i>Wayleaves</i> . . . . .	„ MINES ; TELEGRAPHS AND TELEPHONES.

## Part I.—Nature and Characteristics of Easements.

### SECT. 1.—DEFINITION.

1. **Word known in law.**—A man cannot prescribe to have a necessary easement in the lands of another person for himself & his servants to catch fish in his several fishery.

The word "easement" is known in law, but here the thing itself is set forth, viz., to catch fish, etc., & certainly no instance can be given of a prescription for such a liberty by such a word or name (*per cur.*).—PEERS *v.* LUCY (1694), 4 Mod. Rep. 362; 87 E. R. 444.

2. **Privilege without profit.**—(1) Declaration stated, that A. was seised in fee of an inn, & yard thereto adjoining, & by indenture demised the same to pltf. for a term of years, which was undetermined; that deft. was possessed of a certain other yard adjoining the premises of pltf. as tenant thereof to B.; & that deft. & his landlord granted to A. his heirs & assigns, authority to make, at the costs of A. a drain from the inn, & across, a certain part of the yard of deft., into the yard of pltf.; & that A. his heirs & assigns, & his farmers & tenants, occupiers of the inn & yard, should have the foul water collected in the scullery of the inn, to run from the same, through the drain, across the part of the yard of deft., into the yard of pltf. for so long time as occasion should require for the convenient occupation of the inn or its appurtenances. Breach, that deft., without notice, obstructed the drain. Another count stated the grant to be for so long time as deft. should be in possession or occupation of the last-mentioned land, or so long as the same should be requisite for the convenient occupation of the inn. It appeared in evidence that the licence to construct & continue the drain was by parol:—*Held*: as the right claimed in the declaration was a freehold right, assuming that it was an easement only upon the land of another, & not an interest in the land, it could not be created without deed.

(2) *Terms de la Ley*, a book of great antiquity & accuracy, defines an easement to be a privilege that one neighbour hath of another by charter or prescription, without profit; & it instances "as a way or sink through his land, or such like" (BAYLEY, J.).

(3) A right of way or a right of passage for water, where it does not create an interest in the land, is an incorporeal right, & stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, etc. (BAYLEY, J.).—HEWLINS *v.* SHIPPAM (1826), 5 B. & C. 221; 7 Dow. & Ry. K. B. 783; 4 J. O. S. K. B. 241; 108 E. R. 82.

*Annotations*:—As to (1) *Apld.* Cocker *v.* Cowper (1834), 1 Cr. M. & L. 418. *Consd.* Wood *v.* Leadbitter (1845), 13 M. & W. 838; Perry *v.* Fitzhove (1846), 3 Q. B. 757; McManus *v.* Cooke (1887), 35 Ch. D. 681. *Apld.* Aldin *v.* Latimer Clark, Muirhead, [1894] 2 Ch. 437. *Reid.* Wallis *v.* Harrison (1838), 1 Horn & H. 405; Taplin *v.* Florence (1851), 10 C. B. 744; Met. Ry. *v.* Fowler, [1892] 1 Q. B. 165; Hurst *v.* Picture Theatres, [1915] 1 K. B. 1. As to (2) *Consd.* Mounsey *v.* Ismay (1865), 12 L. T. 26. *Reid.* Met. Ry. *v.* Fowler, [1892] 1 Q. B. 165. As to (3) *Reid.* Liggins *v.* Inge (1831), 7 Bing. 682.

3. —(1) One of the earliest definitions of an easement is in the *Termes de la Ley*, & it is a "privilege that one neighbour hath of another by writing or prescription, without profit, as a way or a sink through his land."

In this definition custom is not mentioned; prescription is, & it therefore seems to point to a

privilege belonging to an individual, not a custom which appertains to many as a class (MARTIN, B.).

(2) To constitute an easement there must be two tenements, a dominant one to which the right belongs, & a servient one upon which the obligation is imposed (MARTIN, B.).—MOUNSEY *v.* ISMAY (1865), 3 H. & C. 486; 34 L. J. Ex. 52; 12 L. T. 26; 11 Jur. N. S. 141; 13 W. R. 521; 150 E. R. 621.

*Annotations*:—As to (2) *Reid.* Shuttleworth *v.* Le Fleming (1865), 19 C. B. N. S. 687; Met. Ry. *v.* Fowler, [1892] 1 Q. B. 165; Mercer *v.* Denne, [1905] 2 Ch. 538. *Generally*, *Mentd.* Sowerby *v.* Coleman (1867), L. R. 2 Exch. 96; Hall *v.* Nottingham (1875), 45 L. J. Q. B. 50.

4. **Burden on proprietary right.**—(1) A right to lateral support from adjoining land may be acquired by twenty years uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time; & it is so acquired if the enjoyment is peaceable & without deception or concealment & so open that it must be known that some support is being enjoyed by the building. *Semble*: such a right of support is an easement within the meaning of Prescription Act, 1832 (c. 71), s. 2. Two dwelling houses adjoined, built independently but each on the extremity of its owner's soil & having lateral support from the soil on which the other rested. This having continued for much more than twenty years one of the houses (pltf.'s) was, in 1849, converted into a coach factory, the internal walls being removed & girders inserted into a stack of brickwork in such a way as to throw much more lateral pressure than before upon the soil under the adjoining house. The conversion was made openly, & without deception or concealment. More than twenty years after the conversion the owners of the adjoining house employed a contractor to pull down their house & excavate, the contractor being bound to shore up adjoining buildings & make good all damage. The contractor employed a sub-contractor upon similar terms. The house was pulled down, & the soil under it excavated to a depth of several feet & pltf.'s stack being deprived of the lateral support of the adjacent soil sank & fell, bringing down with it most of the factory:—*Held*: pltf.'s had acquired a right of support for their factory by the twenty years' enjoyment & could sue the owners of the adjoining house & the contractor for the injury.

(2) In one sense every easement may be regarded as a right of property in the owner of the dominant tenement, not a full or absolute right, but a limited right or interest in land which belongs to another, whose *plenum dominium* is diminished to the extent to which his estate is affected by the easement. But a right constituted in favour of estate A. & its owners, in or over the adjoining lands of B., is in my opinion of the nature of an easement, & that, whether such right is one of the natural incidents of property, or has its origin in grant or prescription (LORD WATSON).

(3) At the time when the twenty years' rule was first promulgated by the cts., a document under seal was the only specific mode known to the common law in which an incorporeal hereditament could be created. But there are many cases in which equitable rights in the nature of an easement arise without any deed at all. There may be a binding agreement for valuable consideration

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not under seal. There may be conduct or inaction on the part of an adjoining owner which will in equity preclude him from denying that a right in the nature of an easement has been acquired against himself (BOWEN, J.).

The absence in fact of a grant, meaning thereby, a deed under seal, cannot, in my opinion, be conclusive against pltf. [grantee]. Assent or acquiescence on part of defts. to the erection of pltf.'s building, with a knowledge of its peculiar mode of construction, would, in the absence of any deed under seal, entitle pltf. to maintain this action (LINDLEY, J.).

(4) When [the landowner] severs the ownership & conveys a part of the land to another he gives the person to whom it is conveyed, unless the contrary is expressed, not a right to complain of what has been already done but a right to have the support in future (LORD BLACKBURN).

(5) Forty years user has the same effect which, under Prescription Act, 1832 (c. 71), s. 3, twenty years user has as to light; it makes the right absolute & indefeasible, unless it is shown to have been enjoyed by consent or agreement in writing. But twenty years user, under sect. 2 may be defeated "in any other way by which" it was previously (i.e., before Aug. 1, 1832), "liable to be defeated," except that it can no longer be defeated or destroyed "by showing only that it was first enjoyed at any time prior to such period of twenty years." The effect of this, as I understand it, is to apply the law of prescription, properly so called, to an easement enjoyed as of right for twenty years, subject to all defences to which a claim by prescription would previously have been open, except that of showing a commencement within time of legal memory. To allege that there was no evidence from which a grant could be presumed, or that there was evidence from which it ought to be inferred that there was, in fact, no grant, would not (as I understand the law) have been, before Aug. 1, 1832, a competent mode of defeating or destroying any claim to an easement by prescription, & no jury would have been directed to find a grant in any such case, when there was no proof of a commencement within time of legal memory (LORD SELBORNE, C.).

(6) Prescription Act, 1832 (c. 71), so far as it went, made that a direct bar which was before only a bar by the intervention of a jury & the use of an artificial fiction of law. But it did not abolish the old doctrine; if it had, old rights even from time immemorial would have been put an end to by unity of occupation for the space of a year. I think the law, as far as regards this subject, is the same as it was before that Act was passed (LORD BLACKBURN).

(7) From the view which I take of the nature of the right to support, that it is an easement, not purely negative, capable of being granted, & also capable of being interrupted, it seems to me to follow that it must be within Prescription Act, 1832 (c. 71), s. 2, unless that sect. is confined to rights of way & rights of water (LORD SELBORNE, C.).

(8) The easement of the riparian landowner is natural; that of the mill owner of the stream so far as it exceeds that of an ordinary riparian proprietor is conventional, i.e. it must be established by prescription or grant (LORD SELBORNE, C.).

(9) In the natural state of land, one part of it receives support from another, upper from lower

strata, & soil from adjacent soil. This support is natural, & is necessary, as long as the *status quo* of the land is maintained; &, therefore, if one parcel of land be conveyed, so as to be divided in point of title from another contiguous to it, or (as in the case of mines) below it, the *status quo* of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the land itself, *sine quo res ipsa haberi non debet*. All existing divisions of property in land must have been attended with this incident, when not excluded by contract; & it is for that reason often spoken of as a right by law; a right of the owner to the enjoyment of his own property, as distinguished from an easement supposed to be gained by grant; a right for injury to which an adjoining proprietor is responsible, upon the principle, *sic utere tuo, ut alienum non laedas* (LORD SELBORNE, C.).

(10) I think it clear that any such right of support to a building, or part of a building, is an easement; & it is both scientifically & practically inaccurate to describe it as one of a merely negative kind (LORD SELBORNE, C.).

(11) Though the right of support to a building is not of common right & must be acquired yet when it is acquired the right of the owner of the building to support for it is precisely the same as that of the owner of the land to support for it (LORD BLACKBURN).

(12) Support to that which is artificially imposed upon land cannot exist *ex jure naturæ*, because the thing supported does not itself so exist; it must in each particular case be acquired by grant, or by some means equivalent in law to grant, in order to make it a burden upon the neighbour's land, which (naturally) would be free from it (LORD SELBORNE, C.).

(13) If a building is divided into floors or "flats," separately owned, the owner of each upper floor or "flat" is entitled to vertical support from the lower part of the building & to the benefit of such lateral support as may be of right enjoyed by the building itself (LORD SELBORNE, C.).—DALTON v. ANGUS (1881), 6 App. Cas. 740; 46 J. P. 132; 30 W. R. 191, II. L.; *sub nom.* PUBLIC WORKS COMRS. v. ANGUS & Co., DALTON v. ANGUS & Co., 50 L. J. Q. B. 689; 44 L. T. 844; *affg.* S. C. *sub nom.* ANGUS v. DALTON (1878), 4 Q. B. D. 162, C. A.

*Annotations:—As to (1) Apld.* Lemaître v. Davis (1881), 19 Ch. D. 281. *Consd.* Kine v. Jolly, [1905] 1 Ch. 480. *Reid.* Bell v. Love (1883), 10 Q. B. D. 547; Hughes v. Percival (1883), 8 App. Cas. 443; Hardaker v. Idle District Council, [1896] 1 Q. B. 335; Blake v. Woolf, [1898] 2 Q. B. 426; Jordonson v. Sutton, Southcoates & Drypool Gas Co., [1899] 2 Ch. 217; Penny v. Wimbledon U. C. (1899), 68 L. J. Q. B. 704; Gardner v. Hodgson's Kingston Breweries Co., [1900] 1 Ch. 592; Robinson v. Beaconsfield R. C., [1911] 2 Ch. 188; Padbury v. Holliday & Greenwood (1912), 28 T. L. R. 491; Hurlstone v. L. Elec. Ry. (1914), 30 T. L. R. 398. *As to (2) Reid.* Schwann v. Cotton, [1916] 2 Ch. 120. *As to (3) Reid.* Sturges v. Bridgman (1879), 11 Ch. D. 852; Cory v. Davies, [1923] 2 Ch. 95. *As to (4) Reid.* Greenwell v. Low Beechburn Coal Co., [1897] 2 Q. B. 165; Edinburgh & District Water Trustees v. Clippens Oil Co. (1902), 87 L. T. 275. *As to (5) Consd.* Simpson v. Godmanchester Corp., [1897] A. C. 696; Gardner v. Hodgson's Kingston Breweries Co., [1900] 1 Ch. 592; Union Lighterage Co. v. London Graving Dock Co., [1902] 2 Ch. 557. *Reid.* Norfolk v. Arbutnot (1880), 5 C. P. D. 390; Goodman v. Saltash Corp., (1882), 7 App. Cas. 633; Russell v. Watts (1885), 55 L. J. Ch. 158; Harris v. De Pinna (1886), 33 Ch. D. 238; Perry v. Eames, Salaman v. Eames, Mercers' Co. v. Eames, [1891] 1 Ch. 658; Corbett v. Jonas, [1892] 3 Ch. 137; Wheaton v. Maple, [1893] 3 Ch. 48; Chastey v. Ackland (1885), 72 L. T. 845; A.-G. v. Antrobus (1905), 74 L. J. Ch. 599; Cable v. Bryant, [1908] 1 Ch. 259; Fwillbach Colliery Co. v. Woodman, [1915] A. C. 634. *As to (6) Reid.* Hyman v. Van Don Bergh, [1908] 1 Ch. 167. *As to (7) Reid.* Lemaître v. Davis (1881), 19 Ch. D. 281; Bass v. Gregory (1890), 25 Q. B. D. 481; Perry v. Eames, Salaman v. Eames,

*Mercers' Co. v. Eames*, [1891] 1 Ch. 658; *Simpson v. Godmanchester Corp.*, [1897] A. C. 696; 1 R. Comrs., [1901] 1 K. B. 416; *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557; *Selby v. Whitbread*, [1917] 1 K. B. 736. *As to (b) Consd.* *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557. *Reid*. *Jordeson v. Sutton*, *Southcoates & Drypool Gas Co.*, [1899] 2 Ch. 217; *Howley Park Coal & Canal Co. v. L. & N. W. Ry.*, [1913] A. C. 11. *As to (10) Reid*. *Kine v. Jolly*, [1905] 1 Ch. 480. *As to (11) Reid*. *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q. B. 165; *Southwark & Vauxhall Water Co. v. Wandsworth Board of Works*, [1888] 2 Ch. 603. *As to (12) Consd.* *Tone v. Preston* (1883), 24 Ch. D. 739; *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557. *Reid*. *Lemaitre v. Davis* (1881), 19 Ch. D. 281; *Goodman v. Saltash Corp.* (1882), 7 App. Cas. 433; *Haigh v. West* (1893), 62 L. J. Q. B. 532. *As to (13) Reid*. *Tone v. Preston* (1883), 24 Ch. D. 739. *Generally, Mentd.* *Rivers v. Adams* (1878), 3 Ex. D. 361; *Duke v. Courage* (1882), 46 J. P. 453; *Esdale v. Payne* (No. 2) (1885), 53 L. T. 21; *Dicker v. Popham*, *Radford* (1890), 63 L. T. 379; *Crawford v. Consett L. B.* (1891), 65 J. P. 218; *Smith v. Baxter*, [1900] 2 Ch. 138; *Cribb v. Kynoch*, [1907] 2 K. B. 548; *A. G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Kirby v. Chessum* (1913), 30 T. L. R. 15; *Hall v. Manchester Corp.* (1914), 111 L. T. 182; *Lyell v. Hothfield*, [1914] 3 K. B. 811; *Cox v. Coulson*, [1916] 2 K. B. 177.

5. —[—]—A special Act authorised the M. railway co. to construct an underground railway, & provided that with respect to lands under a highway the co. should not be required wholly to take such lands, but might appropriate & use the subsoil & under-surface. Under this Act the co. constructed a tunnel under a highway for the purposes of the railway:—*Held*: upon the true construction of their special Act the co., had with respect to the tunnel an interest in land & not merely an easement; the tunnel was a "hereditament" within the meaning of Land Tax Act, 1797 (c. 5), s. 4, & the co., was in respect thereof chargeable with the land tax imposed by that Act.

I think it right to notice that, in one of the clauses of their special Act of 1879, the interest of the co. in strata under-lying a highway is referred to as an easement, which is a mere burden upon the proprietary right of the owner in fee. It may consist either in restraining, for the benefit of the dominant tenement, certain uses which its owner might otherwise make of the servient land, or in compelling him to submit to uses of that land by others, which are not incompatible with his retaining the right of property. In this case, so long as the tunnel is used for railway purposes, the interest of the owner from whom it was appropriated appears to me to be entirely ousted. I am of opinion that, in the present question, regard must be had to the substance & true legal character of the interest conferred upon the co. by statute, & not to general terms, occurring in the statute, & not inaccurately describe it (*LORD WATSON*).—*METROPOLITAN RY. CO. v. FOWLER*, [1893] A. C. 416; 62 L. J. Q. B. 553; 69 L. T. 390; 57 J. P. 756; 42 W. R. 270; 9 T. L. R. 610; 1 R. 264, H. L.

*Annotations*:—*Reid*. *Taff Vale Ry. v. Cardiff Ry.*, [1917] 1 Ch. 299; *Derry v. Sanders*, [1919] 1 K. B. 223. *Mentd.* *Halkyn District Mines Drainage Co. v. Holywell Union* (1893), 3 Ryde Lat. App. 338; *Southport Corp. v. Ormskirk Union Assmt. Com.*, [1894] 1 Q. B. 196; *Farmer v. Waterloo & City Ry.*, [1895] 1 Ch. 527; *Westminster Corp. v. Johnson*, *Same v. Fuller*, [1904] 2 K. B. 737; *Newton Chambers v. Hall*, [1907] 2 K. B. 446; *Liverpool Corp. v. West Derby Union Assmt. Com.*, [1908], 72 J. P. 397; *C. L. Ry. v. City of London Land Tax Comrs.*, [1911] 2 Ch. 467; *Toronto Corp. v. Consumers' Gas Co.*, [1916] 2 A. C. 618.

#### PART I. SECT. 2, SUB-SECT. 1.

6 i. *Interest in land*.—A deed granting all the right, title, interest, etc., of A. in & to the water privilege of a piece of land, conveys only an easement in the land, & no interest in the land itself; therefore the grantee

cannot by virtue of the deed maintain trespass for an entry on the land.—*WILSON v. SINCLAIR* (1856), 3 All. 343.—*CAN.*

6 ii. —[—]—A deed, after granting certain land, describing it by metes & bounds, continued, "also a road forty

#### SECT. 2.—CHARACTERISTICS.

##### SUB-SECT. 1.—IN GENERAL.

6. *Interest in land*.—*GODLEY v. FRITH* (1609), Yelv. 159; 80 E. R. 106.

7. —[—]—An action for obstructing a right of way is not an action concerning the freehold or inheritance, or title of land, & therefore, is prevented being removed out of an inferior ct. by 21 Jac. 1, c. 23. On removing such an action, a recognisance must be entered into, under Inferior Courts Act, 1778 (c. 70), though the action is for damages only. A recognisance in the alternative, to pay the debt & costs, or render debt. to prison, is bad.—*FRANKS v. QUINSE* (1839), 2 Will. Woll. & H. 58; 3 Jur. 1104.

8. —[—]—(1) The right of support is not an easement but one of the ordinary rights of property.

Comrs., under an enclosure Act, made an award in 1770 allotting a certain portion of surface land to P., & the minerals underneath the same land to H. The award executed by P., & other landowners, but not by H., contained a covenant by the several proprietors, parties thereto, stating "that the mines so allotted may for ever after be held & enjoyed by the persons to whom the same are assigned, according to the true intent of this award, & be worked accordingly without interruption of any other persons parties thereto, & those claiming under them respectively, who for the time being may be owners of the surface under which such mines are situate, & without being subject or liable to any action for damage on account of working the same, by reason that the surface may be rendered uneven & less commodious to the occupiers thereof by sinking in hollows or being otherwise injured; the proprietors having agreed with each other to accept their respective allotments, subject to any inconvenience or incumbrance which may arise from the cause aforesaid." Ever since the date of the award the surface had been occupied by P. & his assignees, whose interests had vested in pltf., & the mines by H. & his assignees, who were now represented by deft. Houses were built upon the land of P. after the award. After they had been standing more than twenty years, the surface land & houses were injured by the subsidence of the soil, caused by the working by deft. of the underlying minerals. The working had been carried on without any negligence on the part of deft., & according to the custom of mining in the neighbourhood:—*Held*: pltf. had acquired the title to the surface soil with only a qualified right of support, & subject to the covenant, & could not, therefore, maintain an action against deft. for the damage caused to the surface by the working of the mines in the usual & proper way.

(2) An easement must be an interest in or over the soil; but the owner of the mines might have removed every atom of the minerals without being liable to an action if the soil above had not fallen. So, if the superincumbent strata rested on the minerals, he might have abstracted them, & substituted stone, or brick or any other substance, & would not have incurred any liability if the surface had not sunk. In such case the consequential

feet wide," adding to the description thereof "& not included in the above quantity of land".—*Held*: the fee in the freehold therein did not pass to the grantee but merely an easement of the right of way over the land.—*FISHER v. WEBSTER* (1895), 27 O. R. 35.—*CAN.*

*Sect. 2.—Characteristics: Sub-sect. 1.]*

damage is the cause of action; & Stat. Limitations would run only from the time when the injury was sustained, & not from the time when the act was done. The award then cannot be treated as a grant of the surface with a qualified easement of support from the mines below (CRESSWELL, J.).

(3) I am of opinion that it is competent to the owner of land, on or after the severance of the mines, to grant to the grantee of the mines the right to damage the surface. I cannot see how, if there may not be a grant of mines, & of the right to enter, sink shafts, & work, there may be such a grant as that contended for here. Nor can I see how, if a grant of the right of unobstructed light & air, or of support of the soil, to an adjoining owner, would be good, a grant of such a right as claimed here would not be. My brother HAYES said presumed grants of windows & of support were idle fictions, which ought never to have been invented: perhaps so; but the fact that they were shows that the inventors & everybody else supposed that real grants of such a nature would be good. But another objection is taken. It is said that all easements suppose a right exercised over the servient tenement; even in the case of lights it is the passage of the rays of light & of air; & in the support of the neighbouring soil it is its continuance in its place; & that the claim of deft. here is not to do something on pl'tfs.' land, but merely not to be sued for what he does on his own. It is no answer to this objection to say that it is exceedingly subtle. It certainly would be strange if such a right could not be given with a grant of an estate in the mines, but could, to a licence; & yet to the latter the objection would not apply. And I think the true answer to it (assuming deft. claims an easement) is, that the rules which are applicable to owners adjoining vertically, which is the natural order, are not applicable where there is an unusual order of things, viz. a division of horizontal ownership (BRAMWELL, B.).—*ROWBOTHAM v. WILSON* (1857), 8 E. & B. 123; 27 L. J. Q. B. 61; 20 L. T. O. S. 357; 3 Jur. N. S. 1207; 5 W. R. 820; 120 E. R. 45, Ex. Ch.; *affd.* (1860), 8 H. L. Cas. 348, H. L.

*Annotations:—As to (1) Consd.* Williams v. Bagnall (1866), 15 W. R. 272; Wakefield v. Buolochell (1867), L. R. 4 Eq. 613; Hext v. Gill (1872), 7 Ch. App. 699. *Appld.* Smith v. Darby (1872), L. R. 7 Q. B. 716; Aspden v. Seddon (1875), 10 Ch. App. 394. *Consd.* Dalton v. Angus (1881), 6 App. Cas. 740; Bell v. Love (1883), 10 Q. B. D. 547. *Appld.* Sitwell v. Londonborough, [1905] 1 Ch. 460. *Distd.* Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-op. Co., [1906] A. C. 305. *Consd.* Davies v. Powell Duffryn Steam Coal Co. (No. 2) (1921), 91 L. J. Ch. 49. *Refd.* Dugdale v. Robertson (1857), 3 K. & J. 695; Bonomi v. Backhouse (1859), K. B. & E. 646; Brown v. Robins (1859), 4 H. & N. 186; Scots Mines Co. v. Leadhills Mines Co. (1859), 34 L. T. O. S. 34; Solomon v. Vintners' Co. (1859), 4 H. & N. 585; Blackett v. Bradley (1862), 1 B. & S. 940; Shatto v. Johnson (1863), 8 B. & S. 252, n.; Murchie v. Black (1865), 19 C. B. N. S. 190; Proud v. Bates (1865), 6 New Rep. 92; Richards v. Harper (1866), 4 H. & C. 55; Woodall v. Hingley (1866), 14 L. T. 167; Richards v. Jenkins (1868), 18 L. T. 437; Buolochell v. Wakefield (1870), L. R. 4 H. L. 377; Keadon v. Jeffcock (1872), L. R. 7 Exch. 379; Dixon v. White (1883), 8 App. Cas. 833; Pountney v. Clayton (1883), 11 Q. B. D. 820; N. B. Ry. v. Park Yard Co., [1898] A. C. 643; Davies v. Powell Duffryn Steam Coal Co., [1917] 1 Ch. 488; Thomson v. St. Catharine's College, Cambridge, & Mappin's Maabro' Old Brewery, St. Catharine's College, Cambridge v. Rosse (No. 2) (1918), 118 L. T. 758; Westhoughton U. C. v. Wigan Coal & Iron Co., [1919] 1 Ch. 159. *As to (2) Consd.* Dalton v. Angus (1881), 6 App. Cas. 740. *Refd.* Darley Main Colliery Co. v. Mitchell (1886), 11 App. Cas. 137. *As to (3) Consd.* Dalton v. Angus (1881), 6 App. Cas. 740. *Generally, Refd.* Butterley Co. v. New Bucknall Colliery Co., [1910] A. C. 381; Consett Industrial & Provident Soc. v. Consett Iron Co., [1922] 2 Ch. 135; Consett Waterworks Co. v. Ritson (1889), [1922] 2 Ch. 187, n. *Mentd.* Jones v. Tapling (1862), 8 Jur. N. S. 333; Hammersmith, etc.

*Ry. v. Brand* (1869), L. R. 4 H. L. 171; *Ramsay v. Blair* (1876), 1 App. Cas. 701; *Hall v. Byron* (1877), 4 Ch. D. 667; *G. N. Ry. v. I. R. Comrs.*, [1901] 1 K. B. 416.

9. —.]—*DALTON v. ANGUS*, No. 4, ante.

10. —.]—The purchaser of a piece of land agreed, as part of the consideration, to grant within a given time to the vendor a right of way, & to make a road with sewers leading to other land belonging to the vendor. The purchaser was unable to grant the right of way or to make the road & sewers until long after the time fixed, & the vendor brought an action for specific performance & for damages, as the other land had remained unproductive until the road was made:—*Held*: judgment for specific performance with costs must be given but no damages, as the contract was for a sale of real estate; there being no distinction between a contract to grant a right of way & make a road & sewers, & a contract to sell real estate.—*ROWE v. LONDON SCHOOL BOARD* (1887), 36 Ch. D. 619; 57 L. J. Ch. 179; 57 L. T. 182; 3 T. L. R. 672.

*Annotation:—Refd.* Morgan v. Russell, [1909] 1 K. B. 357.

11. Incorporeal right.]—*HEWLINS v. SHIPPAM*, No. 2, ante.

12. —.]—(1) A railway co. gave notice of their intention to widen their railway, by making an arch over the land of P. & C., which was used as a manufactory. P. & C. gave the co. notice to take all their manufactory. The co. then gave the usual notices to the sheriffs to summon a jury to assess the value of the property—property in the nature of an easement comprised in the original notice, taking no heed of the counter-notice. On a bill filed by P. & C., the co. were restrained from proceeding before the jury until they had agreed to purchase the whole of the manufactory, pl'tfs. undertaking to sell the same, & to make a good title. The co. then served another notice on P. & C., withdrawing the original notice, & giving notice of intention to summon a jury to assess the value of the whole manufactory. P. & C. filed a second bill against the co. to restrain them from proceeding pursuant to these notices; the co. offering to submit to any mode of valuation, either of the easement or of the whole manufactory which the ct. might direct, the injunction was refused, as such an injunction would restrain the co. from taking that which P. & C. had undertaken to sell, & upon which undertaking the original injunction had been granted.

(2) A right of way is not an hereditament within the meaning of Lands Clauses Consolidation Act, 1845 (c. 18).

(3) A right of way may be considered as a right upon, in, & connected with a particular property, but no right of way, or any number of rights of way, can form a part of that particular property.

(4) A notice to take an easement is not warranted by above Act.

(5) Where a notice & counternotice are given under sect. 62 of above Act, the two notices are to be considered, with a view to the exercise of the compulsory powers of the Act, as one amalgamated notice.—*PINCHIN v. LONDON & BLACKWALL RY. CO.* (1854), 5 De G. M. & G. 851; 3 Eq. Rep. 433; 24 L. J. Ch. 417; 24 L. T. O. S. 196; 18 J. P. 822; 1 Jur. N. S. 241; 3 W. R. 125; 43 E. R. 1101, L. C. & L. JJ.

*Annotations:—As to (1) Consd.* Schwinge v. London & Blackwall Ry. (1855), 3 Eq. Rep. 536. *Refd.* Re Met. Dist. Ry. & Coah (1880), 13 Ch. D. 607. *As to (2) Refd.* G. W. Ry. v. Swindon & Cheltenham Ry. (1884), 9 App. Cas. 787. *As to (3) Consd.* G. W. Ry. v. Swindon & Cheltenham Ry. (1884), 9 App. Cas. 787. *As to (4) Consd.* Ingram v. Mid. Ry. (1860), 3 L. T. 533. *Generally, Mentd.* Haynes v.

Haynes (1861), 1 Drew. & Sm. 426; London Assn. of Shipowners & Brokers v. London & India Docks Joint Committee, [1892] 3 Ch. 242.

13. —[1] A railway co. was entitled by special Act to acquire compulsorily an easement of tunnelling under land, unless a jury should determine that such easement could not be acquired by the co. without material detriment to the remainder of such land:—*Held*: the co. might enter upon the land for the purpose of making the tunnel under Lands Clauses Consolidation Act, 1845 (c. 18), upon depositing the value of the easement & could not be compelled to deposit the value of the whole land.

(2) I ask myself whether this easement, or the right to construct this tunnel, is or is not a hereditament of some tenure. It appears to me to be plainly a hereditament (FRY, J.).—*HILL v. MIDLAND RY. CO.* (1882), 21 Ch. D. 143; 51 L. J. Ch. 774; 47 L. T. 225; 30 W. R. 774.

*Annotation*:—As to (2) *Consd. G. W. Rly. v. Swindon & Cheltenham Rly.* (1884), 9 App. Cas. 787.

14. **Incorporeal hereditament.**—By a special Act the S. co. were authorised to make a railway & to carry it across the railway of the G. co. at one point by a bridge over & at another by an archway under that railway, the archway to remain the property of the G. co. The Act, by sect. 8, which was inserted at the instance of the G. co. for their protection provided that the S. co. should not purchase & take any land of the G. co. which the S. co. were authorised to use, enter upon or interfere with, but that the S. co. might purchase & take, & the G. co. should sell & grant accordingly an easement or right of using the same in perpetuity for the purposes of the Act; & by sect. 9, that if any dispute should arise respecting the matters aforesaid it should be settled by an arbitrator to be appointed under the Act. Lands Clauses Consolidation Act, 1845 (c. 18), except where expressly varied by the special Act, was incorporated therewith & it was enacted that the words & expressions to which meanings were assigned by the above Act should have the same respective meanings unless there was something in the subject or context repugnant to such construction. The S. co. gave the G. co. a notice to treat for the purchase of an easement or right in or over lands of the G. co. for the purposes of the crossing, & shortly afterwards a notice of their desire to enter upon & use the lands for those purposes, & of their intention to apply to the Board of Trade to appoint a surveyor to determine the value of such easement or right. The valuation was made, & the S. co. deposited the amount & entered into a bond under sect. 85 of the 1845 Act. The G. co., having brought an action for an injunction to restrain the S. co. from entering or continuing upon the lands mentioned in the notice to treat, or from putting in force any of the powers of the special Act or of the 1845 Act in relation to the compulsory purchase of land, on the ground that the capital of the S. co. had not been duly subscribed as required by sect. 16 of the 1845 Act:—*Held*: (1) the S. co. could not be restrained on that ground; (2) the assertion of the rights conferred by sect. 8 of the special Act was not a "putting in force of the powers of the 1845 Act or of the special Act in relation to the compulsory taking of land"; even if the perpetual easements created by sect. 8 of the special Act would constitute "land" within sect. 16 of the 1845 Act yet the case had been taken out of the compulsory powers of that Act by sect. 8 of the special Act.

We have, therefore, before us not the case of

any known easement, or of any hereditament of any tenure known to the law, but a right the result of a Parliamentary arrangement of a peculiar & special nature (LORD FITZGERALD).

It is clear to me that it is what the Statute calls it, an easement, or rather easements, & nothing more. . . . The respondents' estate or interest then is (if an hereditament at all) incorporeal. . . . I am of opinion then that "hereditaments" includes "incorporeal hereditaments" (LORD BRAMWELL).—*GREAT WESTERN RY. CO. v. SWINDON & CHELTENHAM RY. CO.* (1884), 9 App. Cas. 787; 53 L. J. Ch. 1075; 51 L. T. 798; 48 J. P. 821; 32 W. R. 957, H. L.

*Annotations*:—As to (1) *Reid. Charlton v. Rolleston* (1884), 28 Ch. D. 237; M., S., & L. Rly. v. Sheffield & South Yorkshire Navigation Co. (1890), 6 T. L. R. 414; *Taff Vale Rly. v. Cardiff Rly.*, [1917] 1 Ch. 209. As to (2) *Apld. Re Gerard & Beocham's Contract*, [1894] 3 Ch. 295; *Re C. & S. L. Rly. & St. Mary Woolnoth & St. Mary Woolchurch Haw*, [1903] 2 K. B. 728.

15. —[By an agreement under seal dated 1854, & made between H., the owner in fee of land, & a railway co., while a bill, which subsequently became an Act, was before Parliament to enable the co. to construct certain railways intended to pass to a great extent over H.'s land, it was agreed that H. should, immediately after the passing of the bill, grant to the co., by lease in the form set out verbatim in the agreement, a "way-leave" over his land, with the right to make & use the railways thereon. The form of lease so embodied in the agreement purported to grant to the co. a way-leave & right to make & use the railways, or such parts thereof as were to pass over H.'s land, for the term of 1,000 years, the co. paying to H. a specified rent on coal carried over any part of the railways comprehended in the special Act, to Port B. The form of lease gave H. powers of distress & entry for non-payment of rent, & contained a covenant by the co., with H., to pay the rent to him. No formal lease was ever executed, but the co. entered on H.'s land & constructed the railways. One of them, the M. branch, partly crossed H.'s land, & coal was carried over it to B. For upwards of forty years from the date of the agreement rent was paid by the co. for coal carried over this branch so far only as it crossed H.'s land, the parties acting throughout on the assumption that under the agreement no rent was payable for coal not carried over H.'s land. In an action brought by H.'s successor in title to the land against the co., claiming that, according to the true construction of the agreement, rent was payable for coal passing over any part of the M. branch to B., whether it crossed his land or not:—*Held*: (1) the agreement with the embodied form of lease was not an executory instrument, but must be construed as an agreement, complete in all its terms, for a lease of a way-leave for 1,000 years over H.'s land; (2) the agreement could not be regarded as an ancient document capable of being construed by the light of contemporaneous usage, but must be construed according to its literal meaning, namely, that rent was payable for coal carried over any part of the M. branch to B., whether it crossed H.'s land or not; (3) the way-leave granted was an incorporeal hereditament annexed to the land in the hands of H. or his successors in title; (4) the rent, whether for coal carried over H.'s land or not, must be regarded as payable in respect of the land leased, & was consequently payable to pltf. as the owner of the reversion within 32 Hen. 8, c. 34, s. 1, & not to H.'s legal personal representative, there being sufficient privity of estate between the owners of the land over which the



**Sect. 2.—Characteristics: Sub-sects. 1, 2 & 3, A.]**

way-leave was granted & the co. to enable such owners to sue the co. on its covenant.—**NORTH EASTERN RY. CO. v. HASTINGS (LORD)**, [1900] A. C. 260; 69 L. J. Ch. 516; 82 L. T. 429; 16 T. L. R. 325, H. L.; *affg.* S. C. *sub nom.* **HASTINGS (LORD) v. NORTH EASTERN RY. CO.**, [1899] 1 Ch. 656, C. A.

**Annotations:—***As to* (2) **Refd.** Van Diemen's Land Co. v. Table Cape Marine Board, [1906] A. C. 92; Watcham v. East Africa Protectorate, [1919] A. C. 533. *As to* (4) **Refd.** Brown v. Peto, [1900] 2 Q. B. 653. *Generally*, **Mentd.** A. G. v. Tamworth R. D. C. (1901), 85 L. T. 190; Rokersley v. Wigan Coal & Iron Co. (1910), 102 L. T. 264; Hong Kong & China Gas Co. v. Glen (1914), 110 L. T. 859.

**16. — Settled Land Act, 1882 (c. 38), s. 2 (10).—**An easement is not an incorporeal hereditament within the above sub-sect.—**RE BROTHERTON, BROTHERTON v. BROTHERTON, Re MARKHAM'S SETTLEMENT** (1907), 77 L. J. Ch. 58; 97 L. T. 880; 52 Sol. Jo. 44; *on appeal* (1908), 77 L. J. Ch. 373, C. A.

**Annotation:—****Mentd.** *Re* Westminster's S. E., Westminster v. Shaftesbury, [1921] 1 Ch. 585.

**17. Whether rent may issue out of easements.]—**M. granted to J. a leasehold interest in certain premises, for the term of 30 years, to be computed from Mar. 10, 1839. On Nov. 10, 1846, J. demised to deft. the same premises for the term of 23 years, reserving a rent, & afterwards assigned his interest to pltf. Pltf. sued to recover arrears of rent. By the deed entered into by deft. & J. licence & liberty was given to deft. to use, during the continuance of the demise, a certain railway, jointly with J. Pltf. had after the assignment to him, & before the rent for which the action was brought became due, prevented deft. from using the railway:—**Held:** this constituted no answer to the action, as the rent issued out of the thing demised, & not out of the easement to use the railway.—**WILLIAMS v. HAYWARD** (1859), 1 B. & E. 1040; 28 L. J. Q. B. 374; 33 L. T. O. S. 344; 5 Jur. N. S. 1417; 7 W. R. 563; 120 E. R. 1200.

**Annotations:—****Refd.** Evans v. Robins (1863), 11 L. T. 211; Chappell v. Mason (1894), 10 T. L. R. 404. **Mentd.** Wedd v. Porter, [1916] 2 K. B. 91.

**18. —**—[Lands Clauses Consolidation Act, 1845 (c. 18), s. 10, empowers an absolute owner to sell land to the promoters of an undertaking for "an annual rentcharge" & sect. 11 charges the "yearly rents reserved" upon the rates payable under a special Act. Liverpool Corpn. Waterworks Act, 1855 (which incorporates Lands Clauses Act) by sects. 2 & 3, enables the corpn. to purchase, & persons empowered by Lands Clauses Act to convey lands, to grant lands & easements, "at an annual or other rent." Under above Acts a limited owner conveyed land & an absolute owner granted easements to the corpn. In both cases a perpetual yearly rent was reserved:—**Held:** the Liverpool Act, ss. 2 & 3, extended the provisions of Lands Clauses Act, ss. 10 & 11, & gave to a limited owner the same power of selling for a rentcharge as an absolute owner, & also enabled an easement to be purchased for a rentcharge, so that the rents reserved were charged upon the rates.

Although rent cannot issue out of an easement at common law, yet it may by statute.—**Re GERARD (LORD) & BRECHAM'S CONTRACT**, [1894]

3 Ch. 295; 63 L. J. Ch. 695; 71 L. T. 272; 42 W. R. 678; 7 R. 519, C. A.

*See, generally*, RENTCHARGES & ANNUITIES.

**19. Right of distress on land occupied as easement.]—**Can (a distress) be made upon property situated upon land which is not parcel of the demise-land of which the tenant has at most an easement? . . .

The total absence of all clear & direct authority upon such a point is, I think, decisive against it (**ALEXANDER, C.B.**).—**CAPEL v. BUSZARD** (1829), 6 Bing. 150; 3 Y. & J. 344; 3 Moo. & P. 480; 130 E. R. 1237; *affg.* S. C. *sub nom.* **BUSZARD v. CAPEL** (1828), 8 B. & C. 141; 6 L. J. O. S. K. B. 267.

**Annotations:—****Apld.** *Perring v. Emerson* (1905), 75 L. J. K. B. 12. **Refd.** Hancock v. Austin (1863), 14 C. B. N. S. 634. **Mentd.** Cuthbert v. Robinson (1882), 51 L. J. Ch. 238.

—[*See, generally*, DISTRESS.

**SUB-SECT. 2.—MUST BE APPURTENANT TO LAND—NO EASEMENTS IN GROSS.**

**20. General rule.]—**In an action of trespass defts. justified under a right of way supposed to have been conveyed to them by S. The deed was set out by pltf. & the description of the parcels conveyed contained the following words: "Together with all ways, etc., particularly the right & privilege to & for the owners & occupiers of, etc. (the premises conveyed) & all persons having occasion to resort thereto, of passing & repassing for all purposes in, over, along, & through a certain road," etc. (describing the *locus in quo*). Defts. in their plea, after stating the conveyance to S. in the terms of the deed, & deducing their title from S. under a conveyance to them of the same "lands, tenements, hereditaments, premises, & appurtenances," as those conveyed to him by the above-mentioned deed, alleged that they being owners & occupiers of the premises, & having occasion for their own purposes to use the right & privilege granted by the conveyance to S. did on foot, etc., pass & repass (for the purposes of them, defts., along the road, etc. (the *locus in quo*)):—**Held:** (1) the right granted by the conveyance to S. was not restricted to a user of the road for purposes connected with the enjoyment of the land conveyed to him by the same deed; (2) the conveyance to defts. of the land conveyed to S. & its appurtenances, could not give defts. as owners & occupiers of that land, a right of road over other land for purposes unconnected with the enjoyment of the land of which they were owners & occupiers, & therefore did not pass to them the rights which S. had over the *locus in quo*.

A vendor cannot create rights not connected with the enjoyment of the land & annex them to it; nor can the owner of land render it subject to a new species of burden, so as to bind it in the hands of an assignee.—**ACKROYD v. SMITH** (1850), 10 C. B. 164; 19 L. J. C. P. 315; 15 L. T. O. S. 395; 14 Jur. 1047; 138 E. R. 68.

**Annotations:—***As to* (1) **Consd.** Thorpe v. Brumfit (1873), 8 Ch. App. 650. **Distd.** Simpson v. Godmanchester Corpn., [1897] A. C. 696. **Refd.** Richards v. Harper (1856), 35 L. J. Ex. 130; Skull v. Glenister (1864), 16 C. B. N. S. 81; Shuttleworth v. Le Fleming (1865), 19 C. B. N. S. 687; Nuttall v. Bracewell (1866), L. R. 2 Exch. 1; Edgar v.

**MILLER v. TIPLING** (1918), 43 O. L. R. 88; 43 D. L. R. 469.—**CAN.**

**20 ii. —**—[Deft. claimed a right of way over pltf.'s land under an agreement with R., who was entitled to a right of way over the land in question as appurtenant to land owned by him:

—**Held:** the right of way to which R. was entitled could not by agreement be transferred in gross to deft., for no one can have such a way but he who has the land to which it is appendant.—**DOREY v. RAFUSE** (1919), 52 N. S. R. 61.—**CAN.**

**20 iii. —**—[There is no such

**PART I. SECT. 2, SUB-SECT. 2.**

**20 i. General rule.]—**There is no such thing as an "easement in gross" in the proper sense of the words; an easement must be appurtenant to some particular piece of land, or to the ownership of a particular piece of land.



English Fisheries Special Comrs. (1870), 23 L. T. 732; *Royal v. Yaxley* (1872), 20 W. R. 903; *Thames Conservators v. Kent*, [1918] 2 K. B. 272. *As to (2) Expi.* *Thorpe v. Brumfit* (1873), 8 Ch. App. 650. *Reid*. *Richards v. Harper* (1856), 35 L. J. Ex. 130; *London & Westminster Loan & Discount Co. v. Drake* (1859), 6 C. B. N. S. 798; *Bailey v. Stephens* (1862), 12 C. B. N. S. 91; *Ellis v. Bridgnorth Corp.* (1863), 15 C. B. N. S. 52; *Hill v. Tupper* (1863), 2 H. & C. 121; *Chosterfield v. Harris*, [1908] 2 Ch. 397; *A.-G. v. Horne* (No. 2), [1913] 2 Ch. 140. *Generally, Mentd.* *Saunders v. Latham* (1855), 4 W. R. 97; *Limmer Asphaltic Paving Co. v. I. R. Comrs.* (1872), L. R. 7 Exch. 211; *Laker v. Dennis* (1877), 7 Ch. D. 227; *G. N. Ry. v. I. R. Comrs.*, [1901] 1 K. B. 416.

21. —.]—A prescriptive right to go upon the foreshore & to place & let on hire chairs & seats on the sands for profit cannot be claimed as the Prescription Act, 1832 (c. 71) does not apply to easements in gross.—*RAMSGATE CORPN. v. DEHLING* (1906), 70 J. P. 132; 22 T. L. R. 369; 4 L. G. R. 495.

22. Whether appurtenant to incorporeal hereditament.]—A several fishery may exist either apart from or as incident to the ownership of the soil over which the river flows; but where a several fishery is proved to exist, the owner of the fishery is to be presumed, in the absence of evidence to the contrary, to be the owner of the soil, whether it is a navigable river or a river neither public nor navigable. The use of the word "several" or "*separalis piscaria*" is not necessary to create a several fishery. The grant of "weirs" is a grant not of a mere right of fishing, but of a corporeal hereditament consisting not only of the soil on which any particular weir is constructed, but of the soil over which the river runs, & upon which there is the right to construct weirs for the purpose of taking fish. A grant purporting to give a definite length of several fishery may still be a good grant of a several fishery in part of the river so included though as to other part of it the Crown, at the time, had no several fishery to give.

*Semble*: an incorporeal right of way along both banks of a river may be appendant to an incorporeal right of fishing, the one being capable of union with the other without any incongruity.—*HANBURY v. JENKINS*, [1901] 2 Ch. 401; 70 L. J. Ch. 730; 65 J. P. 631; 40 W. R. 615; 17 T. L. R. 539.

*Annotation*:—*Mentd.* *Beaufort v. Aird* (1901), 20 T. L. R. 602.

23. —.]—In order to found a claim to an easement . . . there must be a dominant tenement to which the easement can be attached. I can find no authority for the suggestion that a right of way can be considered to be such a dominant tenement for the purpose of having such a right attached to it (*LORD ALVERSTONE, C.J.*).—*A.-G. v. COPELAND*, [1901] 2 K. B. 101; 70 L. J. K. B. 512; 84 L. T. 562; 65 J. P. 581; 49 W. R. 489; 17 T. L. R. 422; *reversd.* on other grounds, [1902] 1 K. B. 690, C. A.

*Annotation*:—*Mentd.* *Thomas v. Gower* R. D. C., [1922] 2 K. B. 76.

#### SUB-SECT. 3.—DOMINANT AND SERVIENT TENEMENTS.

##### A. In General.

24. Necessity for dominant & servient tenements.]—*MOUNSEY v. ISMAY*, No. 3, *ante*.

25. Distinguished from running powers over railway.]—The entry by a railway co. on land for

the purpose of diverting over it a public way which ran over lands already in the occupation of the co., is an entry with a view to the permanent user of the land within Lands Clauses Consolidation Act, 1845 (c. 18), s. 84; & no entry for such purpose is lawful, except on payment of the proper purchase-money.

It appears clear that to create an easement over land you must possess the ownership of the land. Every easement has its origin in a grant express or implied. The person who can make that grant must be the owner of the land. But I must also observe that it appears to me to be an incorrect expression to speak of this as an easement. There can be no easement properly so called unless there be both a servient & a dominant tenement. There is in this case no dominant tenement whatever. There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross (*LORD CAIRNS, L.J.*).—*RANGELEY v. MIDLAND RY. CO.* (1868), 3 Ch. App. 306; 37 L. J. Ch. 313; 18 L. T. 69; 16 W. R. 547, L. J.J.

*Annotations*:—*Reid*. *Simpson v. Godmanchester Corp.* (1895), 64 L. J. Ch. 837; *A.-G. v. Copeland*, [1901] 2 K. B. 101 (*see* [1902] A. C. 690). *Mentd.* *Beauchamp v. G. W. Ry.* (1868), 3 Ch. App. 745; *Dowling v. Pontypool, Caerleon & Newport Rly.* (1874), L. R. 18 Eq. 714; *Pugh v. Golden Valley Rly.* (1879), 41 L. T. 30; *Loosemore v. Tiverton & North Devon Rly.* (1882), 22 Ch. D. 25; *Wilkinson v. Hull, Barnsley & West Riding Junction Rly. & Dock Co.* (1882), 46 L. T. 455; *Macfie v. Callander & Oban Rly.*, [1898] A. C. 270; *Schweder v. Worthing Gas Light & Coke Co.* (No. 2), [1913] 1 Ch. 118.

26. —.]—An action for trespass to land to which *pltf.* has an undisputed possessory title is not an action in which the title to any corporeal hereditament is in question, & is therefore triable in a county ct.

A public right of navigation is not an easement within County Courts Act, 1888 (c. 43), s. 60, so as to oust the jurisdiction of the county ct. where such a right is in question.

*Def.* claims only an easement to do what he has done. No doubt the term "easement" has, somewhat loosely & inaccurately perhaps, but still with sufficient accuracy for some purposes, been said to define the case of a public right of way, in which case there exists no dominant & servient tenement; but in strictness & according to the proper use of legal language, the term "easement" does imply a dominant tenement in respect of which the easement is claimed, & a servient tenement upon which the right claimed is exercised (*LORD COLERIDGE, C.J.*).—*HAWKINS v. RUTTER*, [1892] 1 Q. B. 668; 61 L. J. Q. B. 146; 40 W. R. 238; 36 Sol. Jo. 152, D. C.

*Annotation*:—*Reid*. *Howorth v. Sutcliffe*, [1895] 2 Q. B. 358.

27. —.]—But if it is an easement it is elementary to say that you must have a dominant & servient tenement. You cannot have a dominant tenement without some definition of what is the tenement which goes by the name of the servient tenement. . . . You cannot have a servient tenement without an area. You must have lines defining some area (*COZENS-HARDY, M.R.*).—*WOODMAN v. PWLLBACH COLLIERY CO., LTD.* (1914), 111 L. T. 169, C. A.; *affd. sub nom.* *PWLLBACH COLLIERY CO., LTD. v. WOODMAN*, [1915] A. C. 634, H. L.

*Annotations*:—*Mentd.* *Priest v. Manchester Corp.* (1915), 84 L. J. K. B. 1734; *Malay v. Eichholz*, [1916] 2 K. B. 308; *Phelps v. City of London Corp.*, [1916] 2 Ch. 255; *A.-G. v. Cory*, *Kennard v. Cory*, [1921] 1 A. C. 521; *Hansford v. Jago*, [1921] 1 Ch. 322; *Cory v. Davies*, [1922] 2 Ch. 95.

thing as an easement in gross in the proper sense of the word.—*ADAMSON v. BELL TELEPHONE CO. OF CANADA*, *BELL TELEPHONE CO. OF CANADA v.*

*ADAMSON* (1920), 48 O. L. R. 24; 18 O. W. N. 325.—CAN.

20 iv. —.]—There is no such thing

as an easement in gross.—*DOUSLIN v. BROWNLEE* (1884), 3 N. Z. L. R. C. A. 57.—N.Z.

**Sect. 2.—Characteristics: Sub-sect. 3, B. & C. (a) & (b).]**

**B. Benefit of Dominant Tenement.**

**28. Servient owner acquires no right to continuance.]**—Before 1800, a canal co., under powers of an Act of Parliament, diverted for the purposes of the canal a considerable part of the water from a brook which flowed through pltf.'s land, at a point above pltf.'s land, the rest of the water continuing to flow in its natural channel. In 1847 an Act was passed authorising defts., a railway co., to purchase the canal, to discontinue the use of it, & to fill it up, & sell such parts as were not used for the railway. Under these powers the use of the canal was discontinued in 1853; & in 1864 defts. made a cut by which they restored to the brook at a point above pltf.'s land the water which had been diverted from it. In 1865 defts. conveyed the part of the canal on which they had made the cut to a purchaser in fee. The bed of the stream, owing to the diminished scour of the water from 1800 to 1853, had been silted up, so as to be insufficient to carry off the water coming down in extraordinary floods. In 1866 such a flood occurred; the water overflowed pltf.'s land & damaged his crops:—*Held*: there being no obligation imposed upon the canal co. to continue the diversion, pltf. had no right of action.

An easement exists for the benefit of the dominant owner alone, & the servient owner acquires no right to insist on its continuance, or to ask for damages on its abandonment (*COCKBURN, C.J.*).

The right of diverting water which in its natural course would flow over or along the land of a riparian owner & of conveying it to the land of the party diverting it, the *servituo aquae ducendae* of the civilians, is an easement well known to the law of this as of every other country. Ordinarily such an easement can be created, according to the law of England only by grant or by long combined enjoyment from which the existence of a former grant may be reasonably presumed. But such a right may, like any other rights, be created in derogation of a prior right by the action of the legislation (*COCKBURN, C.J.*).—*MASON v. SHREWSBURY & HEREFORD RY. CO.* (1871), L. R. 6 Q. B. 578; 40 L. J. Q. B. 203; 25 L. T. 239; 30 J. P. 324; 20 W. R. 14.

**29. Exercise of easement beneficial to other owners.]**—An easement, exercised for the benefit of the dominant estate, is not invalid merely because from the very nature of the right its exercise by the dominant estate confers some benefit upon other tenements.

**PART I. SECT. 2, SUB-SECT. 3.—B.**

**a. General rule.]**—A right of way appurtenant exists solely for the benefit of the dominant tenement, & apart therefrom has no existence.—*LEACH (A. J.) Co. v. CHESLAND* (1919), 43 O. L. R. 209; 45 D. L. R. 140.—*CAN.*

**28 i. Servient owner acquires no right to continuance.]**—The owner of a servient tenement who takes water by an artificial stream from the dominant tenement, created by the owner of the latter for his own convenience for the purpose of discharging surplus water upon the servient tenement, acquires no right to insist upon the continuance of the flow, which may be terminated by the owner of the dominant tenement; & the fact that the burden has been imposed for over forty years does not alter the character of the easement & convert the dominant into a servient tenement.—*OLIVER v. LOCKIE* (1895), 26 O. R. 28.—*CAN.*

**28 ii. —.]**—The owner of a servient tenement cannot by prescription acquire a portion of the dominant owner's servitude.—*DREYER v. LETTERSTEDT'S EXECUTOR* (1865), 5 S. 88.—*S. AF.*

**PART I. SECT. 2, SUB-SECT. 3.—C. (a).**

**33 i. Servient owner cannot make enjoyment more difficult.]**—The proprietor of the servient land can do nothing which tends to render the exercise of the servitude less convenient than it was at the date of its creation.—*WHEELER v. BLACK* (1887), M. L. R. 2 Q. B. 139; 9 L. N. 202; 14 S. C. R. 242.—*CAN.*

**33 ii. —.]**—The owner of the servient tenement has no right to embark out, as against the owner of the dominant tenement, water entitled to flow through the servient tenement, because such water has been wrongfully added to without any act or

The corp. of G. as owners of certain lands had for more than 200 years opened as of right the gates of certain sluices or locks belonging to applt. upon the river O. in time of flood or likelihood of flood in order to prevent damage to those lands:—*Held*: the easement was good & was none the worse because the exercise of it also benefited lands belonging to other persons; & the corp. could maintain their right either by Prescription Act, 1832 (c. 71), s. 2, or by the fiction of a lost grant.—*SIMPSON v. GODMANCHESTER CORPN.*, [1897] A. C. 696; 66 L. J. Ch. 770; 77 L. T. 409; 13 T. L. R. 544, H. L.; *affg.*, [1896] 1 Ch. 214, C. A.

*Annotations*:—*Mentd.* *Creyke v. Hatfield Chase Level Corp.* (1896), 12 T. L. R. 383; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140.

**C. Burden on Servient Tenement.**

**(a) In General.**

**30. Whether servient owner bound to repair.]**—*POMFRET v. RIGROFT*, No. 482, *post*.

**31. —.]**—Where a servitude of support to a highway by a wall has been acquired, the owner of the highway, & not the owner of the wall, in the absence of express stipulation to that effect in the instrument, if any, creating the easement, is bound to repair the wall when out of repair & insufficient to support & maintain the highway.

*Semble*: such stipulation, covenant, or obligation cannot be inferred merely from the fact that the wall has been on several occasions repaired by the owner of the wall or his predecessors in title.

As a general rule easements impose no personal obligation upon the owner of the servient tenement to do anything; the burden of repair falls on the owner of the dominant tenement (*LOPES, J.*).—*STOCKPORT & HYDE DIVISION OF MACCLESFIELD HUNDRED HIGHWAY BOARD v. GRANT* (1882), 51 L. J. Q. B. 357; 46 L. T. 388.

**32. —.]**—*JONES v. PRITCHARD*, No. 229, *post*.—*See, also, BOUNDARIES*, Vol. VII., pp. 291, 292, Nos. 173–187.

**33. Servient owner cannot make enjoyment more difficult.]**—*JONES v. PRITCHARD*, No. 229, *post*. **Construction, alteration & repair of way.]**—*See* Part VII., Sect. 6, sub-sect. 3, D., *post*.

**Alteration & repair of watercourses.]**—*See* Part IX., Sect. 2, sub-sect. 4, *post*.

**Repair of water rights.]**—*See* Part IX., Sect. 3, sub-sect. 3, *post*.

**(b) Increase of Burden.**

**34. Whether burden can be increased—Right of way.]**—If A. has a way from C. to B. & occupies

default of the owner of the dominant tenement.—*MOUNT HURT ROAD DISTRICT (INHABITANTS) v. DENT* (1896), 14 N. Z. L. R. 113.—*N.Z.*

**b. Must not be excessive.]**—There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected.—*DYCK v. HAY (LADY)* (1852), 1 Macq. 305.—*SCOT.*

**c. Knowledge of servient owner.]**—For the purpose of acquiring a right of way or other easement under Limitation Act, 1877, s. 26, it is not necessary that the enjoyment of the easement should be known to the servient owner.—*ARZAN v. RAKHAL CHUNDER ROY CHOWDHURY* (1883), 1 L. R. 10 Calc. 214.—*IND.*

**PART I. SECT. 2, SUB-SECT. 3.—C. (b).**

**34 i. Whether burden can be increased—Right of way.]**—A right of

lands beyond C. he cannot justify using the way to those lands.

Prescription presupposed a grant, & ought to be continued according to the intent of its original creation (*per* CUR.).—HOWELL v. KING (1674), 1 Mod. Rep. 190; 86 E. R. 821.

*Annotations*:—*Consd.* Skull v. Glenister (1864), 16 C. B. N. S. 81. *Refd.* Lawton v. Ward (1896), 1 Ld. Raym. 75; Allan v. Gomme (1840), 11 Ad. & El. 759; Finch v. G. W. Ry. (1879), 5 Ex. D. 254.

35. ———.]—(1) Under a right of way over a close to a particular place, a man cannot justify going beyond that place. Therefore if a deft. justifies passing along a private way under a right of way to a close called A., *pltf.* may reply that he went beyond A. In an action for spoiling *pltf.*'s way with deft.'s carriages, deft. may justify going along the way with the carriages of a third person, having a right to go along the way. (2) A man may prescribe for a way in himself & all those whose estate he has, without showing that the way is appurtenant to his estate. If he states that he was seised of two closes, & that he & all those, etc., had a right of way, *tanquam ad tenementa spectantem*, the *ct.* will reject the words "*tanquam ad tenementa spectantem*," as surplusage.—LAWTON v. WARD (1896), 1 Ld. Raym. 75; 91 E. R. 946; *sub nom.* LAUGHTON v. WARD, 1 Lut. 111.

*Annotations*:—*As to* (1) *Consd.* Skull v. Glenister (1864), 16 C. B. N. S. 81. *Refd.* Allan v. Gomme (1840), 11 Ad. & El. 759; Holt v. Daw (1851), 16 Q. B. 990; Finch v. G. W. Ry. (1879), 5 Ex. D. 254. *Generally*, *Mentd.* Atkinson v. Teasdale (1772), 2 Wm. Bl. 817.

36. ———.]—SKULL v. GLENISTER, No. 706, *post*.

37. ———.]—(1) The immemorial user of a right of way for all purposes for which a road was wanted in the then condition of the property, does not establish a right of way for all purposes in an altered condition of the property where that would impose a greater burden on the servient tenement. Where a road had been immemorially used to a farm not only for usual agricultural purposes, but in certain instances for carrying building materials to enlarge the farmhouse & rebuild a cottage on the farm, & for carting away sand & gravel dug out of the farm:—*Held*: that did not establish a right of way for carting the materials required for building a number of new houses on the land.

Is there any such evidence of user for purposes beyond what was necessary, & beyond what was reasonably required for the occupation of the land in its existing state, as that we can find that the right extends beyond that? I agree, if we found

passage was granted over certain land for agricultural purposes:—*Held*: the passages could not be used for the purposes of a coal oil refinery & trade, which aggravated the servitude & rendered it more onerous to the servient land than it was when the servitude was established.—MCMILLAN v. HENDER (1885), 14 S. C. R. 736.—CAN.

34 II. ———.]—*Pltf.* & deft. owned adjoining lots of land, deft. having a right of way over *pltf.*'s land from the street:—*Held*: deft. had no right to deposit snow upon the way, laid from his own land.—DOOHAN v. LA FORREST (1885), 24 N. B. R. 553.—CAN.

d. ———.]—*Flow of water.*—The proprietor of higher land can do nothing to aggravate the servitude of lower land. Where *pltf.* being entitled to a flow of water from their land executed certain works which had the effect of accumulating the volume of water, & probably of increasing the depth of its channel:—*Held*: to the extent of

such accumulations & consequent increase of flow, they had aggravated the servitude of the lower land, & to that extent had no right to demand a free course for the water sent down by them.—FRICHETTE v. COMPAGNIE MANUFACTURIERE DE ST. HYACINTHE (1883), 9 App. Cas. 170.—CAN.

e. ———.]—*Pltf.*, in an action for injury done to his mill dam, proved that defts. owned a mill pond & dam about half a mile higher up the stream, & that he left his gate open twelve or fifteen inches the night the accident happened. *Pltf.*'s gates were all closed, & the splashboards up at the time & after the accident. There had been heavy rains for some days previous:—*Held*: the opening of defts. gates, unless they admitted a larger quantity than would naturally flow down the stream, would not render him liable for an accident to *pltf.*'s dam; & it was *pltf.*'s duty to guard against any natural flow of the stream; & further, unless defts. let the water flow faster than was supplied by natural

causes, they were not liable for damages resulting from such flow.—WICKHAMPTON v. KERR (1859), 8 C. P. 456.—CAN.

f. ———.]—An easement was granted to parties under whom defts. claimed, consisting of the right to construct & repair a reservoir or tank to hold water & to conduct thereto the water from a spring on the property:—*Held*: although there was nothing in the description to limit the size of the tank, a tank having been constructed of a certain size, defts. could not afterwards construct another tank which differed substantially from the original one & imposed a greater burden on the land.—CORBITT v. WILSON (1891), 21 N. S. R. 25.—CAN.

g. ———.]—The construction upon a dominant tenement of an ice-house in a manner to cause the water from melting ice stored therein to flow down upon adjoining lands of lower level & injuriously affect the same is an aggravation of the natural servitude in respect of which the owner of

that several houses had been built from time to time, & that the owner had carried the materials over this road, & the occupiers of the new houses had used the road, we might infer that the right of way was not to be confined to those particular houses, because that was not the original grant, but that the parties contemplated building generally at the time of the original grant, & intended to include in it a right of way to all future houses. I will not say that there is no evidence here of such a right, but there is not sufficient evidence for us to act upon, or to lead us to say that there is a right beyond what is necessary & reasonable for the occupation of the premises as a farm (MELLISH, L.J.).

(2) *Semble*: the fact that the occupiers of the farm, in passing with carts from a particular point to a certain gate over a common on which no definite road was marked out, did not keep to one line, but used several tracks, did not prevent their acquiring a right of way between that point & the gate.—WIMBLEDON & PUTNEY COMMONS CONSERVATORS v. DIXON (1875), 1 Ch. D. 362; 45 L. J. Ch. 353; 33 L. T. 679; 40 J. P. 102; 24 W. R. 466, C. A.

*Annotations*:—*As to* (1) *Appl.* Bradburn v. Morris, Morris v. Bradburn (1876), 3 Ch. D. 812. *Distd.* Nowcomen v. Coulson (1877), 5 Ch. D. 133. *Consd.* Finch v. G. W. Ry. (1879), 5 Ex. D. 254. *Appl.* Milner's Safe Co. v. G. N. & City Ry., [1907] 1 Ch. 208. *Refd.* Bolton v. London School Board (1879), 40 L. T. 582; Robinson v. Cowpen 1. B. (1893), 62 L. J. Q. B. 619; Tynne Improvement Comrs. v. Ingle, A.-G. v. Tynne Improvement Comrs. (1899), 81 L. T. 174; Met. Ry. v. G. W. Ry. & London Corp'n. (1901), 84 L. T. 333; Thames Conservators v. Kent, [1918] 2 K. B. 272. *As to* (2) *Refd.* A.-G. v. Antrobus, [1905] 2 Ch. 188.

38. ———.]—User for twenty years of a way to a field used only for agricultural purposes does not give a right of way for mineral purposes. The owner of a field, with a right of way to it through an occupation road, agreed to sell the surface of the field, reserving the minerals. The field had never been used for mining, & the vendor did not appear to have any present intention of working the minerals:—*Held*: (1) the vendor, having had a right to use the road for agricultural purposes only, could not prevent the purchaser from so altering the road as to make it unfit for the use of the vendor in working the minerals under the land agreed to be sold; (2) even if the vendor had a right to use the road for minerals, inasmuch as he had no present intention of working the minerals, the *ct.* would not interfere.

*Qu.*: whether, where an occupation road follows the boundary of two estates so as to afford a presumption of ownership *ad medium filum*, each

cause, they were not liable for damages resulting from such flow.—WICKHAMPTON v. KERR (1859), 8 C. P. 456.—CAN.

f. ———.]—An easement was granted to parties under whom defts. claimed, consisting of the right to construct & repair a reservoir or tank to hold water & to conduct thereto the water from a spring on the property:—*Held*: although there was nothing in the description to limit the size of the tank, a tank having been constructed of a certain size, defts. could not afterwards construct another tank which differed substantially from the original one & imposed a greater burden on the land.—CORBITT v. WILSON (1891), 21 N. S. R. 25.—CAN.

g. ———.]—The construction upon a dominant tenement of an ice-house in a manner to cause the water from melting ice stored therein to flow down upon adjoining lands of lower level & injuriously affect the same is an aggravation of the natural servitude in respect of which the owner of

**Sect. 2.—Characteristics:** *Sub-sect. 3, C. (b) & (c); sub-sect. 4.]*

owner has not the right to use the road for all purposes though the actual user has been only for limited purposes.—**BRADBURN v. MORRIS, MORRIS v. BRADBURN** (1876), 3 Ch. D. 812, C. A.

**39. ———.]—HARRIS v. FLOWER, No. 702, post.**

**40. ——— Sewage.]—S.**, whilst owner of certain adjoining premises, A. & B., laid down a four-inch pipe to carry surface water from A. to a main sewer running along a highway. This pipe ran into another pipe, which passed under B. & thence into the sewer. A socket joint was placed midway in the four-inch pipe, but this was not at the time connected with any other drain. In 1887 S. sold B. to resp., & some days afterwards applt. purchased A. The conditions of sale in each case provided that the sale was subject to all existing easements. There was no express reservation of a right of drainage in the conveyance to resp. Applt. subsequently connected the soil pipe of a water closet on A. with the socket joint in the four-inch pipe, & at the same time laid down a larger pipe in place of the latter. Resp. thereupon stopped the flow of all drainage from applt.'s pipe into his own. In an action by applt. for damages & an injunction:—**Held:** applt. was not entitled to send sewage through the pipe on resp.'s premises, inasmuch as no easement of that nature existed at the time of the severance of the properties & there was then no junction by means of which sewage could pass into the pipe, although S. might have contemplated using the socket joint to make a connection for this purpose.—**WATSON v. TROUGHTON** (1882), 48 L. T. 508; 47 J. P. 518, C. A.

**41. ———.]—**Notwithstanding the obligation imposed on a local board by Public Health Act, 1875 (c. 55), to drain their district, their right to send the sewage of their district, directly or indirectly, into the sewers belonging to the sanitary authority of an adjoining district is, in the absence of express enactment or agreement, no higher than the right of a landowner to send sewage from his land on to the land or into the drains of a neighbouring landowner. If, therefore, a prescriptive right has been acquired to send some sewage from one district into the sewers of another, the burden cannot be increased without the consent of the sanitary authority of the latter district.—**A.-G. v. ACTON LOCAL BOARD** (1882), 22 Ch. D. 221; 52 L. J. Ch. 108; 47 L. T. 510; 31 W. R. 153.

**Annotations:—****Refd.** L. C. C. v. Acton U. D. C. (1902), 18 T. L. R. 689. **Mentd.** Charles v. Finchley L. B. (1883), 23 Ch. D. 767; A.-G. v. Clerkenwell Vestry, [1891] 3 Ch. 527; Brown v. Dunstable Corp., [1899] 2 Ch. 378; Islington Vestry v. Hornsey U. C., [1900] 1 Ch. 695.

— **By alteration of dominant tenement—**

the servient tenement may recover damages for the injury sustained & have a decree for the abatement of the nuisance.—**AUDERTTE v. O'CAIN** (1907), 39 S. C. R. 103.—**CAN.**

**h. ———.]—**The owner of the dominant tenement cannot make the position of the owner of the servient tenement more burdensome than is necessary for the due & proper exercise of his right.—**CUMMING v. BROWN** (1909), E. D. C. 54.—**S. AF.**

**k. ———.]—**Where a person wrongfully brings upon his land, in addition to water which a neighbouring owner is bound to receive, other water which he is not so bound to receive, such neighbouring owner is entitled, if he cannot otherwise reasonably exclude such

added water, to exclude the entry of any water.—**MOUNT HUTT ROAD DISTRICT (INHABITANTS) v. DENT** (1896), 14 N. Z. L. R. 113.—**N.Z.**

**40 i. ——— Sewage.]—**A property being burdened with the servitude of receiving & carrying off in a sewer the ordinary waste water from a neighbouring tenement:—**Held:** the proprietor of the dominant tenement was not entitled, in erecting a distillery on his premises, to discharge on the servient a large quantity of additional water introduced artificially for the supply of his distillery.—**SCULLER v. ROBERTSON** (1829), 7 Sh. (Ct. of Sess.) 344.—**SCOT.**

**l. Whether easement lost by aggravation.]—**A., the owner of two adjoin-

**Generally.]—**See Part VI., Sect. 2, sub-sect. 2, D., post.

— **Ways.]—**See Part VII., Sect. 6, sub-sect. 3, C., post.

— **Light.]—**See Part VIII., Sect. 5, sub-sect. 2, post.

(c) *Exclusive Use of Servient Tenement.*

**42. Servient owner can make ordinary use of land.]—**There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected.—**DYCE v. HAY (LADY)** (1852), 1 Macq. 305, H. L.

**Annotations:—****Refd.** Race v. Ward (1855), 4 E. & B. 702; Mounsey v. Ismay (1865), 3 H. & C. 486; Hall v. Nottingham (1875), 45 L. J. Q. B. 50; Bourko v. Davis (1889), 44 Ch. D. 110; Mercer v. Denne, [1905] 2 Ch. 538. **Mentd.** Goodman v. Saltash Corp., (1882), 7 App. Cas. 633; A.-G. of Southern Nigeria v. Holt (Liverpool), [1915] A. C. 599.

**43. Whether exclusive use consistent with easement—Sewer.]—**A conveyance of land from pltf. to deft. contained the following clause: "Save & always reserved unto pltf., his heirs & assigns, the power to enter upon the land, & to dig & make a covered sewer through the land, in order to convey the waste water from the premises of pltf. into the river W., on making reasonable compensation to deft. for any damage or injury which might be occasioned thereby, either to the surface of the ground, or the buildings under which the same might be made." Pltf. having constructed a covered sewer, in pursuance of the power, deft. made an opening in it, & drained his premises through it:—**Held:** the reservation gave pltf. a right to the exclusive use of the sewer.—**LEE v. STEVENSON** (1858), E. B. & E. 512; 27 L. J. Q. B. 263; 4 Jur. N. S. 950; 120 E. R. 600.

**Annotation:—****Refd.** Sutherland v. Heathcote, [1891] 3 Ch. 501.

**44. ———.]—****LONDON TAVERNS CO. v. WORLEY** (1888), cited in 44 Ch. D. p. 18; 62 L. T. p. 379, C. A.

**Annotation:—****Distd.** Reilly v. Booth (1890), 44 Ch. D. 12.

**45. ———.]—**The exclusive or unrestricted use of a piece of land, I take it, beyond all question passes the property or ownership in that land & there is no easement known to law which gives exclusive or unrestricted use of a piece of land (**LOPES, L.J.**).—**REILLY v. BOOTH** (1890), 44 Ch. D. 12; 62 L. T. 378; 38 W. R. 481, C. A.

**Annotations:—****Apprvd.** Met. Ry. v. Fowler, [1893] A. C. 416. **Refd.** Phelps v. London Corp., [1916] 2 Ch. 255; Taff Vale Ry. v. Cardiff Ry., [1917] 1 Ch. 299.

**46. ———.]—**By a deed of July 12, 1871, the trustees of a highway, in exercise of rights & powers given to them under Acts of Geo. 3 & Geo. 4, & for valuable consideration, granted a licence to the predecessor in title of deft. co. to construct & use a tunnel under the highway. The rights & powers of the trustees came to an end on Nov. 1,

ing houses, had a privy in one, the water from which flowed into the land of B. & as to this there existed an easement in favour of A. But A. built a new privy in the second house & connected the drains of the two so that the amount of water discharged over B.'s land was largely increased. B. then blocked up the channel through which the water came on to his land. On suit by A. to have this obstruction removed:—**Held:** Indian Easements Act, 1882, s. 43, did not apply & the dominant owner did not lose his easement altogether through the action which he had taken, but the *status quo ante* both could & should be restored.—**LAMESHWEN, ETC. v. MALEARY, ETC.** (1922), 1 L. L. R. 44 All. 343.—**IND.**

1871, when 33 & 34 Vict. c. 73 was passed. The tunnel in question was completed in 1872, & remained without any substantial alteration, in the exclusive possession & occupation of deft. co., or their predecessors in title, until the commencement of the action in Aug. 1891. The tunnel was many feet beneath the surface; it was bricked at either end, & was used to carry chalk & soil from one part of deft.'s property to another. Pltf. was owner of the land abutting on the highway on one side, & at one place, on both sides; & he alleged that he was owner of the soil under the highway. By his action he claimed an injunction to restrain the trespass upon his land:—*Held*: even assuming that pltf. had a sufficient title to the soil under the highway, apart from Stat. Limitations, the action was barred by that statute, inasmuch as deft. co. had enjoyed no mere easement, but the exclusive occupation & possession of the tunnel for more than the required twelve years.—*BEVAN v. LONDON PORTLAND CEMENT CO., LTD.* (1892), 67 L. T. 615; 9 T. L. R. 12; 3 R. 47.

47. —[Gas mains.]—By a private Act the local board of B. had the exclusive right of laying gas mains & pipes in B., & were bound to keep the mains & public lamps in good repair & condition, & to afford to the corpn. of S. the use of the same for the supply of gas for public & private purposes in B., the corpn. paying the local board, in consideration therefor, certain sums, calculated upon the amount of gas supplied. The local board laid gas mains & kept them in repair, & afforded the corpn. the use thereof for the supply of gas in B., the mains being used for no other purpose than the supply of gas by the corpn.:—*Held*: the corpn. were not the occupiers of the gas mains, but had merely an easement, & were not liable to be rated.—*SOUTHPORT CORPN. v. ORMSKIRK UNION ASSESSMENT COMMITTEE*, [1894] 1 Q. B. 196; 63 L. J. Q. B. 250; 69 L. T. 852; 58 J. P. 212; 42 W. R. 153; 10 T. L. R. 34; 9 R. 46; Ryde, Rat. App. [1891–93] 438, C. A.

48. —[Land may be occupied in the enjoyment of an easement so as to make the occupier liable to poor-rate, although the occupation is exclusive only for certain purposes, & although the owner of the soil may have reserved rights of possession subordinate to the paramount rights he has granted. The test of ratability is not whether the rights granted are corporeal or incorporeal, but whether there is occupation, which is a question of fact. Pursuant to statute, a landowner granted to a drainage co., the exclusive right to drain through a tunnel & a watercourse on his land, with a right to place works in the tunnel & watercourse, & of making other tunnels in connection with it, but reserving to himself mineral & other rights:—*Held*: the statute & grant gave the co. not merely an easement but possession of the tunnels & watercourse; the rights reserved by the owner were subordinate to the rights granted to the co., & the co. were *de facto* in occupation of tunnels & watercourse, & ratable in respect thereof.—*HOLYWELL UNION & HALKYN PARISH v. HALKYN DRAINAGE CO.*, [1895] A. C. 117; 64 L. J. M. C. 113; 71 L. T. 818; 59 J. P. 566; 11 T. L. R. 132; 11 R. 98, H. L.;

*revsg.* S. C. *sub nom.* HALKYN DISTRICT MINES DRAINAGE CO. v. HOLYWELL UNION ASSESSMENT COMMITTEE & HALKYN PARISH OVERSEERS, *SAME v. SAME ASSESSMENT COMMITTEE & NORTHOP PARISH OVERSEERS* (1893), 69 L. T. 705, C. A.

*Annotations*:—*Reid*, M. S. & L. Ry. v. Kingston-upon-Hull (1896), 75 L. T. 127; Ystradgynodwg & Pontypridd Main Sewerage Board v. Newport (Mon.) Assmt. Com. (1901), 70 L. J. K. B. 318; Percy v. Hall (1903), 88 L. T. 830. *Mentd.* Bootle Overseers v. Liverpool Warehousing Co., *Same v. Webster* (1901), 85 L. T. 45; Mitchell v. Workson Union Assmt. Com. (1904), 92 L. T. 62; Swansea Union Assmt. Com. v. Swansea Harbour Trustees (1907), 97 L. T. 585; Winstanley v. North Manchester Overseers. [1910] A. C. 7; Young v. Liverpool Assmt. Com., [1911] 2 K. B. 195; Margate Corpn. v. Pettman (1912), 106 L. T. 101; Liverpool Corpn. v. Chorley Union Assmt. Com., [1913] A. C. 197; *Re* Nott, & Cardiff Corpn., [1918] 2 K. B. 146; Cleveland Bridge & Engineering Co. v. Darlington Union Assmt. Com. (1923), 21 L. G. R. 511.

#### SUB-SECT. 4.—OWNER OR OCCUPIER OF TENEMENT CANNOT HAVE EASEMENT OVER IT.

49. *General rule.*—(1) No way, or other easement can subsist in land of which there is an unity of possession. But if a lessor, having used convenient ways over his own adjoining land during his own occupation, demises premises with all ways appurtenant, unless it be shown in evidence that there was some way appurtenant *in alieno solo*, to satisfy the words of the grant, it shall be intended that he meant the ways used, & they shall pass, though he miscall them appurtenant.

(2) An action on the covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity.

(3) A lease demised a messuage, consisting of two parts, separated by intervening reserved land, subjected only to a specific right of way for the lessee to a third building for a specific purpose, which reservation, strictly interpreted, would preclude him from all access to the one part, which was accessible only by crossing the reserved land, in one of two directions, the one by entering it from the residue of the demised premises; the other, & far the more convenient, by entering it from a public street:—*Held*: the lessee was entitled to a way across the reserved land from the public street to that part.

(4) It would not be a great stretch to call that a necessary way without which the most convenient & reasonable mode of enjoying the premises could not be had (*MANSFIELD, C.J.*).—*MORRIS v. EDGINGTON* (1810), 3 Taunt. 24; 128 E. R. 10.

*Annotations*:—*As to* (1) *Consd.* Barlow v. Rhodes (1833), 1 Cr. & M. 439. *Distd.* Plant v. James (1833), 5 B. & Ad. 791. *Reid*. Wilson v. Bagshaw (1830), 5 Man. & Ry. K. B. 448; Tatton v. Hammersley (1849), 3 Exch. 279. *As to* (4) *Reid*. Pheysey v. Vicary (1847), 16 M. & W. 484; Dodd v. Burchell (1862), 1 H. & C. 113.

50. —[Estates, A. & B., formerly distinct, became vested in coparceners. Before that time, a right of way had been enjoyed from A. over B., & after the unity of seisin, the way always continued to be used. The parceners, for the purpose of making partition, conveyed to a releasee to uses the messuages, etc. (of which the estates consisted), & all houses, out-houses, ways,

#### PART I. SECT. 2, SUB-SECT. 4.

49 i. *General rule.*—One piece of land cannot be said to be burdened by an easement in favour of another when both belong absolutely to the same owner, who has, in the exercise of his own unrestricted right of enjoyment, the power of using both as he thinks

fit & of making the use of one parcel subservient to that of the other, if he chooses so to do; & if the title to different parcels comes to be vested in the same owner, there is an extinguishment of any easements which may previously have existed, a species of merger by which what may have been, whilst the different parcels were

in separate hands, legal easements, cease to be so, & become mere easements in fact.—*ATKILL v. PLATT* (1833), 10 S. C. R. 425.—*CAN.*

49 ii. —[Strictly speaking there could not be a reservation by the lessor of a servitude over his own property.—*BOAS v. WYTHE* (1906), E. D. C. 313.—*S. AF.*

## Sect. 2.—Characteristics: Sub-sects. 4 &amp; 5. Sect. 3.]

easements, etc., to the several messuages, etc., belonging or appertaining, or therewith usually held, used, occupied, or enjoyed: to have & to hold the messuages, etc., called A., with the buildings, lands, etc., thereunto belonging, & their appurtenances, to the releasee to the use of S. in fee; *habendum*, as to estate B., in similar terms with respect to the parcels, to the releasee to his own use in fee, in order that he might become tenant to the *præcipe* in a recovery:—*Held*: the deed sufficiently showed an intention that a right of way, which way was admitted to have been used up to the time of the deed, from the high road over B. to A. & back, for the convenient use of A., by the occupiers of A., should pass to the uses limited as to A. By the word "appurtenances," in the *habendum* as to A., interpreting that clause with reference to the other parts of the deed, the way in question did pass. The releasee to uses, having no estate in A., had not such a seisin of the soil as would extinguish the right of way by unity of seisin.

(2) When there is unity of seisin of the land & the way over the land in one & the same person, the right of way is either extinguished or suspended according to the duration of the respective estates in the land & the way (TINDAL, C.J.).—JAMES v. PLANT (1836), 4 Ad. & El. 749; 6 Nev. & M. K. B. 282; 6 L. J. Ex. 260; 111 E. R. 967, Ex. Ch.; *revers*. S. C. *sub nom.* PLANT v. JAMES (1833), 5 B. & Ad. 791.

*Annotations*:—As to (1) *Consd.* Wardle v. Brocklehurst (1860), 1 E. & E. 1065; Worthington v. Gimson (1860), 2 E. & E. 618; Thomson v. Waterlow (1868), L. R. 6 Eq. 36. *Reid*. Tatton v. Hammersley (1849), 18 L. J. Ex. 162; Langley v. Hammond (1868), L. R. 3 Exch. 161; Kay v. Oxley (1875), L. R. 10 Q. B. 360; Brown v. Alabaster (1887), 37 Ch. D. 490; Long v. Gowllett, [1923] 2 Ch. 177. As to (2) *Reid*. Barkshire v. Grubb (1881), 18 Ch. D. 616.

51. —.]—Pltf. was possessed of a mill on the river C. & deft. of a mill on the river H., which flowed into the C. at a point above pltf.'s mill. Declaration complaining that deft. deposited upon the bed of the H., & on the banks & side thereof, near to deft.'s mill, large quantities of cinders, etc., which were washed down & carried into the H., & so passed with the water into the C., & into pltf.'s mill-pond, etc., & into pltf.'s part of the bed & channel of the C., filling them up & obstructing the working of his mill. Plea, as to the depositing, etc., that deft. had been the occupier of the mill on the river H. for more than twenty years before, etc., & that being such occupier deft. enjoyed as of right & without interruption the privilege & easement of depositing upon the bed & channel of the H., & the banks & sides & near to his mill, all such quantities of cinders, etc., as were produced in the mill:—*Held*: (1) supposing deft. to claim the banks & bed of the H., on & in which the cinders, etc., had been deposited, as in his own occupation, or that the banks & bed were in the occupation of some third person, as against whom a valid right by way of easement had been gained, in either view the plea failed to show any right of easement as against pltf.; (2) even if it were taken that an easement in the bed & banks of the H. had been alleged & proved, & as a natural consequence that the deposit on the bed of the C. was necessarily established, still, as it was consistent with the plea that no perceptible deposit had been occasioned on pltf.'s part of the bed of the C. for twenty years, the plea was insufficient to show a claim to an easement of depositing cinders, etc., on

pltf.'s part of the bed of the C. *Qu.*: whether, if such a claim had been alleged, it could be considered as a valid claim to an easement, within Prescription Act, 1832 (c. 71), s. 2.

(3) Deft. might claim the banks & bed of the H. on & in which the cinders have been deposited, as in his own occupation, in which case the right to deposit them there could be no easement (COLERIDGE, J.).—MURGATROYD v. ROBINSON (1857), 7 E. & R. 391; 26 L. J. Q. B. 233; 29 L. T. O. S. 63; 3 Jur. N. S. 615; 5 W. R. 375; 119 E. R. 1292.

*Annotation*:—As to (1) *Reid*. Clark v. Somersetshire Drainage Comrs. (1888), 38 W. R. 890.

52. —.]—(1) A right to the access & use of light to a house cannot be acquired, under Prescription Act, 1832 (c. 71), s. 3, by the lapse of time during which the owner of the house, or his occupying tenant, is also the occupier of the land over which the right would extend. During such period of unity of occupation the running of the twenty years under the statute is only suspended.

(2) *Semble*: the owner in fee of land demised for a term of years is subject to any right to access & use of light over his land which may be acquired by the owner of an adjoining house during the demise.—LADYMAN v. GRAVE (1871), 6 Ch. App. 703; 25 L. T. O. S. 52; 36 J. P. 228; 19 W. R. 863, L. C.

*Annotation*:—*Consd.* Hyman v. Van Den Bergh, [1908] 1 Ch. 167.

53. —.]—(1) In 1872 the owner of two adjoining pieces of land granted one to pltf. & the other to deft. The grant to pltf. contained the general words, "together with all ways, etc., easements, & appurtenances whatsoever to the tenement, & premises hereby granted, or any part thereof, now or heretofore held or enjoyed, or reputed or known as part or parcel thereof, or appurtenant thereto." Prior to 1852 the occupiers of the two tenements had used in common a formed private road, for the purpose of going to & from their respective tenements to the high road. There was access to pltf.'s tenement from the high road without passing over the private road, but the only access to deft.'s tenement was by means of that road. In 1852, by the permission of the owner, the then occupier of pltf.'s tenement built a wall which entirely separated his tenement from the private road, & from that time down to 1872, & afterwards, with one exception, down to the issue of the writ, the occupiers of pltf.'s tenement made no use of the private road, but obtained access to the tenement directly from the high road:—*Held*: under the circumstances the inference that the word "heretofore" in the grant to pltf. was used in its ordinary grammatical meaning was rebutted, & no right to the use of the private road passed to him.

(2) Of course, strictly speaking, the owner of two tenements can have no easement over one of them in respect of the other (FRY, L.J.).—ROE v. SIDONS (1888), 22 Q. B. D. 224; 60 L. T. 345; 53 J. P. 246; 37 W. R. 228, C. A.

*Annotations*:—As to (1) *Appl.* Acton L. B. v. North & South Western Junction Ry. (1893), 37 Sol. Jo. 357. As to (2) *Consd.* Derry v. Sanders, [1919] 1 K. B. 223.

54. —.]—An easement is some right which a person has over land which is not his own, but if the land is his own, if he has an interest in it, then his right is not an easement. You cannot have an easement over your own land; & if your right is an interest in land it is a hereditament (ESHER, M.R.).—METROPOLITAN Ry. Co. v. FOWLER, [1892] 1 Q. B. 165; 61 L. J. Q. B. 193; 65 L. T. 772; 56 J. P. 244; 40 W. R. 306; 8



T. L. R. 189; 36 Sol. Jo. 137, C. A.; *affd.*, [1893] A. C. 416, H. L.

*Annotations*.—*Consol. Taff Vale Ry. v. Cardiff Ry.*, [1917] 1 Ch. 299; *Derry v. Sanders*, [1919] 1 K. B. 223. *Mentd.* Halkyn District Mines Drainage Co. v. Holywell Union (1893), 9 R. 779; Southport Corp'n. v. Ormskirk Union Assmt. Com., [1894] 1 Q. B. 196; *Farmer v. Waterloo & City Ry.*, [1895] 1 Ch. 527; *Westminster Corp'n. v. Johnson*, Same v. Fuller, [1904] 2 K. B. 737; *Newton, Chambers v. Hall*, [1907] 2 K. B. 446; *Liverpool Corp'n. v. West Derby Union Assmt. Com.* (1898), 72 J. P. 397; *C. L. Ry. v. City of London Land Tax Comrs.*, [1911] 2 Ch. 467; *Toronto Corp'n. v. Consumers Gas Co.*, [1916] 2 A. C. 618.

55. —[1] The owner of land in which water flows through an artificial channel has no right to appropriate all such water. Nor is he entitled to diminish the flow of water down the stream by abstracting water from the springs which feed that stream.

(2) The conveyance to pltf.'s predecessor expressly included all easements & watercourses "appertaining to the land conveyed," but the words "or usually enjoyed therewith or reputed as part thereof or appurtenant thereto" were not inserted. The watercourse in question was not an easement in any proper sense, whilst the lands in which the stream originated, & through which it flowed, belonged to one & the same owner. But it is, in my opinion, clear that after the conveyance to pltf.'s predecessor the vendor could not have cut off the stream & have deprived the purchaser of the benefit of its flow (LINDLEY, L.J.).

(3) Before 1879 these properties belonged to the same person. In that year they were sold by auction in separate lots on the same day, & pltf.'s predecessor bought the land east of the railway, deft.'s predecessor buying the land west of the railway in which the spring or stream commences. The plan in the particulars of sale does not show the spring or stream, neither is it marked upon the plan on the conveyance to pltf.'s predecessor. It is not mentioned in that conveyance, which contains only the general word "watercourse" which could apply to it. But, although the law is now understood to be, that upon a grant easements cannot be reserved over the land granted by implication without express words, it is otherwise as to implied grants of such easements as are continuous & apparent. The grantor cannot derogate from his grant, & a continuous & apparent easement passes by implication without express words. The law is the same where the servient & dominant tenements are sold at the same time & the quasi easement only becomes an easement in fact by the severance of ownership. On this ground, even if deft. could otherwise have destroyed the spring or stream, I should be of opinion that the law would not permit him to do so. When the unity of ownership was severed, this watercourse & spring then existing in the condition I have described, it would be both apparent & continuous, & deft. could no more interfere with it than the grantor could have done if he had retained deft.'s land (KAY, L.J.).—BUNTING v. HICKS (1894), 70 L. T. 455; 10 T. L. R. 360; 7 R. 293, C. A.

*Annotation*.—*Reid. Mostyn v. Atherton*, [1890] 2 Ch. 360.

56. —[1] Where works on the foreshore, intended to protect the adjacent lands from the invasion of the sea, have been carried out by the occupier without the knowledge & assent of the Crown, the foreshore right originally attaching to such land before the reclamation are not thereby destroyed. There may be an easement to store goods on the land of another person, but there can be no easement over a tenement which the owner of the dominant tenement claims as his own.

A transfer of the dominion of lands cannot be affected by possession for a period short of the full requisite period of prescription without the presumption of a lost grant.

The law (of easements) must adapt itself to the conditions of modern society & trade, & there is nothing in the purposes for which the easement is claimed (storage) inconsistent in principle with a right of easement as such (*per Cur.*).—A.-G. OF SOUTHERN NIGERIA v. HOLT (JOHN) & CO. (LIVERPOOL), LTD., [1915] A. C. 599; 84 L. J. P. C. 98; 112 L. T. 955, P. C.

*Annotations*.—*Mentd.* Amodu Tijani v. Southern Nigeria, [1921] 2 A. C. 399; *Brighton & Hove General Gas Co. v. Hove Bungalows* (1923), 68 Sol. Jo. 165.

**Effect of exclusive use of servient tenement.**—See Part I., Sect. 2, sub-sect. 3, (c) (c), *ante*.

**Extinction of easements by unity of seisin.**

—See Part VI., Sect. 3, *post*.

#### SUB-SECT. 5.—RATING OF EASEMENTS.

See RATES & RATING.

#### SECT. 3.—CLASSIFICATION.

57. **Affirmative & negative.**—User which is neither physically capable of prevention by the owner of the servient tenement, nor actionable, cannot support an easement. This is applicable both to affirmative & negative easements. On this principle the right to make a noise so as to annoy a neighbour cannot be supported by user unless during the period of user the noise has amounted to an actionable nuisance. In considering whether any act is a nuisance, regard must be had not only to the thing done, but to the surrounding circumstances. What would be a nuisance in one locality might not be so in another.

A confectioner had for more than twenty years used a pestle & mortar in his back premises, which abutted on the garden of a physician, & the noise & vibration were not felt as a nuisance & were not complained of. But in 1873 the physician erected a consulting-room at the end of his garden, & then the noise & vibration became a nuisance to him. He accordingly brought an action for an injunction:—*Held*: deft. had not acquired a right to an easement of making a noise & vibration, & the injunction was granted.

(Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, & of the fiction of a lost grant, & hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi, nec clam, nec precario*; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests & endeavours to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold, that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence. It is a principle which must be equally appropriate to the case of affirmative as of negative easements; in other words, it is equally unreasonable to imply your consent to your neighbour enjoying something which passes from your tenement to his, as to his subjecting

*Sect. 3.—Classification. Part II.]*

your tenement to something which comes from his, when in both cases you have no power of prevention. But the affirmative easement differs from the negative easement in this, that the latter can under no circumstances be interrupted except by acts done upon the servient tenement, but the former, constituting, as it does, a direct interference with the enjoyment by the servient owner of his tenement, may be the subject of legal proceedings as well as of physical interruption (THESSIGER, L.J.).—*STURGES v. BRIDGMAN* (1879), 11 Ch. D. 852; 48 L. J. Ch. 785; 41 L. T. 219; 43 J. P. 716; 28 W. R. 200, C. A.

*Annotations*.—*Consd.* Dalton v. Angus (1881), 6 App. Cas. 740; Union Lighterage Co. v. London Graving Dock Co., [1901] 2 Ch. 300. *Apld.* Liverpool Corp. v. Coghill, [1918] 1 Ch. 307. *Reid.* Hollins v. Verney (1884), 13 Q. B. D. 304; Byass v. Bettam (1885), 2 T. L. R. 88; Harris v. De Pinna (1886), 33 Ch. D. 238; Foster v. Warblington U. C., [1906] 1 K. B. 648; Owen v. Faversham Corp. (1908), 72 J. P. 404; Lyell v. Hothfield, [1914] 3 K. B. 911; Bosworth-Smith v. Gwynnes (1919), 122 L. T. 15. *Mentd.* Cooper v. Crabtree (1881), 19 Ch. D. 193; L. B. & S. C. Ry. v. Fruman (1885), 11 App. Cas. 45; Reinhardt v. Mentasti (1889), 42 Ch. D. 685; Spruzen v. Dossett (1896), 12 T. L. R. 246; Tushmor v. Polsue & Alfieri, [1906] 1 Ch. 234; Wood v. Conway Corp., [1914] 2 Ch. 47.

58. —.]—A contract for the sale of land provided that the title should commence with a conveyance dated Aug. 11, 1890. A deed dated 1872 created restrictive covenants over a large part of the land purchased. The vendor had bought in 1901 from a person who had himself purchased from a person, who had acquired a possessory title in 1890. On both sales the title required went back only to 1878. The vendor had no actual notice of the restrictive covenants, nor did they appear on the abstract. The purchaser, having received notice of the restrictive covenants, objected to complete:—*Held*: the restrictive covenants were in the nature of negative easements binding the land in equity, & were paramount to the title of the dispossessed owner; as the vendor & the person from whom he purchased had not insisted on a forty years' title, they had constructive notice of what they would have ascertained if they had insisted on the same; consequently, no title was shown.

The person who stands simply with the benefit of a negative easement is certainly not put upon the assertion of his right unless & until that right has been interfered with in some way; & it is a matter of absolute indifference to him what person is the owner of the land over which that right exists until that land is used in some manner incompatible with the assertion of that right on the part of the person entitled to it (COLLINS, M.R.).—*Re NISBIT & POTTS' CONTRACT*, [1906] 1 Ch. 386; 75 L. J. Ch. 238; 22 T. L. R. 233; 50 Sol. Jo. 101; *sub nom. Re NESBITT & POTTS' CONTRACT*, 94 L. T. 297; 54 W. R. 286, C. A.

*Annotations*.—*Consd.* L. C. C. v. Allen, [1914] 3 K. B. 642. *Reid.* Abbey v. Gutierrez (1911), 55 Sol. Jo. 364; Wilkes v. Spooner, [1911] 2 K. B. 473; Long v. Gray (1913), 58 Sol. Jo. 46; Meyer v. Charles (1918), 34 T. L. R. 589.

59. Continuous & non-continuous.]—SUFFIELD v. BROWN, No. 226, *post*.

60. —.]—(1) A testatrix, who at the date of her will was possessed of two adjoining cottages & gardens, in one of which she lived, & in the garden of which there was a well & pump, to which her tenant in the adjoining cottage was with her permission accustomed to resort for the purpose of taking water, there being none upon his premises, devised the two properties, giving the one she occupied herself to pltf., & the one occupied by her tenant to the assignor of deft., describing such

last-mentioned premises by the words "as now in the occupation of A."—*Held*: deft. had no right under this devise to go upon pltf.'s premises to the pump for water for the use of his tenement.

(2) There is no distinction between easements such as a right of way or easements used from time to time & easements of necessity or continuous easements. The cases recognise this distinction & it is clear law that upon a severance easements used as of necessity, or in their nature continuous, will pass by law without any words of grant, but with regard to easements which are used from time to time only they do not pass unless the owner, by appropriate language, shows an intention that they should pass (ERLE, C.J.).—*POLDEN v. BASTARD* (1865), L. R. 1 Q. B. 156; 7 B. & S. 130; 35 L. J. Q. B. 92; 13 L. T. 441; 30 J. P. 73; 14 W. R. 198, Ex. Ch.

*Annotations*.—*As to* (1) *Consd.* Nicholls v. Nicholls (1899), 81 L. T. 811. *Reid.* Bayley v. G. W. Ry. (1884), 26 Ch. D. 434; Kilgour v. Gaddes (1903), 89 L. T. 444. *As to* (2) *Consd.* Roe v. Siddons (1888), 22 Q. B. D. 224. *Distd.* Phillips v. Low, [1892] 1 Ch. 47. *Consd.* Schwann v. Cotton, [1916] 2 Ch. 120. *Reid.* Watts v. Kelson (1871), 6 Ch. App. 166; Thomas v. Owen (1887), 20 Q. B. D. 225; Tawn v. Knowles, [1891] 2 Q. B. 564.

61. —.]—WHELDON v. BURROWS, No. 253, *post*.

62. Apparent & non-apparent.]—PYER v. CARTER, No. 216, *post*.

63. —.]—SUFFIELD v. BROWN, No. 226, *post*.

64. —.]—WHELDON v. BURROWS, No. 253, *post*.

65. Easements of necessity—Definition.]—SUFFIELD v. BROWN, No. 226, *post*.

66. — Whether most convenient for use of dominant tenement.]—MORRIS v. EDGINGTON, No. 49, *ante*.

67. — —.]—WATTS v. KELSON, No. 250, *post*.

68. — —.]—(1) An easement of necessity is one without which the property retained upon a severance cannot be used at all; not one which is merely necessary to the reasonable enjoyment of that property.

In 1860 a dock & a wharf to the west of it, & divided from it by a fence, belonged to the same owner. In order to secure the side of the dock, he in that year carried a number of tie-rods under the ground beneath the fence & beneath the surface of the wharf for a distance of about fifteen & a half feet to the west of the fence, the rods being there fastened by nuts to piles which were driven into the soil of the wharf. The tie-rods were not visible; but two nuts on piles were visible on the western side of the camp-sheathing which held up the side of the wharf. In 1877 the then owners of both properties conveyed the wharf to pltf., without any express reservation of a right of support for the dock. In 1886 the same owners conveyed the dock to defts.' predecessors in title. In 1900 pltf. in making some excavations in the wharf, became for the first time aware of the existence of the tie-rods:—*Held*: (2) when the wharf was conveyed to pltf. there was no implied reservation of a right of support to the dock, & the tie-rods did not remain vested in the grantors as part of or appurtenant to the dock; (3) the owners of the dock had not acquired an easement of support by length of enjoyment, the enjoyment having been *clam*, & pltf. were entitled to remove the tie-rods from their land; (4) the easement of support was not one of necessity, & therefore a reservation of it could not be implied.

A prescriptive right to an easement over a man's land should be acquired only when the enjoyment



has been open, that is, of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of the enjoyment (ROMER, L.J.).—UNION LIGHTERAGE CO. v. LONDON GRAVING DOCK CO., [1902] 2 Ch. 557; 71 L. J. Ch. 791; 87 L. T. 381; 18 T. L. R. 754, C. A.

*Annotations*:—As to (1) *Apld.* Ray v. Hazeldine, [1904] 2 Ch. 17. As to (3) *Refd.* Schwann v. Cotton, [1916] 2 Ch. 120; Solby v. Whitbread, [1917] 1 K. B. 736; Liverpool Corp'n. v. Coghill, [1918] 1 Ch. 307.

69. ———.]—Deft., being the owner of two adjoining tenements, granted one of them to pltf.'s predecessor in title, while retaining the other, without expressly reserving to himself any rights over the tenement granted. Pltf. built a wall on her premises so as to block out the light to two windows in deft.'s premises. One of these windows lighted a pantry which could not be lighted in any other way except by means of borrowed light, & the obstruction rendered the pantry useless as a pantry:—*Held*: there was no implied reservation to deft. of the right to the access of light to the pantry window, inasmuch as it was not an easement of necessity.

If a vendor of land desires to reserve any right in the nature of an easement for the benefit of his adjacent land which he is not parting with he must do it by express words in the deed of conveyance. . . . That is the general rule, but the rule is subject to certain exceptions. One of them is the well-known exception of an easement of necessity, that is to say, where the enjoyment of the alleged right over the adjoining land is necessary to the property which is not conveyed, then the ct. will consider the easement as implicitly reserved, though it has not been reserved by express words (KEKEWICH, J.).—RAY v. HAZELDINE, [1904] 2 Ch. 17; 73 L. J. Ch. 537; 90 L. T. 703.

70. — - Whether valid for right of fishing.]—PEERS v. LUCY, No. 1, *ante*.

*See, also*, Part VII., Sect. 3, sub-sect. 2, *post*.

71. Quasi-easement.]—A grantor cannot derogate from his own grant, & therefore if, when letting a house, he retains adjoining land, he cannot use it so as to interfere with the stability of the house. It is sometimes put on the ground of implied agreement, or implied grant of a quasi-easement, a right in the nature of an easement, not to have anything done which disturbs the stability of the property (DAVEY, L.J.).—GROSVENOR HOTEL CO. v. HAMILTON, [1894] 2 Q. B. 836; 63 L. J. Q. B. 661; 71 L. T. 362; 42 W. R. 626; 10 T. L. R. 506; 9 R. 819, C. A.

*Annotations*:—*Consd.* Browne v. Flower, [1911] 1 Ch. 219. *Distd.* Malzy v. Eichholz, [1916] 2 K. B. 308. *Consd.* Hoare v. McAlpine, [1923] 1 Ch. 167. *Refd.* Markham v. Paget, [1908] 1 Ch. 697.

72. ———.]—There may be a lawful & valid custom for the inhabitants of a parish to have a churchway through the demesne of a manor which is within the parish. *Primâ facie* a custom in reference to a churchway is a parochial custom.

Pltf. was lord of the manor of I. & also of the manor of S., both within the parish of I. Deft. was the occupier of a tenement in the same parish, but in the manor of S. Across the demesne of the manor of I. was a footpath which ran in front of pltf.'s mansion house to the parish church, & deft. claimed the right to use it as an inhabitant of the parish for the purpose of going to & from the church. In an action of trespass against deft., pltf. alleged that the path was not a churchway for the parishioners generally, but only by virtue of a manorial custom of the manor of I. for a certain class of the tenants of that manor, & in support of that contention tendered in evidence a memorandum made by one of his predecessors in title:—*Held*: (1) on the evidence no such manorial custom existed; (2) if proved, it was doubtful whether it would be good in law; (3) the memorandum was not admissible in evidence on behalf of pltf.; (4) the path was a churchway by custom for the inhabitants of the parish at large.

It is well settled that by custom a local public or class of persons, as the inhabitants of a parish, may be entitled to have some use or quasi-easement of land, as to have a way to a church or market (JOYCE, J.).—BROCKLEBANK v. THOMPSON, [1903] 2 Ch. 344; 72 L. J. Ch. 626; 89 L. T. 209; 19 T. L. R. 285.

*Annotation*:—*Refd.* Derry v. Sanders, [1919] 1 K. B. 223.

73. ———.]—Where a local authority requires to open up the soil of a street, the surface only of which has been dedicated to the public, they do not commit a trespass on private property so long as the act to be done is within the area of their statutory powers. Therefore:—*Held*: no trespass was committed by the digging of a hole in the footway in which to place a pole to carry the electric wire for a tramway scheme authorised by a private Act, which incorporated the provisions of Lands Clauses Act, the act complained of not amounting to a taking of land but only to the exercise of a right in the nature of an easement.—ESCOTT v. NEWPORT CORPN., [1904] 2 K. B. 369; 73 L. J. K. B. 693; 90 L. T. 348; 68 J. P. 135; 52 W. R. 543; 20 T. L. R. 158; 2 L. G. R. 779.

*Annotations*:—*Apld.* Andrews v. Abertillery U. C. (1911), 80 L. J. Ch. 724. *Refd.* Taff Vale Ry. v. Cardiff Ry., [1917] 1 Ch. 299.

74. Inchoate easement.]—GREENHALGH v. BRINDLEY, No. 412, *post*.

75. Precarious easement.]—BURROWS v. LANG, No. 189, *post*.

## Part II.—Distinction between Easements and Other Rights.

76. Distinguished from profits à prendre—Loss & revival.]—ROBINS v. BARNES (1615), Hob. 131; 80 E. R. 280.

*Annotation*:—*Refd.* Palmer v. Fessler (1664), 1 Keb. 794.

77. ——— Fishery.]—PEERS v. LUCY, No. 1, *ante*.

78. ——— Claimable by custom.]—GOODMAN v. SALTASH CORPN., No. 322, *post*.

79. ———.]—Any acquisition of right arising from long continued user must be founded upon either custom, prescription, or lost grant. It is well settled that the public cannot have any

right to fish founded upon custom, however long the practice has continued (NORTH, J.).—SMITH v. ANDREWS, [1891] 2 Ch. 678; 65 L. T. 175; 7 T. L. R. 527.

*Annotations*:—*Refd.* Hindson v. Ashby, [1896] 2 Ch. 1. Johnston v. O'Neill, [1911] A. C. 552.

*See, also*, COMMONS, Vol. XI., p. 5, No. 1.

Profits à prendre generally.]—*See* Part XIII., *post*.

80. Distinguished from licence—Irrevocable.]—Where one declared for obstructing a water-course upon his possession of a mill with the

appurtenances & that by reason of his possession he had a right to the use of water running in a tunnel to the mill; such allegation is not supported by proof that the tunnel was made on deft.'s land which he had agreed to let pltf. have for this purpose for a consideration, but of which no conveyance was made by deft. to pltf., & he (deft.) had since refused assent; because pltf. had not the water by reason of his possession of the mill, etc., but by parol licence, or contract, which could not pass the title to the land, & as a licence was revocable & had been revoked.—*FENTIMAN v. SMITH* (1803), 4 East, 107; 102 E. R. 770.

*Annotations*.—*Fold*. *Hewlins v. Shippam* (1826), 5 B. & C. 221. *Reid*. *Boyle v. Tamlyn* (1827), 9 Dow. & Ry. K. L. 430; *Wood v. Leadbitter* (1845), 13 M. & W. 838; *Wood v. Waud* (1849), 3 Exch. 748; *Laing v. Whaley* (1858), 3 H. & N. 675.

81. ———.]—*Held*: the taking a grant of a licence from the lord of a manor to erect a cottage on a piece of land, rendering an annual rent of 10s. 6d. as a quit-rent, & also a grant of a licence to inclose a piece of ground for a garden to the cottage, both being parts of the waste, & building a cottage thereon, & residing in it a year & a half, were not to confer a settlement; this being a licence only, & not a grant of any interest in land.—*R. v. HORNDON-ON-THE-HILL (INHABITANTS)* (1816), 4 M. & S. 562; 105 E. R. 942.

*Annotations*.—*Reid*. *Wood v. Leadbitter* (1845), 13 M. & W. 838. *Mentd*. *R. v. Goddington* (1823), 2 B. & C. 129; *R. v. Hagworthingham* (1823), 1 B. & C. 634; *R. v. Cuddington* (1845), 14 L. J. M. C. 182.

82. ———.]—The locking of a gate, through which parol leave has been given to pass, is of itself a sufficient notice of revocation of the leave.

Pltf. & deft. having agreed, on a dispute existing between them as to a right of way, that deft. should use the way *ad interim*, without prejudice, until

it should be determined how the question should be settled:—*Held*: pltf. having locked the gate, & deft. broken the lock, the equitable position of the parties was not such as to bar an action of trespass at common law.—*HYDE v. GRAHAM* (1862), 1 H. & C. 593; 1 New Rep. 64; 32 L. J. Ex. 27; 7 L. T. 563; 8 Jur. N. S. 1229; 11 W. R. 119; 158 E. R. 1020.

83. ———.]—*By parol*.—A beneficial licence to be exercised upon land, may be granted without deed, & without writing. A licence to be exercised upon land for 21 years, granted for a valuable consideration, & acted upon, cannot be countermanded.—*TAYLER v. WATERS* (1816), 7 Taunt. 374; 2 Marsh. 551; 129 E. R. 150.

*Annotations*.—*Consd*. *Wood v. Leadbitter* (1845), 13 M. & W. 838. *Reid*. *Hewlins v. Shippam* (1826), 5 B. & C. 221; *Liggins v. Inge* (1831), 7 Bing. 682; *Williams v. Morris* (1841), 8 M. & W. 488; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Met. Ry. v. Fowler*, [1892] 1 Q. B. 165; *Hurst v. Picture Theatros*, [1915] 1 K. B. 1. *Mentd*. *Wood v. Manley* (1839), 11 Ad. & El. 34; *Wells v. Kingston-upon-Hull Corpn.* (1875), 44 L. J. C. P. 257; *Webber v. Lee* (1882), 9 Q. B. D. 315.

84. ———.]—*HEWLINS v. SHIPPAM*, No. 2, *ante*.

85. ———.]—*COCKER v. COWPER*, No. 120, *post*.

Licences in relation to land generally, see *DEEDS*, Vol. XVII., pp. 192-195, Nos. 26-50, 54-61; *LANDLORD & TENANT*; *MINES*; *TRESPASS*.

86. Distinguished from running powers over railways.]—*RANGELEY v. MIDLAND RY. CO.*, No. 25, *ante*.

87. ———.]—*GREAT WESTERN RY. CO. v. SWINDON & CHELTENHAM RY. CO.*, No. 14, *ante*.

Running powers generally.]—See *RAILWAYS*.

88. Distinguished from customary rights.]—*MOUNSEY v. ISMAX*, No. 3, *ante*.

———.]—*Sec, further*, *CUSTOM & USAGES*, Vol. XVII., pp. 5-7, Nos. 16-29.

## Part III.—Creation of Easements.

### SECT. 1.—BY EXPRESS GRANT.

#### SUB-SECT. 1.—NATURE OF RIGHTS WHICH MAY BE GRANTED.

89. Must be of nature known to law.—*Restrictive covenant*.]—*Monmouthshire Canal Act* provided that, upon auxiliary railroads made by private individuals under the authority of the Act, the tolls should not exceed the rate charged by the canal co., which, for the articles of limestone & ironstone, was restricted to 2½d. a ton per mile; & it also empowered the canal co., by agreement with the landowners, itself to construct auxiliary railroads, on which tolls not exceeding 5d. a ton per mile might be charged. Certain landowners & owners of iron works, & among

others, the lessees of B. works, formed a joint-stock co., & under the powers given by the Act, constructed a railroad connecting a lime quarry, called T. quarry, with the several iron works & with the railroads of the canal co. In the partnership deed of the railroad co., the lessees of B. works covenanted for themselves, their heirs, etc., & assigns, with the other shareholders, their exors., etc., so long as the covenantors, their exors., etc., should occupy B. works, to procure all the limestone used in the works from T. quarry, & to convey all such limestone, & also all the ironstone from the mines to the works along the T. railroad, & to pay a toll of 5d. a ton per mile for the same.

Upon a bill filed by the shareholders of the railroad to enforce this covenant against a person

#### PART II.

88 i. Distinguished from customary rights.]—Pleas setting up a custom for inhabitants of the surrounding country as of right to drink the water of certain mineral springs for forty years were bad, for such right could not be claimed in gross under Prescription Act, R. S. O. 1877, c. 108, s. 38.—*GRAND HOTEL CO. v. CROSS* (1879), 44 U. C. R. 153.—*CAN.*

m. Distinguished from ordinary proprietary rights.]—The right to restrain another from exercising ordinary proprietary rights over his own land is of the nature of an easement different from the ordinary rights of owners of land; the burden of proof wherefore lie upon the party alleging such

rights.—*HARI MOHAN THAKUR v. KISSEN SUNDARI* (1884), 1 L. R. 11 Cal. 52.—*IND.*

n. Distinguished from right to hold musical festival.]—No easement to hold something in the nature of a musical festival on a plot of ground can properly exist.—*MOHINI MOHAN ADHIKARY v. KASHINATH ROY CHOWDHURY* (1909), 1 L. R. 36 Cal. 615.—*IND.*

o. Distinguished from right to sell refreshments on raccourse.]—Appls. purchased from the race committee the sole & exclusive right to sell wines, spirits, & refreshments on the raccourse on Mar. 25. They brought an action against respts. for interfering with that right by occupying a booth

& selling wines, spirits, etc., at the same place & on the same day:—*Held*: the action was not maintainable, as the law recognised no such easement in gross or servitude as that claimed by appls.—*CLEMENTS v. EDMONDSON*, Mac. 542.—*N.Z.*

#### PART III. SECT. 1, SUB-SECT. 1.

p. Right of way to two dominant tenements.]—The owner of land upon which there was an avenue, having granted a right of way through the avenue to the owner of one tenement, is not on that account prevented from granting a right of way through the same avenue to the owner of another tenement, unless the second servitude

who had purchased B. works, with notice of the partnership deed:—*Held*: the covenant did not run with the land so as to bind assignees at law; & a ct. of equity would not, by holding the conscience of the purchaser to be affected by the notice, give the covenant a more extensive operation than the law allowed to it.

So in respect of enjoyment, one may have the possession & the fee simple, & another may have a rent issuing out of it, or the tithes of its produce, or an easement, as a right of way upon it, or of common over it. Such last incorporeal hereditament may be annexed to an estate which is wholly unconnected with the estate affected by the easement, although both estates were originally united in the same owner, & one of them was afterwards granted by him with the benefit, while the other was left subject to the burthen. All these kinds of property, however, all these holdings, are well known to the law & familiarly dealt with by its principles. But it must not therefore be supposed that incidents of a novel kind can be devised & attached to property, at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law & to the public weal, that such a latitude should be given (BROUGHAM, C.).—*KEPPEL v. BAILEY* (1834), 2 My. & K. 517; *Coop. temp. Brough.* 298; 30 E. R. 1042, L. C.

*Annotations*:—*Consd. Stockport Waterworks Co. v. Potter* (1864), 3 H. & C. 300. *Reid. Tulk v. Moxhay* (1848), 11 Beav. 571; *Ackroyd v. Smith* (1850), 10 C. B. 164; *Rowbotham v. Wilson* (1857), 8 E. & B. 123; *Balley v. Stevens* (1862), 31 L. J. C. P. 226; *Hill v. Tupper* (1863), 2 H. & C. 121; *Richards v. Harper* (1866), 35 L. J. Ex. 130; *G. N. Ry. v. I. R. Comrs.*, [1901] 1 K. B. 416. *Mentl. Norval v. Pascoe* (1864), 4 New Rep. 390; *Limmer Asphaltic Paving Co. v. I. R. Comrs.* (1872), L. R. 7 Exch. 211; *Aspden v. Seddon*, *Preston v. Seddon* (1876), 34 L. T. 906; *Luker v. Dennis* (1877), 7 Ch. D. 227; *Haywood v. Brunswick Permanent Benefit Bldg. Soc.* (1881), 45 L. T. 699; *Werdernan v. Soc. Générale D'Electricité* (1881), 19 Ch. D. 246; *Zetland v. Hislop* (1882), 7 App. Cas. 427; *Whitmores (Edenbridge) v. Stanford*, [1909] 1 Ch. 427; *L. C. C. v. Allen*, [1914] 3 K. B. 642; *Re Woking Urban District Council (Basingstoke Canal) Act*, 1911, [1914] 1 Ch. 300; *Woodman v. Pwllbach Colliery Co.* (1914), 111 L. T. 169; *Barker v. Stickney*, [1919] 1 K. B. 121.

90. — & connected with use of land—Right of way.]—*ACKROYD v. SMITH*, No. 20, *ante*.

91. — Boats for hire on canal.]—The proprietors of a canal by deed granted to *pltf.* the sole & exclusive right of putting or using pleasure-boats for hire on the canal:—*Held*: this did not confer such an interest in *pltf.* as to give him a right of action against another person for using pleasure-boats for hire on the canal.

It appears to me a right of this sort cannot be created so as to constitute a property. It is merely a licence or covenant that the party may do the particular thing. He may sue in the name of the grantor so as to prevent strangers from intervening, if the grantor gives him permission in order to carry out the grant. A new species of incorporeal hereditament cannot be created at the will & pleasure of an individual owner of an estate; he must be contented to take the sort of estate & the right to dispose of it as he finds the law settled by decisions, or controlled by Act of Parliament. He may grant what he pleases, but he cannot carve out the property so as to enable the grantee to bring an action against the grantor for the sort of right he claims in this case (POLLOCK, C.B.).—*HILL v. TUPPER* (1863),

2 H. & C. 121; 2 New Rep. 201; 32 L. J. Ex. 217; 8 L. T. 792; 9 Jur. N. S. 725; 11 W. R. 784; 159 E. R. 51.

*Annotations*:—*Consd. Stockport Waterworks Co. v. Potter* (1864), 3 H. & C. 300; *Nuttall v. Bracowell* (1866), L. R. 2 Exch. 1. *Mentl. Richards v. Harper* (1865), 4 H. & C. 55; *Fitzgerald v. Firbank*, [1897] 2 Ch. 96; *A.-G. v. Horner* (No. 3), [1913] 2 Ch. 140.

92. — Grant of water rights—To land not abutting on stream.]—*STOCKPORT WATERWORKS Co. v. POTTER*, No. 1070, *post*.

93. — Flow not continuous.]—*BURROWS v. LANG*, No. 189, *post*.

94. — Support of railway by coal.]—(1) A colliery co., who were the owners of coal under & adjacent to a railway, gave notice to the railway co. under Railways Clauses Consolidation Act, 1845 (c. 20), s. 78, of their intention to work the coal. The railway co. thereupon gave notice to the colliery co. under the sect. that they were willing to make compensation for the coal. The amount of the compensation having been fixed by arbitration, the railway co. paid that amount, & the colliery co. executed an instrument under seal by which they acknowledged receipt of the amount in satisfaction of all claims by them in respect of the coal, & undertook to leave the coal unworked:—*Held*: the right of the railway co. to have the coal left unworked came into existence when the notices were given under the above sect.

The fetter so accepted by the owner could not be made the subject of a grant or conveyance so as to bind the lands in the hands of successive owners. It is an arbitrary fetter debarring the owner from dealing with a given area of land in a particular way irrespective of whether it is more or less than is actually required for the support of the railway & whether or not substituted support is supplied by shoring or other means. The right to enforce such a restriction could not, in my judgment, be the subject of a grant so as to bind the land in the hands of successive owners. Nothing but a statute could create such a right, & a statute has created it (COLLINS, L.J.).

(2) Such a right differs from a right of support, being more extensive in some respects, & less so in others. In particular it differs in this, that the obligation under it is purely negative; whereas a right of support to buildings is an easement not purely negative, & is capable of being created by grant. There is no authority that a right or obligation such as that which arises under the above sect. is capable of being created by grant (STIRLING, L.J.).—*GREAT NORTHERN RY. Co. v. INLAND REVENUE COMRS.*, [1901] 1 K. B. 416; 70 L. J. K. B. 336; 84 L. T. 183; 65 J. P. 275; 49 W. R. 261; 17 T. L. R. 218; 45 Sol. Jo. 237, C. A.

*Annotations*:—*As to* (1) *Reid. Re Bwlfa & Morthyr Dare Steam Collieries* (1891) & *Pontypridd Waterworks Co.*, [1901] 2 K. B. 798; *Richard v. G. W. Ry.*, [1905] 1 K. B. 68.

## SUB-SECT. 2.—CONDITIONS PRECEDENT TO VALID GRANT.

### A. Extent of Grantor's Estate.

95. Must be not less than that for which easement created.]—A lessor granted a lease for 21 years of a house with its appurtenances among

interferes with the proper enjoyment of the first.—*AHLBOM v. VICKERS* (1892), 9 S. C. 484.—S. AF.

q. Right to discharge water on

land.]—An agreement by which the owner of a house undertook to permit the owner of an adjoining house when he built a second storey, which was in contemplation to discharge rain water

& also water used for daily household purposes on to the premises of the former, was a grant of an easement.—*BHAGWAN SAHAI v. NARASINGH SAHAI* (1909), 1 L. R. 31 All. 612.—IND.

*Sect. 1.—By express grant: Sub-sect. 2, A. & B.; sub-sects. 3 & 4.]*

which lights were specified. At the time of the grant he held an adjoining house for a term of years. He subsequently acquired the reversion expectant on the term in the adjoining house; & after the expiration of the term he proceeded to build on the site of the adjoining house in a manner which might interfere with the lights of the demised house, these lights not being ancient lights:—*Held*: lessor was not by his grant prevented from so building.

General words in a grant must be restricted to that which the grantor had then power to grant & will not extend to anything which he might subsequently acquire (MELLISH, L.J.).

At the time when the lease was made, deft. was no doubt the owner of a term of a few years in the adjoining property, & no doubt the words of the lease amount to a grant of the light coming over the adjoining property during the term which deft. at the date of the lease had in that property (JAMES, L.J.).—*Booth v. Alcock* (1873), 8 Ch. App. 603; 42 L. J. Ch. 557; 29 L. T. 231; 37 J. P. 709; 21 W. R. 743, L. J.

*Annotations*:—*Consd.* *Beddington v. Atlee* (1887), 35 Ch. D. 317; *Godwin v. Schwepss* [1902] 1 Ch. 926. *Reid*. *Master v. Hansard* (1876), 4 Ch. D. 718; *Quick v. Chapman*, [1903] 1 Ch. 659. *Mentd.* *Davis v. Town Properties Investment Corp.*, [1903] 1 Ch. 797.

96. — *Executrix with power of sale.*—An executrix, who has no estate or interest in land, but only a power to sell it, is not empowered to grant an easement over it.—*Re BARKOW-IN-FURNESS CORPN. & RAWLINSON'S CONTRACT*, [1903] 1 Ch. 339; 72 L. J. Ch. 233; 87 L. T. 724; 51 W. R. 248.

97. *Must not be ultra vires.*—A railway co. having the usual powers under their special Act to take & use land for the purpose of the railway & works cannot, whether for valuable consideration or otherwise, alienate for any purpose except the purposes of the Act any portion of its land, not being "superfluous land" within Lands Clauses Act, 1845 (c. 18), s. 127, not being land taken for extraordinary purposes within Railway Clauses Act, 1845 (c. 20), s. 45, nor any easement over the same.—*MULLINER v. MIDLAND RY. CO.* (1879), 11 Ch. D. 611; 48 L. J. Ch. 258; 40 L. T. 121; 43 J. P. 573; 27 W. R. 330.

*Annotations*:—*Distd.* *Bayley v. G. W. Ry.* (1881), 26 Ch. D. 434. *Consd.* *Grand Junction Canal Co. v. Petty* (1888), 21 Q. B. D. 273; *Foster v. L. C. & D. Ry.* (1894), 71 L. T. 855. *Expld. & Distd.* *Re Gonty & M. S. & L. Ry.*, [1896] 2 Q. B. 439. *Apld.* *G. W. Ry. v. Solihull R. D. Co.* (1902), 86 L. T. 852. *Consd.* *G. W. Ry. v. Talbot*, [1902] 2 Ch. 759. *Distd.* *Stretford U. D. C. v. Manchester South Junction & Altrincham Ry.* (1903), 68 J. P. 59. *Consd.* *Taft Vale Ry. v. Pontypridd U. D. C.* (1905), 93 L. T. 126. *Distd.* *S. E. Ry. v. Associated Portland Cement Manufacturers* (1900), Ltd., [1910] 1 Ch. 12. *Reid.* *Ayr Harbour Trustees v. Oswald* (1883), 8 App. Cas. 623; *Stevens v. Met. Dist. Ry.* (1885), 29 Ch. D. 60; *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614; *G. C. Ry. v. Balby-with-Hexthorpe U. C.*, A.-G. v. G. C. Ry., [1912] 2 Ch. 110; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251; *Thames Conservators v. Kent*, [1918] 2 K. B. 272. *Mentd.* *Sevenoaks, Maidstone & Tunbridge Ry. v. L. C. & D. Ry.* (1879), 11 Ch. D. 625; *Re Met. Dist. Ry. & Cosh* (1880), 13 Ch. D. 607; *Re Higgins & Hitchman's Contract* (1882), 21 Ch. D. 95; *Ware v. L. B. & S. C. Ry.* (1882), 52 L. J. Ch. 198; *Davis v. Leicester Corp.*, [1894] 2 Ch. 208; *Thames Conservators v. Southwark & Vauxhall Water Co.* (1897), 13 T. L. R. 155; *L. & N. W. Ry. v. Runcorn R. C.*, [1898] 1 Ch. 34; *M. S. & L. Ry. v. Anderson*, [1898] 2 Ch. 394; *Hackney Corp. v. Lee Conservancy Board*, [1904] 2 K. B. 541; *Stourcliffe Estates Co. v. Bournemouth Corp.*, [1910] 2 Ch. 12; *Re Plymouth Corp. & Walter*, [1918] 2 Ch. 354.

98. — *A railway co., under their special Act, were entitled, notwithstanding Lands Clauses Consolidation Act, 1845 (c. 18), s. 92, to take a*

portion of certain houses or other buildings or manufactories scheduled in their Act without being obliged to take the remainder, if the portion taken could, in the opinion of the authority to whom the question of disputed compensation should be submitted, be severed from the remainder of the property without material detriment thereto. The co. gave notice to treat for a portion of certain property, & before the arbitrator appointed under the Lands Clauses Consolidation Act to assess compensation, they undertook to provide access to the remainder of the property by means of a right of way over the portion taken. On a case stated by the arbitrator in his award:—*Held*: as the giving the proposed right of way over the lands of the co. was not inconsistent with the purposes for which the lands were taken, the co. had power to grant it.—*Re GONTY & MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.*, [1896] 2 Q. B. 439; 65 L. J. Q. B. 625; 75 L. T. 239; 45 W. R. 83; 12 T. L. R. 617, 620; 40 Sol. Jo. 715, C. A.

*Annotations*:—*Consd.* *Calc. Ry. v. Turcan*, [1898] A. C. 256. *Apld.* *S. E. Ry. v. Associated Portland Cement Manufacturers* (1900), [1910] 1 Ch. 12. *Reid.* *Stretford U. D. C. v. Manchester, South Junction & Altrincham Ry.* (1903), 1 L. G. R. 683; *G. C. Ry. v. Balby-with-Hexthorpe U. C.*, A.-G. v. G. C. Ry., [1912] 2 Ch. 110. *Mentd.* *G. E. Ry. v. L. C. C.* (1906), 51 Sol. Jo. 132; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251.

99. *Tenant for life—Powers under Settled Land Acts, 1882 (c. 38), & 1890 (c. 69)—Easement over principal mansion house.*—The tenant for life of a settled estate, for the purpose of giving his wife a dower or jointure house, in 1889 granted her a lease for 21 years of a house called X. about three miles from the principal mansion house on the T. estate, of which estate X. formed part, together with rights of way over all roads & drives which from time to time should exist on T. estate. The drives then existing were about 25 miles long & extended over the estate generally including the park usually occupied with the mansion house & up to the gate & door of such mansion house:—*Held*: having regard to sect. 6 of 1882 Act, & sect. 10 of 1890 Act, the lease of X. was invalid by reason of its granting rights of way over the park & lands usually occupied with the principal mansion house.—*SUTHERLAND (DOWAGER DUCHESS) v. SUTHERLAND (DUKE)*, [1893] 3 Ch. 169; 62 L. J. Ch. 946; 69 L. T. 186; 42 W. R. 12; 9 T. L. R. 530; 37 Sol. Jo. 618; 3 R. 650.

*Annotations*:—*Folld.* *Pease v. Courtney*, [1904] 2 Ch. 503. *Mentd.* *Brown v. Peto*, [1900] 1 Q. B. 346; *Re Handman & Wilcox's Contract*, [1902] 1 Ch. 599; *Gilbey v. Isth.*, [1906] 1 Ch. 11; *Re Cornwallis West, Ex p. Trustee* (1919), 88 L. J. K. B. 1237.

100. — *Settled Land Act, 1890 (c. 69), s. 10, which precludes the life tenant from leasing "the principal mansion house on any settled land, & the pleasure grounds & park & lands usually occupied therewith," without the consent of the trustees or an order of the ct., applies to a park not usually occupied with the principal mansion house, the words "usually occupied therewith" referring merely to the word "lands" immediately preceding.*

The sect. also applies to the lease of an easement over the same property.

A life tenant without the consent of the trustees agreed to let the park, together with an easement over the mansion house, for a term of years. The lessees entered & held under the agreement, which contained no provision as to title. The lessor died without being required to execute a lease, & the lessees were ejected by the remainderman. It did not appear that the lessor could have obtained the trustees' consent:—*Held*: the

lessees were not entitled to damages against the lessor's estate.—*PEASE v. COURTNEY*, [1904] 2 Ch. 503; 73 L. J. Ch. 760; 91 L. T. 341; 53 W. R. 75; 20 T. L. R. 653; 48 Sol. Jo. 622.

*Annotation*:—*Mentd. Re Wythos' S. E.* (1908), 98 L. T. 277.

101. ———.]—The sale of subsoil of settled land is not the sale of an easement under Settled Land Act, 1882 (c. 38), s. 3, but the ct. has power under that sect. to make an order authorising the sale as being a sale of part of the settled land.—*Re PARSON'S WILL* (1900), 83 L. T. 626.

102. ——— **Creation of easement in exchange.**—Settled Land Act, 1890 (c. 69), s. 5, empowers a tenant for life to grant an easement over the settled land in exchange for an easement over adjoining land. The latter part of the sect. is independent of the earlier part, & is not dominated by the first words of the sect., "on an exchange or partition."—*Re BRACKEN'S SETTLEMENT*, [1903] 1 Ch. 265; 72 L. J. Ch. 101; 87 L. T. 743; 51 W. R. 411.

*Annotation*:—*Consd. Re Brotherton, Brotherton v. Brotherton, Re Markams Settltmt.* (1907), 77 L. J. Ch. 58.

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tenants & occupiers for the time being of Blackacre to use the footway. A. was then & until 1870, when he purchased the fee simple, only tenant from year to year of Blackacre:—*Held*: notwithstanding the limited interest of A. when the easement was granted, & the cesser of that interest by merger in 1870, a lessee of Blackacre claiming under the freehold title of A. was entitled to use the footway.—*RYMER v. McILROY*, [1897] 1 Ch. 528; 66 L. J. Ch. 336; 76 L. T. 115; 45 W. R. 411.

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**Repair of ways.**—*See* Part VII., Sect. 6, sub-sect. 3, D. (b), *post*.

**Repair of watercourses.**—*See* Part IX., Sect. 2, sub-sect. 6, *post*.

### SUB-SECT. 4.—RESERVATIONS AND EXCEPTIONS OF EASEMENTS.

*See, generally, DEEDS, Vol. XVII., pp. 380–385, Nos. 1886–1930.*

107. **Easement cannot be reserved or excepted.**—*DURHAM & SUNDERLAND RY. CO. v. WALKER*, No. 584, *post*.

108. **Reservation or exception operates by way of re-grant.**—Where a lease of land reserved to the lessor the mines & quarries under the same, with full power to work them, & free wayleave & passage to, from & along the same; & the lessor covenanted that in working he would do as little damage & spoil to the soil & herbage of the premises as he or they could conveniently make or do:—*Held*: (1) the lessor had an absolute right of way through the property for any purpose he thought fit, & not merely for working the mines.

The words did not express a mere limited right of way . . . but a right of way for all purposes (Wood, V.-C.).

(2) I do not think anything can be excepted out of a demise except that which is part of the property itself. It is not a right issuing out of the property which can be excepted. You either demise or not the whole of the property. If you do demise the whole property & except anything, then it is by way of re-grant (Wood, V.-C.).—*PROUD v. BATES* (1805), 6 New Rep. 92; 34 L. J. Ch. 406; 12 L. T. 565; 13 L. T. 61; 11 Jur. N. S. 441.

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**a. Right of way—No right to windows on way.**—A conveyance of lands fronting on public highways with the right of passage merely over a private lane does not create a servitude that can entitle the grantee to make windows & openings in walls which are built upon the line of the lane.—*LESPEANCE v. GONE* (1905), 36 S. C. R. 618.—*CAN.*

**a. Grant of equitable easement—Right to legal easement.**—An agreement creating an equitable easement of support does not confer on the owner of the dominant tenement the further right to have that agreement specifically performed by the grant of a legal easement.—*WELLINGTON CITY, ETC. v. PUBLIC TRUSTEE*, [1921] N. Z. L. R. 423.—*N.Z.*

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**a. Reservation in grant.**—Lands for a highway, laid out in 1857, was

granted by M. to deft. township corp., & the right to a cattle-pass under the highways, to be made & maintained & repaired by deft. corp., was reserved to M.:—*Held*: there was a grant, subject to an easement.—*FREEMAN v. CAMDEN TOWNSHIP* (1918), 41 O. L. R. 179; 13 O. W. N. 221.—*CAN.*

**a. Implied reservation in absolute grant.**—An implied reservation cannot be read into an absolute grant.—*O'MARA v. EDEN* (1892), 40 N. S. L. 172, n.—*CAN.*

**b. Reservation in lease.**—An exception in the lease reserved "liberty of fishing, fowling, hunting, & hawking," to the lessor, his heirs & assigns, in & upon the premises, & an exception to tenants of certain lands of "free liberty of commonage & cutting of turf on the mountain of Tincurry":—*Held*: such was a mere reservation of an easement, & did not amount to a grant of the mountain.—*WATERPARK v. FENNELL* (1855), 5 I. C. L. R. 120;

8 Ir. Jur. 45.—*IR.*

**c. Reservation of mineral rights—Implied right of way.**—A reservation in a conveyance of land of the minerals & oils therein & thereon is not an easement & need not be registered as a charge upon the fee, nor need the implied easements of necessity incidental to the getting of the minerals & oils so excepted be registered.—*ALBERTI LAND CO. v. REGISTRAR GENERAL OF TITLES*, [1918] 2 W. W. R. 537; 40 D. L. R. 142.—*CAN.*

**d.** ———.]—A reservation, in a fee-farm grant of mines, & the right to the grantor, his servants, horses, & carriages, to enter & carry away the minerals, enables the owner of the mines to lay down & maintain a railway over the surface of the lands granted, where such railway is reasonably necessary for working the mines.—*ANTRIM (EARL) v. DOBBS* (1891), 30 L. Ir. R. 424.—*IR.*

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**Sect. 1.—By express grant: Sub-sect. 2, A. & B.; sub-sects. 3 & 4.]**

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General words in a grant must be restricted to that which the grantor had then power to grant & will not extend to anything which he might subsequently acquire (MELLISH, L.J.).

At the time when the lease was made, deft. was no doubt the owner of a term of a few years in the adjoining property, & no doubt the words of the lease amount to a grant of the light coming over the adjoining property during the term which deft. at the date of the lease had in that property (JAMES, L.J.).—*BOOTH v. ALCOCK* (1873), 8 Ch. App. 663; 42 L. J. Ch. 557; 29 L. T. 231; 37 J. P. 709; 21 W. R. 743, L. J.J.

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**96. — Executrix with power of sale.]—**An executrix who has no estate or interest in land, but only a power to sell it, is not empowered to grant an easement over it.—*Re BARROW-IN-FURNESS CORPN. & RAWLINSON'S CONTRACT*, [1903] 1 Ch. 339; 72 L. J. Ch. 233; 87 L. T. 724; 51 W. R. 248.

**97. Must not be ultra vires.]—**A railway co. having the usual powers under their special Act to take & use land for the purpose of the railway & works cannot, whether for valuable consideration or otherwise, alienate for any purpose except the purposes of the Act any portion of its land, not being "superfluous land" within Lands Clauses Act, 1845 (c. 18), s. 127, not being land taken for extraordinary purposes within Railway Clauses Act, 1845 (c. 20), s. 45, nor any easement over the same. — *MULLINER v. MIDLAND RY. CO.* (1879), 11 Ch. D. 611; 48 L. J. Ch. 258; 40 L. T. 121; 43 J. P. 573; 27 W. R. 330.

**Annotations:—***Distd.* *Bayley v. G. W. Ry.* (1881), 26 Ch. D. 434. *Consd.* *Grand Junction Canal Co. v. Petty* (1888), 21 Q. B. D. 273; *Forster v. L. C. & D. Ry.* (1894), 71 L. T. 855. *Expld. & Distd.* *Re Gonty & M. S. & L. Ry.*, [1896] 2 Q. B. 439. *Apld.* *G. W. Ry. v. Solihull R. D. Co.* (1902), 86 L. T. 852. *Consd.* *G. W. Ry. v. Talbot*, [1902] 2 Ch. 759. *Distd.* *Stretford U. D. C. v. Manchester South Junction & Altrincham Ry.* (1903), 68 J. P. 59. *Consd.* *Taft Vale Ry. v. Pontypridd U. D. C.* (1905), 93 L. T. 126. *Distd.* *S. E. Ry. v. Associated Portland Cement Manufacturers (1900) Ltd.*, [1910] 1 Ch. 12. *Refd.* *Ayr Harbour Trustees v. Oswald* (1883), 8 App. Cas. 623; *Stevens v. Met. Dist. Ry.* (1885), 29 Ch. D. 60; *Jorden v. Sutton*, *Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614; *G. C. Ry. v. Balby-with-Hexthorpe U. C.*, *A.-G. v. G. C. Ry.*, [1912] 2 Ch. 110; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251; *Thames Conservators v. Kent*, [1918] 2 K. B. 272. *Mentd.* *Sevenoaks, Maidstone & Tunbridge Ry. v. L. C. & D. Ry.* (1879), 11 Ch. D. 625; *Re Met. Dist. Ry. & Cosh* (1880), 13 Ch. D. 607; *Re Higgins & Hitchman's Contract* (1882), 21 Ch. D. 95; *Ware v. L. B. & S. C. Ry.* (1882), 52 L. J. Ch. 198; *Davis v. Leicester Corp.*, [1894] 2 Ch. 208; *Thames Conservators v. Southwark & Vauxhall Water Co.* (1897), 13 T. L. R. 155; *L. & N. W. Ry. v. Runcorn R. C.*, [1898] 1 Ch. 34; *M. S. & L. Ry. v. Anderson*, [1898] 2 Ch. 394; *Hackney Corp. v. Lee Conservancy Board*, [1904] 2 K. B. 541; *Stourcliffe Estates Co. v. Bournemouth Corp.*, [1910] 2 Ch. 12; *Re Plymouth Corp. & Walter*, [1918] 2 Ch. 354.

**98. —.]—**A railway co., under their special Act, were entitled, notwithstanding Lands Clauses Consolidation Act, 1845 (c. 18), s. 92, to take a

portion of certain houses or other buildings or manufactories scheduled in their Act without being obliged to take the remainder, if the portion taken could, in the opinion of the authority to whom the question of disputed compensation should be submitted, be severed from the remainder of the property without material detriment thereto. The co. gave notice to treat for a portion of certain property, &, before the arbitrator appointed under the Lands Clauses Consolidation Act to assess compensation, they undertook to provide access to the remainder of the property by means of a right of way over the portion taken. On a case stated by the arbitrator in his award:—*Held*: as the giving the proposed right of way over the lands of the co. was not inconsistent with the purposes for which the lands were taken, the co. had power to grant it.—*Re GONTY & MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.*, [1896] 2 Q. B. 439; 65 L. J. Q. B. 625; 75 L. T. 239; 45 W. R. 83; 12 T. L. R. 617, 620; 40 Sol. Jo. 715, C. A.

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**99. Tenant for life—Powers under Settled Land Acts, 1882 (c. 38), & 1890 (c. 69)—Easement over principal mansion house.]—**The tenant for life of a settled estate, for the purpose of giving his wife a dower or jointure house, in 1889 granted her a lease for 21 years of a house called X. about three miles from the principal mansion house on the T. estate, of which estate X. formed part, together with rights of way over all roads & drives which from time to time should exist on T. estate. The drives then existing were about 25 miles long & extended over the estate generally including the park usually occupied with the mansion house & up to the gate & door of such mansion house:—*Held*: having regard to sect. 6 of 1882 Act, & sect. 10 of 1890 Act, the lease of X. was invalid by reason of its granting rights of way over the park & lands usually occupied with the principal mansion house.—*SUTHERLAND (DOWAGER DUCHESS) v. SUTHERLAND (DUKE)*, [1893] 3 Ch. 169; 62 L. J. Ch. 946; 69 L. T. 186; 42 W. R. 12; 9 T. L. R. 530; 37 Sol. Jo. 618; 3 R. 650.

**Annotations:—***Foll.* *Pease v. Courtney*, [1904] 2 Ch. 503. *Mentd.* *Brown v. Peto*, [1900] 1 Q. B. 346; *Re Handman & Wilcox's Contract*, [1902] 1 Ch. 599; *Gilbey v. Rush*, [1908] 1 Ch. 11; *Re Cornwallis West, Ex p. Trustee* (1919), 88 L. J. K. B. 1237.

**100. —.]—**Settled Land Act, 1890 (c. 69), s. 10, which precludes the life tenant from leasing "the principal mansion house on any settled land, & the pleasure grounds & park & lands usually occupied therewith," without the consent of the trustees or an order of the ct., applies to a park not usually occupied with the principal mansion house, the words "usually occupied therewith" referring merely to the word "lands" immediately preceding.

The sect. also applies to the lease of an easement over the same property.

A life tenant without the consent of the trustees agreed to let the park, together with an easement over the mansion house, for a term of years. The lessees entered & held under the agreement, which contained no provision as to title. The lessor died without being required to execute a lease, & the lessees were ejected by the remainderman. It did not appear that the lessor could have obtained the trustees' consent:—*Held*: the



lessees were not entitled to damages against the lessor's estate.—*PEASE v. COURTNEY*, [1904] 2 Ch. 503; 73 L. J. Ch. 760; 91 L. T. 341; 53 W. R. 75; 20 T. L. R. 653; 48 Sol. Jo. 622.

*Annotation*.—*Mentd. Re Wythes' S. E.* (1908), 98 L. T. 277.

101. ———.]—The sale of subsoil of settled land is not the sale of an easement under Settled Land Act, 1882 (c. 38), s. 3, but the ct. has power under that sect. to make an order authorising the sale as being a sale of part of the settled land.—*Re PEARSON'S WILL* (1900), 83 L. T. 626.

102. ——— **Creation of easement in exchange.**—Settled Land Act, 1890 (c. 69), s. 5, empowers a tenant for life to grant an easement over the settled land in exchange for an easement over adjoining land. The latter part of the sect. is independent of the earlier part, & is not dominated by the first words of the sect., "on an exchange or partition."—*Re BRACKEN'S SETTLEMENT*, [1903] 1 Ch. 265; 72 L. J. Ch. 101; 87 L. T. 743; 51 W. R. 411.

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96. — *Executrix with power of sale.*—An executrix who has no estate or interest in land, but only a power to sell it, is not empowered to grant an easement over it.—*Re BARROW-IN-FURNESS CORPN. & RAWLINSON'S CONTRACT*, [1903] 1 Ch. 339; 72 L. J. Ch. 233; 87 L. T. 724; 51 W. R. 248.

97. *Must not be ultra vires.*—A railway co. having the usual powers under their special Act to take & use land for the purpose of the railway & works cannot, whether for valuable consideration or otherwise, alienate for any purpose except the purposes of the Act any portion of its land, not being "superfluous land" within Lands Clauses Act, 1845 (c. 18), s. 127, not being land taken for extraordinary purposes within Railway Clauses Act, 1845 (c. 20), s. 45, nor any easement over the same.—*MULLINER v. MIDLAND RY. CO.* (1879), 11 Ch. D. 611; 48 L. J. Ch. 258; 40 L. T. 121; 43 J. P. 573; 27 W. R. 330.

*Annotations*:—*Distd. Bayley v. G. W. Ry.* (1884), 26 Ch. D. 434. *Consol. Grand Junction Canal Co. v. Petty* (1888), 21 Q. B. D. 273; *Foster v. L. C. & D. Ry.* (1894), 71 L. T. 855. *Exptd. & Distd. Re Gonty & M. S. & L. Ry.*, [1896] 2 Q. B. 439. *Appld. G. W. Ry. v. Solihull R. D. Co.* (1902), 86 L. T. 852. *Consol. G. W. Ry. v. Talbot*, [1902] 2 Ch. 759. *Distd. Stretford U. D. C. v. Manchester South Junction & Altrincham Ry.* (1903), 68 J. P. 59. *Consol. Taff Vale Ry. v. Pontypridd U. D. C.* (1905), 93 L. T. 126. *Distd. S. E. Ry. v. Associated Portland Cement Manufacturers* (1900), Ltd., [1910] 1 Ch. 12. *Reid. Ayr Harbour Trustees v. Oswald* (1883), 8 App. Cas. 623; *Stevens v. Met. Dist. Ry.* (1885), 29 Ch. D. 60; *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614; *G. C. Ry. v. Balby-with-Hexthorpe U. C.*, A.-G. v. G. C. Ry., [1912] 2 Ch. 110; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251; *Thames Conservators v. Kent*, [1918] 2 K. B. 272. *Mentl. Sevenoaks, Maidstone & Tunbridge Rly. v. L. C. & D. Ry.* (1879), 11 Ch. D. 625; *Re Met. Dist. Ry. & Cosh* (1880), 13 Ch. D. 607; *Re Higgins & Hitchman's Contract* (1882), 21 Ch. D. 95; *Ware v. L. B. & S. C. Ry.* (1882), 52 L. J. Ch. 198; *Davis v. Leicester Corp.*, [1894] 2 Ch. 208; *Thames Conservators v. Southwark & Vauxhall Water Co.* (1897), 13 T. L. R. 155; *L. & N. W. Ry. v. Runcorn R. C.*, [1898] 1 Ch. 34; *M. S. & L. Ry. v. Anderson*, [1898] 2 Ch. 394; *Hackney Corp. v. Lee Conservancy Board*, [1904] 2 K. B. 541; *Stourelliffe Estates Co. v. Bournemouth Corp.*, [1910] 2 Ch. 12; *Re Plymouth Corp. & Walter*, [1918] 2 Ch. 354.

98. — *—*—A railway co., under their special Act, were entitled, notwithstanding Lands Clauses Consolidation Act, 1845 (c. 18), s. 92, to take a

portion of certain houses or other buildings or manufactories scheduled in their Act without being obliged to take the remainder, if the portion taken could, in the opinion of the authority to whom the question of disputed compensation should be submitted, be severed from the remainder of the property without material detriment thereto. The co. gave notice to treat for a portion of certain property, & before the arbitrator appointed under the Lands Clauses Consolidation Act to assess compensation, they undertook to provide access to the remainder of the property by means of a right of way over the portion taken. On a case stated by the arbitrator in his award:—*Held*: as the giving the proposed right of way over the lands of the co. was not inconsistent with the purposes for which the lands were taken, the co. had power to grant it.—*Re GONTY & MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.*, [1896] 2 Q. B. 439; 65 L. J. Q. B. 625; 75 L. T. 239; 45 W. R. 83; 12 T. L. R. 617, 620; 40 Sol. Jo. 715, C. A.

*Annotations*:—*Consol. Cale. Ry. v. Turcan*, [1898] A. C. 256. *Appld. S. E. Ry. v. Associated Portland Cement Manufacturers* (1900), [1910] 1 Ch. 12. *Reid. Stretford U. D. C. v. Manchester, South Junction & Altrincham Ry.* (1903), 1 L. G. L. 683; *G. C. Ry. v. Balby-with-Hexthorpe U. C.*, A.-G. v. G. C. Ry., [1912] 2 Ch. 110. *Mentl. G. E. Ry. v. L. C. C.* (1900), 51 Sol. Jo. 132; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251.

99. *Tenant for life—Powers under Settled Land Acts, 1882 (c. 38), & 1890 (c. 69)—Easement over principal mansion house.*—The tenant for life of a settled estate, for the purpose of giving his wife a dower or jointure house, in 1889 granted her a lease for 21 years of a house called X. about three miles from the principal mansion house on the T. estate, of which estate X. formed part, together with rights of way over all roads & drives which from time to time should exist on T. estate. The drives then existing were about 25 miles long & extended over the estate generally including the park usually occupied with the mansion house & up to the gate & door of such mansion house:—*Held*: having regard to sect. 6 of 1882 Act, & sect. 10 of 1890 Act, the lease of X. was invalid by reason of its granting rights of way over the park & lands usually occupied with the principal mansion house.—*SUTHERLAND (DOWAGER DUCHESS) v. SUTHERLAND (DUKE)*, [1893] 3 Ch. 169; 62 L. J. Ch. 946; 69 L. T. 186; 42 W. R. 12; 9 T. L. R. 530; 37 Sol. Jo. 618; 3 R. 650.

*Annotations*:—*Follid. Pease v. Courtney*, [1904] 2 Ch. 503. *Mentl. Brown v. Peto*, [1900] 1 Q. B. 346; *Re Handman & Wilcox's Contract*, [1902] 1 Ch. 599; *Gilbey v. Iush*, [1906] 1 Ch. 11; *Re Cornwallis West, Ex p. Trustee* (1919), 88 L. J. K. B. 1237.

100. — *—*—*—*—Settled Land Act, 1890 (c. 69), s. 10, which precludes the life tenant from leasing "the principal mansion house on any settled land, & the pleasure grounds & park & lands usually occupied therewith," without the consent of the trustees or an order of the ct., applies to a park not usually occupied with the principal mansion house, the words "usually occupied therewith" referring merely to the word "lands" immediately preceding.

The sect. also applies to the lease of an easement over the same property.

A life tenant without the consent of the trustees agreed to let the park, together with an easement over the mansion house, for a term of years. The lessees entered & held under the agreement, which contained no provision as to title. The lessor died without being required to execute a lease, & the lessees were ejected by the remainderman. It did not appear that the lessor could have obtained the trustees' consent:—*Held*: the



lessees were not entitled to damages against the lessor's estate.—*PEASE v. COURTNEY*, [1904] 2 Ch. 503; 73 L. J. Ch. 760; 91 L. T. 341; 53 W. R. 75; 20 T. L. R. 653; 48 Sol. Jo. 622.

*Annotation* :—*Mentid. Re Wythos' S. E.* (1908), 98 L. T. 277.

101. ———.]—The sale of subsoil of settled land is not the sale of an easement under Settled Land Act, 1882 (c. 38), s. 3, but the ct. has power under that sect. to make an order authorising the sale as being a sale of part of the settled land.—*Re PEARSON'S WILL* (1900), 83 L. T. 626.

102. ——— **Creation of easement in exchange.**—Settled Land Act, 1890 (c. 69), s. 5, empowers a tenant for life to grant an easement over the settled land in exchange for an easement over adjoining land. The latter part of the sect. is independent of the earlier part, & is not dominated by the first words of the sect., "on an exchange or partition."—*Re BRACKEN'S SETTLEMENT*, [1903] 1 Ch. 265; 72 L. J. Ch. 101; 87 L. T. 743; 51 W. R. 411.

*Annotation* :—*Consd. Re Brotherton, Brotherton v. Brotherton, Re Markams Settmt.* (1907), 77 L. J. Ch. 58.

103. ——— **Power to grant right to let down surface.**—A tenant for life of settled land has power under sect. 6 of Settled Land Act, 1882, to grant a lease of a right to let down the surface of the land by mining operations.—*SITWELL v. LONDESBOURGH (EARL)*, [1905] 1 Ch. 460; 53 W. R. 445; *sub nom. Re SITWELL, SITWELL v. LONDESBOURGH (EARL)*, 74 L. J. Ch. 254.

*Annotation* :—*Reid. Thomson v. St. Catharine's College, Cambridge, & Mappin's Masbro' Old Brewery, St. Catharine's College, Cambridge v. Roscoe* (No. 2) (1918), 118 L. T. 758.

#### B. Extent of Grantee's Estate.

104. **Grantor must have estate in dominant tenement.**—*SMETERN v. HOLT* (1347), Y. B. 21 Edw. 3, fo. 2, pl. 5.

*Annotations* :—*Distd. Rymer v. Mellroy*, [1897] 1 Ch. 528. *Reid. Anon.* (1581), Godb. 4; *Jorden v. Atwood* (1605), Owen, 121.

105. **Grantee yearly tenant of dominant tenement.—Subsequent purchase of reversion.**—A., the owner in fee of Whiteacre, conveyed it to B. by a deed dated Mar. 12, 1869, which recited that it had been agreed that on completion of the purchase B. should grant to A., his heirs & assigns, a right of way over a defined footway leading from a public road across Whiteacre to Blackacre. The deed also referred to another deed as then prepared, which when executed was dated Mar. 13, 1869, whereby B., in pursuance of this agreement & in consideration of the conveyance of Whiteacre, covenanted & granted with & to A., his heirs & assigns, that it should be lawful for them & the

tenants & occupiers for the time being of Blackacre to use the footway. A. was then & until 1870, when he purchased the fee simple, only tenant from year to year of Blackacre.—*Held*: notwithstanding the limited interest of A. when the easement was granted, & the cesser of that interest by merger in 1870, a lessee of Blackacre claiming under the freehold title of A. was entitled to use the footway.—*RYMER v. MELLROY*, [1897] 1 Ch. 528; 66 L. J. Ch. 336; 76 L. T. 115; 45 W. R. 411.

#### SUB-SECT. 3.—EXTENT OF GRANT.

106. **Includes ancillary rights.**—*JONES v. PRITCHARD*, No. 229, *post*.

**Right to enter & repair.**—*See Part V., post.*

**Repair of ways.**—*See Part VII., Sect. 6, sub-sect. 3, D. (b), post.*

**Repair of watercourses.**—*See Part IX., Sect. 2, sub-sect. 6, post.*

#### SUB-SECT. 4.—RESERVATIONS AND EXCEPTIONS OF EASEMENTS.

*See, generally, DEEDS*, Vol. XVII., pp. 380–385, Nos. 1880–1930.

107. **Easement cannot be reserved or excepted.**

—*DURHAM & SUNDERLAND RY. CO. v. WALKER*, No. 584, *post*.

108. **Reservation or exception operates by way of re-grant.**—Where a lease of land reserved to the lessor the mines & quarries under the same, with full power to work them, & free wayleave & passage to, from & along the same; & the lessor covenanted that in working he would do as little damage & spoil to the soil & herbage of the premises as he or they could conveniently make or do :—*Held*: (1) the lessor had an absolute right of way through the property for any purpose he thought fit, & not merely for working the mines.

The words did not express a mere limited right of way . . . but a right of way for all purposes (WOOD, V.-C.).

(2) I do not think anything can be excepted out of a demise except that which is part of the property itself. It is not a right issuing out of the property which can be excepted. You either demise or not the whole of the property. If you do demise the whole property & except anything, then it is by way of re-grant (WOOD, V.-C.).—*PROUD v. BATES* (1865), 6 New Rep. 92; 34 L. J. Ch. 406; 12 L. T. 505; 13 L. T. 61; 11 Jur. N. S. 441.

*Annotations* :—*As to (2) Consd. Hamilton v. Graham* (1871), L. R. 2 Sc. & Div. 166. *Reid. Ballacorkish Silver, Lead*

8 Ir. Jur. 45.—IR.

c. **Reservation of mineral rights.—Implied right of way.**—A reservation in a conveyance of land of the minerals & oils therein & thereon is not an easement & need not be registered as a charge upon the fee, nor need the implied easements of necessity incidental to the getting of the minerals & oils so excepted be registered.—*ALBERT LAND CO. v. REGISTRAR GENERAL OF TITLES*, [1918] 2 W. R. 537; 40 D. L. R. 142.—CAN.

d. ———.]—A reservation, in a fee-farm grant of mines, & the right to the grantor, his servants, horses, & carriages, to enter & carry away the minerals, enables the owner of the mines to lay down & maintain a railway over the surface of the lands granted, where such railway is reasonably necessary for working the mines.—*ANTHIM (EARL) v. DOBBS* (1891), 30 L. R. 424.—IR.

e. ———.]—A. feued lands

#### PART III. SECT. 1, SUB-SECT. 3.

r. **Right of way.—No right to windows on way.**—A conveyance of lands fronting on public highways with the right of passage merely over a private lane does not create a servitude that can entitle the grantee to make windows & openings in walls which are built upon the line of the lane.—*LESPERANCE v. GONE* (1905), 36 S. C. R. 618.—CAN.

a. **Grant of equitable easement.—Right to legal easement.**—An agreement creating an equitable easement of support does not confer on the owner of the dominant tenement the further right to have that agreement specifically performed by the grant of a legal easement.—*WELLINGTON CITY, ETC. v. PUBLIC TRUSTEE*, [1921] N. Z. L. R. 423.—N.Z.

#### PART III. SECT. 1, SUB-SECT. 4.

t. **Reservation in grant.**—Lands for a highway, laid out in 1857, was

granted by M. to deft. township corp., & the right to a cattle-pass under the highways, to be made & maintained & repaired by deft. corp., was reserved to M.:—*Held*: there was a grant, subject to an easement.—*FREEMAN v. CAMDEN TOWNSHIP* (1918), 41 O. L. R. 179; 13 O. W. N. 221.—CAN.

a. **Implied reservation in absolute grant.**—An implied reservation cannot be read into an absolute grant.—*O'MARA v. EDEN* (1892), 40 N. S. L. 172, n.—CAN.

b. **Reservation in lease.**—An exception in the lease reserved "liberty of fishing, fowling, hunting, & hawking," to the lessor, his heirs & assigns, in & upon the premises, & an exception to tenants of certain lands of "free liberty of commonage & cutting of turf on the mountain of 'Incurry':—*Held*: such was a mere reservation of an easement, & did not amount to a grant of the mountain.—*WATERPARK v. FENNELL* (1855), 5 I. C. L. R. 120;

**Sect. 1.—By express grant: Sub-sects. 4 & 5.]**

& Copper Mining Co. v. Harrison (1873), L. R. 5 P. C. 49; *Bardley v. Granville* (1878), 3 Ch. D. 826; *Batten Pool v. Kennedy*, (1907) 1 Ch. 256. *Generally, Mentel Wakefield v. Buccleuch* (1887), L. R. 4 Eq. 613; *Whidborne v. Recl. Comrs.* for England (1877), 37 L. T. 348.

109. —.] — LONDON CORPN. v. RIGGS, No. 627, *post*.

110. —.] — MIDLAND RY. CO. v. MILES, No. 628, *post*.

111. —.] — In 1820 co-owners demised for a term of 1,000 years a strip of land intersecting their estate for the purpose of making a canal, with a proviso that nothing in the lease contained should prevent the co-owners, their heirs & assigns from using the demised land, or from granting any wayleaves on roads over the same in like manner as they could or might have used the same in case the lease had not been granted, but so as not to injure the canal. In 1838 the estate was partitioned by deed between A., B., & C., the co-owners, the reversion of part of the canal being conveyed to the use of B. & the abutting lands to A. & C. severally. In 1839 B. conveyed his reversion in that part of the canal to the lessees:—*Held*: in the construction of the lease of 1820, the right of way across the canal reserved by the lease was a regrant to the lessors as owners of the reversion of the demised land & not to them as owners of the land intersected by the canal; & accordingly, when by the conveyance by B. in 1839, to the lessee the term became merged in the reversion, the rights of A. & C. over the land comprised in that conveyance were thereupon extinguished.—*DYNEVOR (LORD) v. TENNANT* (1888), 13 App. Cas. 279; 57 L. J. Ch. 1078; 59 L. T. 5; 37 W. R. 193, H. L.

*Annotations*:—*Consol. Rymer v. McIlroy*, [1897] 1 Ch. 528. *Reid. Jones v. Consolidated Anthracite Collieries & Dynevor*, [1916] 1 K. B. 123.

112. —.] — By an accommodation works agreement of May 31, 1847, a railway co., who were purchasing a strip of land for their line, agreed that the landowner, his heirs, etc., might at any time thereafter at his or their own expense make a tunnel thereunder to join the lands severed thereby. The co. also agreed to make a certain defined level crossing. On Dec. 31, 1847, the landowner conveyed the strip to the railway co., reserving to himself, his heirs, appointees, & assigns, the defined level crossing & the right to make a tunnel at his or their own expense, the level crossing & the privilege of making a tunnel being accepted in lieu of all other accommodation works. The site of the tunnel was in no way defined:—*Held*: (1) as against the original covenantors, the railway co., the provision in the agreement as to the tunnel was a personal contract & was not obnoxious to the rule against perpetuities; (2) the benefit of that contract could

be specially assigned to a lessee of part of the severed lands during the continuance of the lease; (3) as the agreement & reservation amounted to a regrant of an easement by the railway co. to the landowner, & not to an exception out of the land granted by him to the co., the right to select the site of the tunnel was vested in the landowner, his heirs, appointees, & assigns, & the agreement & reservation were not void for uncertainty. The grant of the easement was not *ultra vires*. The agreement was also valid as an agreement for a further accommodation work under Railway Clauses Consolidation Act, 1845 (c. 20), s. 71.—*SOUTH EASTERN RY. CO. v. ASSOCIATED PORTLAND CEMENT MANUFACTURERS* (1900), *LTD.*, [1910] 1 Ch. 12; 79 L. J. Ch. 150; 101 L. T. 805; 74 J. P. 21; 26 T. L. R. 61; 54 Sol. Jo. 80, C. A.

*Annotations*:—*As to* (1) *Reid. Sharpe v. Durrant* (1911), 55 Sol. Jo. 423. *As to* (3) *Reid. County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251.

113. *Reservation in agreement for sale—Conveyance not executed by purchaser.*—From 1867 to 1902 farms called W. & C. had been owned by the same person, & during all this time the tenants of C. had by leave (either asked for or not) used a way over W. In 1902 the owner of the farms agreed to sell W., the agreement stating that there were reserved to the vendor, his heirs & assigns, the owners & occupiers for the time being of C., & their servants & others authorised by them, all rights of way hitherto exercised by them in respect of C. over any portion of W. The conveyance contained a similar reservation, but was not executed by the purchaser, who, however, took possession of W.:—*Held*: the purchaser & his successors in title, taking with notice, were bound to give effect to the reservation.—*MAY v. BELLEVILLE*, [1905] 2 Ch. 605; 74 L. J. Ch. 678; 93 L. T. 241; 54 W. R. 12; 49 Sol. Jo. 651.

114. *How effected—By answer to requisition.*—*LONGTON v. WINWICK ASYLUM (VISITORS COMMITTEE)* (1912), 76 J. P. 113, C. A.

*Implied reservations in favour of grantor.*—*See Sect. 2, sub-sect. 1, B., post.*

**SUB-SECT. 5.—FORM OF GRANT.**

115. *Whether deed necessary—General rule.*—An easement or right in nature of an easement can no more be granted or conveyed for life or for years without a deed than in fee simple (*ALDERSON, B.*).—*WOOD v. LEADBITTER* (1845), 13 M. & W. 838; 14 L. J. Ex. 161; 4 L. T. O. S. 433; 9 J. P. 312; 9 Jur. 187; 153 E. R. 351.

*Annotations*:—*Consol. Roffey v. Henderson* (1851), 17 Q. B. 574; *Frogley v. Lovelace* (1859), John. 333. *Reid. Langford v. Brighton, Lewes & Hastings Ry.* (1845), 4 Ry. & Can. Cas. 69; *Mayfield v. Robinson* (1845), 7

"reserving all & sundry the coal & limestone within the bounds of the lands, so as it shall be lawful to A. to set down coal-pits, shanks & sinks & win coal & limestone within the bounds of the lands or any part thereof".—*Held*: the superior, as absolute proprietor of those strata, was entitled to form in them, roads for the underground carriage of minerals between mines in other properties.—*HAMILTON (DUKE) v. GRAHAM* (1871), L. R. 2 Sc. & Div. 166; 9 Macph. (Ct. of Sess.) 98; 43 Sc. Jur. 491.—*SCOT.*

1. *Reservation of right of way.*—In an action for trespass *q.c.f.*, defendants justified under a reservation or exception in a deed through which plaintiffs claimed title, & in which the description of property was followed by the words, "excepting & reserving a right of way

or road allowance of two rods in width along the south side of said lot".—

*Held*: this was only a reservation of a right of way to the grantor, & not an exception of the soil.—*WRIGHT v. JACKSON* (1886), 10 O. R. 470.—*CAN.*

2. —.] — Where an owner of land conveys part of it, retaining the balance himself & in the conveyance reserves a right of way, over a strip of the land conveyed, to himself, his heirs & assigns, the right reserved is a right on the part of himself, his heirs & assigns, of the whole or any part of the land retained by him at the date of the conveyance, & a deed executed by him purporting to grant a right of way over the strip in question to the owner of other adjoining lands is void.—*BANNISTER v. CHENE* (1903), 22 N. Z. L. R. 628.—*N.Z.*

3. *How effected—Necessity for registration.*—If a covenant could be construed as creating an easement, in order to be effective under Land Titles Act, it should have been created & registered as provided by sects. 71 & 73 of that Act.—*Re JAMESON'S CATEAT* (1913), 23 W. L. R. 921; 10 D. L. R. 490; 4 W. W. R. 475.—*CAN.*

**PART III. SECT. 1, SUB-SECT. 5.**

115 i. *Whether deed necessary—General rule.*—An easement can only be granted by deed, & if given by parol, may be revoked at any time.—*CRYSLER v. CREIGHTON* (1839), 1 Ont. Dig. 2146.—*CAN.*

115 ii. —.] — An agreement for the use of driving power of an engine is only an easement which

Q. B. 486; *Thomas v. Fredericks* (1847), 11 Jur. 942; *Adams v. Andrews* (1850), 15 Q. B. 284; *Hewitt v. Isham* (1851), 7 Exch. 77; *Taplin v. Florence* (1851), 10 C. B. 744; *Electric Telegraph Co. v. Salford Overseers* (1855), 11 Exch. 181; *Evans v. Robins* (1862), 1 H. & C. 302; *Francis v. Cockrell* (1870), 22 L. T. 203; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Thomas v. Jennings* (1896), 66 L. J. Q. B. 5; *Kerrison v. Smith*, [1897] 2 Q. B. 445; *Hurst v. Picture Theatres*, [1915] 1 K. B. 1. **Mentd.** *Washbourne v. Burrows* (1847), 16 L. J. Ex. 206; *Wright v. Stavert* (1860), 2 E. & E. 721; *Davies v. Marshall* (1861), 10 C. B. N. S. 697; *Hill v. Tupper* (1863), 32 L. J. Ex. 217; *Wakley v. Froggatt* (1863), 2 H. & C. 669; *Cornish v. Stubbs* (1870), L. R. 5 C. P. 334; *Vaughan v. Hampson* (1875), 33 L. T. 15; *Wells v. Kingston-upon-Hull Corpn.* (1875), L. R. 10 C. P. 402; *Smith v. Lambeth Asmt. Com.* (1882), 52 L. J. M. C. 1; *Ward v. Livesey* (1887), 5 R. P. C. 102; *Butler v. M. S. & L. Ry.* (1888), 21 Q. B. D. 207; *Hall v. Motcalfe*, [1892] 1 Q. B. 208; *Aldin v. Latimer Clark, Muirhead*, [1894] 2 Ch. 437; *Lowe v. Adams*, [1901] 2 Ch. 598; *L. C. C. v. Dundas*, [1904] P. 1; *Warr v. L. C. C.* (1904), 73 L. J. K. B. 362; *Jones v. Tankerville*, [1909] 2 Ch. 440; *Said v. Butt*, [1920] 3 K. B. 497.

116. ———. ———.] — *DALTON v. ANGUS*, No. 4, ante.

117. ———. ———. **Right of way.**] — *HEWLINS v. SHIPPAM*, No. 2, ante.

118. ———. ———. **Burial in vault under church.**] — A grant by a rector to an individual of the exclusive right of burial for himself, his family, & friends, in a vault under the church, is a grant of an easement arising out of land & cannot be made by parol.

If it be not an interest in land it is an easement, or the grant of an incorporeal hereditament; which could only be effectually granted by deed (*BAYLEY, J.*). — *BRYAN v. WHISTLER* (1828), 8 B. & C. 288; 2 Man. & Ry. K. B. 318; 6 L. J. O. S. K. B. 302; 108 E. R. 1050.

**Annotations.** — *Refd.* *Wood v. Leadbitter* (1845), 13 M. & W. 838; *Taplin v. Florence* (1851), 10 C. B. 744; *Kerrison v. Smith* (1897), 66 L. J. Q. B. 762. **Mentd.** *Ashby v. Harris* (1868), L. R. 3 C. P. 523; *North Manchester Overseers v. Winstanley*, [1908] 1 K. B. 835.

119. ———. ———. **Right to flow of water.**] — (1) A parol licence after it is executed at the expense of the grantee, is not countermandable by the grantor. Where, therefore, pltf.'s father gave deft. leave, by parol, to lower the bank of a river & erect a weir, whereby a part of the water which flowed before to pltf.'s mill was diverted: — **Held:** his son could not maintain an action against defts. for continuing the weir, although his father, a few years after the licence was given, had required them to raise up the bank & pull down the weir.

For it cannot be denied that the right to the flow of the water formerly belonging to the owner of pltf.'s mill could only pass by grant as an incorporeal hereditament & not by parol licence. But we think the operation & effect of the licence after it has been completely executed by defts. is sufficient to relieve them from the burthen of restoring to its former state what has been done under the licence (*TINDAL, C.J.*).

(2) Suppose A. authorise B. by express licence to build a house on B.'s own land close adjoining to some of the windows of A.'s house so as to interrupt part of the light; could he afterwards compel B. to pull the house down again simply by giving notice that he countermanded the licence? (*TINDAL, C.J.*).

(3) Suppose a person who formerly had a mill on a stream should pull it down & remove the works with the intention never to return; could it be held that the owner of the land adjoining

might not erect a mill & employ the water so relinquished? (*TINDAL, C.J.*). — *LIGGINS v. INGE* (1831), 7 Bing. 682; 5 Moo. & P. 712; 9 L. J. O. S. C. P. 202; 131 E. R. 263.

**Annotations.** — *As to* (1) *Consd.* *Bridges v. Blanchard* (1834), 1 Ad. & El. 536; *R. v. Chorley* (1848), 12 Q. B. 515; *Plummer v. Wellington Corpn.* (1884), 9 App. Cas. 699. *Refd.* *Mason v. Hill* (1833), 5 B. & Ad. 1; *Wood v. Leadbitter* (1845), 13 M. & W. 838; *Davies v. Marshall* (1861), 10 C. B. N. S. 697; *Jones v. Tapling* (1862), 31 L. J. O. P. 110; *Mellor v. Watkins* (1874), L. R. 9 Q. B. 400; *Kay v. Oxley* (1875), L. R. 10 Q. B. 360. **Generally, Mentd.** *Cocker v. Cowper* (1834), 5 Tyr. 103; *Whaley v. Laing* (1867), 26 L. J. Ex. 327; *Chasemore v. Richards* (1859), 7 H. L. Cas. 349; *Ormerod v. Todmorden Mill Co.* (1889), 11 Q. B. D. 155.

120. ———. ———.] — A verbal licence is not sufficient to confer an easement of having a drain in the land of another to convey water; & such licence may be revoked, though it has been acted upon.

In 1815 A. cut a drain in the land of B. to a spring, the water from which he appropriated as it ran through his own land. In 1833 B. stopped the drain: — **Held:** B. was entitled so to do, no right having been acquired by user or length of possession. — *COCKER v. COWPER* (1834), 1 Cr. M. & R. 418; 5 Tyr. 103; 149 E. R. 1143.

**Annotations.** — *Refd.* *Aldin v. Latimer Clark, Muirhead*, [1894] 2 Ch. 437. **Mentd.** *Wood v. Leadbitter* (1845), 13 M. & W. 838.

121. ———. ———.] — The right to a flow of water in a goit or artificial channel over another's land is a well known easement, & is the subject of property & grant, & not merely of licence. In order, therefore, immediately to bind the original grantor, the creation of such a right must be by deed under seal. But even though sixty years' possession & enjoyment of such a right under a document not under seal may perchance not bind the original grantor & his heirs; yet the actual possession & enjoyment gives a good & valid right of action against a wrongdoer, a superior riparian proprietor who, by abstracting water from the stream, so damages the flow as injuriously to affect a mill fed by the water flowing through such a goit.

A riparian landowner can grant to a non-riparian landowner the flow of water from the stream to his premises, for the use of the premises; & the grantee may sue for a disturbance of his enjoyment by a higher riparian owner.

The rights of a riparian proprietor with respect to the stream are limited only by those of persons in a similar & analogous position with respect to the stream as himself; & if, therefore, he grants to one not a riparian proprietor a right to abstract water from the stream, the grantee can sue only the grantor for any interference with him. But if two adjoining riparian proprietors agree to divert the stream so that it shall run in two channels instead of one, the water passing again into the old stream below their land, & flowing down to the lower proprietors as before, the case is different (*CHANNELL, B.*).

A goit is to all intents & purposes a new stream, & any person having land upon it would have the right of a riparian proprietor to use the water in any way not interfering with others. There is no reason why the law applicable to ordinary running streams should not be applicable to such a stream, for it is natural stream or flow of water, though flowing in an artificial channel (*CHANNELL,*

cannot be created by parol, & a parol agreement would be terminated by a conveyance to a third person from the party agreeing to give the power. — *BREWING v. BERRYMAN* (1879), 2 Fug. 115. — **CAN.**

k. *Whether registration necessary.* — A deed creating the easement was an instrument requiring registration. — *ROSE v. HUNTER* (1881), 2 L. & G. 44; 7 S. C. R. 289. — **CAN.**

1. *Easement must be specified.* — The

reference in a certificate of title to a recorded plan is for purposes of description only, & the owners of land cannot by inscribing on such a plan words purporting to restrict building, create a negative covenant in the nature

*Sect. 1.—By express grant: Sub-sect. 5.]*

B.).—**NUTTALL v. BRACEWELL** (1866), L. R. 2 Exch. 1; 4 H. & C. 714; 36 L. J. Ex. 1; 15 L. T. 318; 31 J. P. 8; 12 Jur. N. S. 989.

*Annotations:—***Distd.** Holker v. Porritt (1875), L. R. 10 Exch. 59. **Expld.** Ormerod v. Todmorden Mill Co. (1883), 11 Q. B. D. 155. **Refd.** Kensit v. G. E. Ry. (1883), 23 Ch. D. 566. **Mentd.** Wilts. & Berks. Canal Navigation Co. v. Swindon Water Works Co. (1873), 9 Ch. App. 453, n.; Roberts v. Richards (1881), 50 L. J. Ch. 297; A.-G. v. Simpson, [1901] 2 Ch. 671.

**122. ——— Church pew.]**—In case for the disturbance of a pew, deft. pleaded leave & licence. Replication as to all the disturbances before a certain day, *de injuriâ*; & as to the residue, a revocation of the licence.

As there was no deed & therefore no grant, plff. might revoke the licence notwithstanding the expense deft. had incurred, unless deft.'s character of churchwarden made any difference (**PATTESON, J.**).—**ADAMS v. ANDREWS** (1850), 15 Q. B. 284; 20 L. J. Q. B. 33; 15 L. T. O. S. 499; 117 E. R. 466; *sub nom.* **ANDREWS v. ADAMS**, 15 Jur. 149.

*Annotation:—***Mentd.** Hurst v. Picture Theatres, [1915] 1 K. B. 1.

**123. ——— Light & air.]**—*Qu.*: whether a licence to the owner of a house to enjoy an unobstructed access of light & air to his new window from over his neighbour's premises may be given by parol, or is an easement, to be granted under seal. *Qu.*: supposing that such licence may be given by parol, whether it is countermandable.—**BRIDGES v. BLANCHARD** (1834), 1 Ad. & El. 536; 3 Nev. & M. K. B. 691; 110 E. R. 1312.

**124. ——— Light.]**—The mere physical fact of the existence of a window overlooking land does not put the purchaser of that land upon inquiry as to whether the window is privileged or not.

Where, therefore, an agreement between adjacent owners provided for enjoyment of a certain window without obstruction:—**Held**: the purchaser for value of the servient tenement, without notice of the agreement, but knowing of the existence of the window, was not bound by the agreement.

This agreement is one which cannot bind deft. in any way, not being by deed, unless he bought with notice or knowledge of the equities created by it. Not having bought with notice or knowledge of it, the question is, had he constructive notice of it (**COTTON, L.J.**).—**ALLEN v. SECKHAM** (1879), 11 Ch. D. 790; 48 L. J. Ch. 611; 41 L. T. 260; 43 J. P. 685; 28 W. R. 26, C. A.

*Annotations:—***Mentd.** English & Scottish Mercantile Investment Co. v. Brunton, [1892] 2 Q. B. 700; Poulton v. Moore (1913), 83 L. J. K. B. 875.

**125. ——— Statute of Frauds, s. 4.]**—The doctrine of part performance of a parol agreement which enables proof of it to be given, notwithstanding Stat. Frauds, applies to all cases in which a ct. of equity would entertain a suit for specific performance if the alleged contract had been in writing. Although the most obvious case of part performance is where deft. is in possession of land of pltf. under the parol agreement, yet the doctrine applies to a parol agreement for an easement, although no interest in land is intended to be acquired.

If, therefore, an easement is not an "interest

in land" under Stat. Frauds, s. 4, it follows that although no such incorporeal hereditament can be granted except by deed, an agreement for such a grant need not be in writing as a contract for an interest in land (**KAY, J.**).—**MCMANUS v. COOKE** (1887), 35 Ch. D. 681; 56 L. J. Ch. 662; 56 L. T. 900; 51 J. P. 708; 35 W. R. 754; 3 T. L. R. 622.

*Annotations:—***Refd.** Hurst v. Picture Theatres, [1915] 1 K. B. 1. **Mentd.** Wimbledon & Putney Commons Conservators v. Nicol (1894), 10 T. L. R. 247; Turner v. Melladew (1903), 19 T. L. R. 273; Dickinson v. Barrow, [1904] 2 Ch. 339; Elliott v. Roberts (1912), 107 L. T. 18.

**126. ——— Exception to rule—Acquiescence in grantee incurring expense.]**—Where a man suffers another to build on his ground, without setting up a right till afterwards, the ct. will oblige the owner to permit the person building to enjoy it quietly.

Lengthening of windows, or making more lights in the old wall than formerly, does not vary the right of persons.—**EAST INDIA CO. v. VINCENT** (1740), 2 Atk. 83; 26 E. R. 451, L. C.

*Annotations:—***Expld.** Blakemore v. Glamorganshire Canal Navigation (1832), 1 My. & K. 154. **Distd.** Harryman v. Collins (1854), 18 Beav. 11. **Consd.** McManus v. Cooke (1887), 35 Ch. D. 681. **Mentd.** Barnard v. Wallis (1840), 2 Ry. & Can. Cas. 102; Lond. v. Murray (1851), 17 L. T. O. S. 248; Scott v. Scott (1854), 23 L. T. O. S. 27; Horvey v. Smith (1855), 1 K. & J. 389; Moynold v. Surtees (1855), 25 L. J. Ch. 257; Crampton v. Varna lty. (1872), 7 Ch. App. 562.

**127. ——— ]**—**CLAVINGER'S CASE** (prior to 1800), cited 5 Ves. at p. 690; 31 E. R. 807.

*Annotations:—***Consd.** Bankart v. Tennant (1870), L. R. 10 Eq. 141. **Refd.** McManus v. Cooke (1887), 35 Ch. D. 681.

**128. ——— ]**—A parol licence to put a skylight over deft.'s area, which impeded the light & air from coming to pltf.'s dwelling house through a window, & cannot be recalled at pleasure after it has been executed at deft.'s expense; at least not without tendering the expenses he had been put to; & therefore no action lies as for a private nuisance, in stopping the light & air, etc., & communicating a stench from deft.'s premises to pltf.'s house by means of such skylight.—**WINTER v. BROCKWELL** (1807), 8 East, 308; 103 E. R. 359.

*Annotations:—***Distd.** Richardson v. Langridge (1811), 4 Taunt. 128. **Expld.** & **Distd.** Howlins v. Shippam (1826), 5 B. & C. 221. **Apld.** Liggins v. Inge (1831), 7 Bing. 682. **Consd.** Davies v. Marshall (1861), 10 C. B. N. S. 697. **Refd.** Taylor v. Waters (1816), 7 Taunt. 374; Harvey v. Reynolds (1823), 1 C. & P. 141; Coaker v. Cowper (1834), 1 Cr. M. & L. 418; Wood v. Manley (1839), 3 Jur. 1028; Wood v. Leadbitter (1845), 13 M. & W. 838; Perry v. Fitzhowe (1846), Q. B. 757; Aldin v. Latimer Clark, Muirhead, [1894] 2 Ch. 437. **Mentd.** Wallis v. Harrison (1838), 4 M. & W. 538; Plimmer v. Wellington Corpn. (1884), 9 App. Cas. 699.

**129. ——— ]**—**LIGGINS v. INGE, No. 119, ante.**

**130. ——— ]**—A parol licence from A. to B. to enjoy an easement over A.'s head is countermandable at any time whilst it remains executory; & if A. conveys the land to another, the licence is determined at once, without notice to B. of the transfer, & B. is liable in trespass if he afterwards enters upon the land.—**WALLIS v. HARRISON** (1838), 4 M. & W. 538; 1 Horn & H. 405; 8 L. J. Ex. 44; 2 Jur. 1019; 150 E. R. 1543; *subsequent proceedings* (1839), 5 M. & W. 142. *Annotations:—***Refd.** Wood v. Leadbitter (1845), 13 M. & W. 838; Roffey v. Henderson (1851), 17 Q. B. 574; Smith v. Colbourne, [1914] 2 Ch. 533.

**131. ——— ]**—Permission was ob-

of a negative easement enforceable against & among all subsequent purchasers of lots described by reference to the plan; to create such easement there should be a direct stipulation to that effect in the agreement of conveyance.—**SUMNER v. MCINTOSH &**

**MCINTOSH**, [1918] 2 W. W. R. 293; 40 D. L. R. 391; 11 Sask. L. R. 152.—**CAN.**

**m. ——— ]**—Under Land Transfer Act, in order to create an easement the instrument must state specifically the

interest to be created & the land to be affected, & a memorial of the instrument must be entered on the title of the servient tenement before any right to the easement passes.—**MACKECHNIE v. BELL** (1909), 28 N. Z. L. R. 318.—**N.Z.**

tained from E. & other landowners, on behalf of a body of subscribers, to make a watercourse through their respective lands to supply the town of G. with water. It was alleged that the subscribers agreed to pay to E. 2s. 6d. a year, but this was denied. E. subsequently diverted the watercourse into the old channel; & upon a bill filed by several of the subscribers, & upon its being amended, & made on behalf of plffs., & others whose names & residences were unknown, being subscribers to the fund:—*Held*: plffs. were entitled to the use of the watercourse passing under the lands of E., & an injunction would be granted to restrain deft. from preventing, obstructing, or interfering with the flow of water, or with plffs.' use of the watercourse.—*DEVONSHIRE (DUKE) v. EGLIN* (1851), 14 Beav. 530; 20 L. J. Ch. 495; 51 E. R. 389.

*Annotations*:—*Reid. Mold v. Wheatcroft* (1859), 29 L. J. Ch. 11; *McManus v. Cooke* (1887), 35 Ch. D. 681.

132. ————]—Pltf., a shipbuilder, being desirous of having a private communication with defts.' railway, entered into negotiations with them for the construction of a tunnel at his own expense, & the directors expressed their assent generally to the project. Pltf. then, with the acquiescence of defts. & the approval of their engineer, executed the necessary works, & the communication was used by pltf., & tolls received by defts. for two years & a half; but no formal agreement was ever executed, the parties being unable to agree upon all the terms. At the end of that time defts. gave notice to pltf., that every agreement between them, if any ever existed, was at an end, & proceeded immediately to stop up the communication. Upon a bill filed for an injunction, & a demurrer thereto:—*Held*: the co. were as much bound by acquiescence as an individual would be, notwithstanding the want of a formal contract; &, after all that had taken place, pltf. had acquired a right of user which the co. had no power to terminate.—*LAIRD v. BIRKENHEAD RY. CO.* (1859), John. 500; 20 L. J. Ch. 218; 1 L. T. 159; 6 Jur. N. S. 140; 8 W. R. 58; 70 E. R. 519.

*Annotations*:—*Distd. Marriott v. Reid* (1900), 82 L. T. 369. *Reid. Bourke v. Alexandra Hotel Co.* (1877), 25 W. R. 393; *Hoare v. Lewisham Corpn.* (1901), 85 L. T. 281. *Mentd. Civil Service Musical Instrument Assn. v. Whiteman* (1899), 68 L. J. Ch. 484; *Michaud v. Montreal City* (1923), 92 L. J. P. C. 161.

133. ————]—Where the owner of a servient tenement stood by without making a distinct objection, while the dominant owner pulled down & rebuilt his tenement in such a manner as to alter his ancient lights, the plans of the alterations having been submitted to the surveyors of the servient owner before the new buildings were commenced, & the works being carried out & completed with his knowledge, the ct. considered that he had waived his right to object to the acquisition by the dominant owner of the necessary easements of light & air for his new lights, & granted an injunction to restrain him from building up a party-wall so as to obstruct such new lights.—*COTCHING v. BASSETT* (1862), 32 Beav. 101; 32 L. J. Ch. 286; 9 Jur. N. S. 590; 11 W. R. 197; 55 E. R. 40.

*Annotations*:—*Consd. Russell v. Watts* (1883), 25 Ch. D. 559. *Reid. McManus v. Cooke* (1887), 35 Ch. D. 681; *Hoare v. Lewisham Corpn.* (1901), 85 L. T. 281. *Mentd. Russell v. Watts* (1885), 10 App. Cas. 590.

134. ————]—By a parol agreement between A., the owner of land & dwelling-houses, & B., also the owner of land & buildings adjoining, a rocky piece of ground which stood close to A.'s freehold was reduced by B. so as to admit further light & air to A.'s dwellings, & buildings were

erected by B. so as to be attached to, & were an encroachment on, A.'s freehold. A. was cognisant of & offered no objection to the work as it proceeded, but acquiesced therein:—*Held*: (1) Stat. Frauds did not apply to such an agreement; (2) A. should be restrained from interfering by action or otherwise in respect of the messuages, etc., erected by B. in pursuance of such agreement, B. undertaking to maintain the lights & windows in the buildings so erected by him in their present size & condition, & not to alter same prejudicially to A. or his assigns.—*FISHER v. MOON* (1865), 11 L. T. 623.

135. ————]—Deft., being the owner of a canal of which plffs. were large customers, a mutual understanding was come to between the parties, that so long as plffs. remained good customers of the canal they should be allowed to use the superfluous water of the canal for the purposes of copperworks, of which they were occupiers under an agreement for lease with deft. It was shown that the use of the water of the canal, though convenient & economical, was not absolutely essential to pltf.'s works:—*Held*: such an understanding did not form the foundation of an equitable right. *Secus*: if plffs. with the knowledge of defts. had incurred expense in establishing a manufacture for which the use of the water was absolutely necessary.—*BANKART v. TENNANT* (1870), L. R. 10 Eq. 141; 30 L. J. Ch. 809; 23 L. T. 137; 34 J. P. 628; 18 W. R. 639.

136. ————]—*DAITON v. ANGUS*, No. 4, ante.

137. ————]—*Grant to & by corporation—Running powers over railway.*—In 1848 the E. railway co. agreed with defts. that a station on defts.' line should be used equally by both cos., but should be subject to the bye-laws of defts., & that a committee of three from each board should be appointed to arrange the working of the traffic, etc.; that the cost & maintenance of the station & the working should be borne by the two cos. equally; that deft. should afford to the E. co. facilities for access to the G. docks, & that the E. co. should give up a piece of land to defts.; that defts. should have the right of running with their engines, etc., on the E. line between G. & L., & that the E. co. should have the same right over defts.' line between G. & N., paying in either case £66 per cent. of the gross receipts to the co. whose line was used; & that each co. should provide station accommodation for the other at N. & L. respectively for three years, as therein mentioned. The E. line of railway became vested in plffs., as lessees thereof for 999 years. Disputes arose between the cos., which ended in defts. preventing plffs. from running their engines, etc., on the line between G. & N., & giving them a formal notice to determine the agreement. On motion, an injunction was granted to restrain defts. from obstructing plffs. running their engines, etc., over that part of defts.' line mentioned in the agreement:—*Held*: (1) the agreement was permanent, & could not be determined without the consent of both parties, & was not a mere licence revocable at the will of either; (2) an agreement to grant an easement of this nature to a corporate body need not be by deed, & might be permanent, although it was to the co. only, & not to the co. & their successors.—*GREAT NORTHERN RY. CO. v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.* (1851), 5 De G. & Sm. 138; 18 L. T. O. S. 344; 16 Jur. 146; 64 E. R. 1053.

*Annotations*:—*As to* (1) *Apprvd. Lilanely Rty. & Dock Co. v. L. & N. W. Ry.* (1873), 8 Ch. App. 942. *Reid. Waring & Gillow v. Thompson* (1912), 29 T. L. R. 154.

**Sect. 1.—By express grant: Sub-sect. 6, A. & B.]**

(NORTH, J.).—NEW WINDSOR CORPN. v. STOVELL (1884), 27 Ch. D. 665; 54 L. J. Ch. 113; 51 L. T. 626; 33 W. R. 223.

*Annotations:—As to (1) Apld. A.-G. v. Hastings Corpn. (1902), 67 J. P. 165. Rejd. Municipal Mutual Insee. v. Pontefract Corpn. (1917), 116 L. T. 671. As to (3) Fold. Milner's Safe Co. v. G. N. & City Ry., [1907] 1 Ch. 208.*

**B. Effect of General Words.**

**149. "Thereunto belonging"—Easement over land of grantor—Way.]—STAPLE v. HEYDON, No. 560, post.**

*See, also, No. 153, post.*

**150. "Appurtenant"—Easement over land of grantor—Way.]—MORRIS v. EDGINGTON, No. 49, ante.**

**151. ————.]—HARDING v. WILSON, No. 590, post.**

**152. ————.]—**A plea that A., being seised of Whiteacre & Blackacre, always used a way over Whiteacre to Blackacre, & afterwards conveyed Blackacre, "together with all ways & appurtenances whatsoever," to B., is not a sufficient justification of an entry into Whiteacre by B. If at the time of the conveyance A. had no access to Blackacre by a way appurtenant or *alieno solo*, that circumstance should be alleged, or it should be pleaded as a grant of the way.—WILSON v. BAGSHAW (1830), 5 Man. & Ry. K. B. 448.

**153. ————.]—**(1) A way not strictly appurtenant will not pass under the words "together with all ways thereto belonging, or in anywise appertaining," unless it can be collected that the parties intended to use those words in a sense more extensive than their ordinary legal signification.

(2) If, in the case of an easement, extinguished by unity of ownership, a man grants the land to which before the extinguishment the right of common was attached, & uses only the words "appertaining" & "belonging," the right will not pass, these words not being sufficient to revive the right. There are, however, apt words for the purpose of passing such an easement, & if you will only insert the words "or therewith & enjoyed" the right would pass.—BARLOW v. RHODES (1833), 1 Cr. & M. 439; 3 Tyr. 280; 2 L. J. Ex. 91; 149 E. R. 471.

*Annotations:—As to (1) Rejd. Plant v. James (1833), 5 B. & Ad. 791; Ackroyd v. Smith (1850), 14 Jur. 1047; Worthington v. Gimson (1860), 2 E. & E. 618. As to (2) Rejd. Wardle v. Brocklehurst (1860), 1 E. & E. 1058; Bald v. Fortune (1861), 5 L. T. 2; Bolton v. Bolton (1879), 11 Ch. D. 968; Baring v. Abingdon, [1892] 2 Ch. 374. Generally, Rejd. Pheysey v. Vicary (1847), 16 M. & W. 484; Tatton v. Hammersley (1849), 3 Exch. 279. Mentd. Glave v. Harding (1858), 27 L. J. Ex. 286.*

**154. ————.]—JAMES v. PLANT, No. 504, ante.**

**155. ———— Apparent & continuous.]—**Certain land, part lying in the parish of N., part in the parish of V., belonged, in 1820, to H. & P., each being seised of an undivided moiety of the whole. A right of way existed from a farm, part of this property, in N., across certain lands on the

property in V., part of the same farm, to another farm on the property in V.; & this right of way had for many years been used by the occupiers of either farm. In 1820, by a deed of partition, H. conveyed his undivided moiety of the part of the property in N. to P., including, among other farms, so much of the farm lying in N. & V. as was in N., "with every of their rights, members, easements & appurtenances." P. also, by the deed, conveyed his undivided moiety of that part of the property lying in V. to H. The deed contained no express reservation of the right of way to either party. Pltf., the present occupier, & the previous occupiers of the farm in N., used the right of way from 1820 to 1859, when it was obstructed by deft., the then occupier of the farm in V. In an action by pltf. for such obstruction:—**Held:** he could not recover; the right of way not passing under the deed of partition, & not being an apparent & continuous easement necessarily passing upon the severance of the property, as incident to the separate enjoyment of the portion severed.—WORTHINGTON v. GIMSON (1860), 2 E. & E. 618; 29 L. J. Q. B. 116; 2 L. T. 320; 24 J. P. 455; 6 Jur. N. S. 1053; 121 E. R. 232.

*Annotations:—Consd. Brett v. Clowser (1880), 5 C. P. D. 376. Rejd. Pearson v. Spencer (1861), 1 B. & S. 571; Polden v. Bastard (1863), 4 B. & S. 258; Schwann v. Cotton, [1916] 2 Ch. 120.*

**156. ————.]—**By a lease in 1877 the lessor demised to the lessee a rectangular plot of building land, A., in the corner formed by the intersection of two public roads, of which one passed along the front & the other along the side of the land. By a lease of even date the same lessor demised to the same lessee another rectangular building plot, B., immediately adjoining A., & also facing the front road but having no direct access to the side road. Both plots abutted at the rear upon a boundary or party wall. The lessee then built a house on each plot & laid out the ground at the back as a garden to the house, with the exception of a narrow strip at the rear of both plots, which he formed into & used as a road or back way from the house & garden, B., into the public road along the side of A. This back way was bounded on the one side by the party-wall & on the other by the garden walls of A. & B., a gate into it being made by the lessee in the garden wall of B. The house on B. completely blocked all access from the front to the garden behind, except by a tiled passage or hall forming part of the house, with a door at each end, one door opening into the garden. In 1878 the lessee assigned to the deft. the whole of plot B., as described in the lease thereof, & also the house thereon, "with their rights, easements, & appurtenances." In 1879 the lessee assigned to pltf.'s predecessor in title the whole of plot A., as described in the lease thereof, & also the house thereon. Each assignment thus included part of the soil on which the back way had been formed, but neither deed contained any reference to the back way, & in particular the assignment to pltf.'s predecessor contained no reservation of a right

by presumption.—FERGUSON v. PRETORIUS (1896), 45 A. L. 246.—S. AF.

**s. Grant of right of way—Ancillary rights.]—**Pltf., being the owner of a part of a farm which was subject to a right of way connecting two other portions of the farm, reserved by a former owner of the whole farm, for the use & benefit of himself, his heirs & assigns, as a lane or roadway so long as needed or required in passing to & from the other lands now owned by the grantor, brought his action for

a declaration of his right to place gates at the terminus of the right of way:—**Held:** he was so entitled.—SIPLE v. BLOW (1903), 24 C. L. T. 392; 8 O. L. R. 547; 3 O. W. R. 855.—CAN.

**PART III. SECT. 1, SUB-SECT. 6.—B.**

**t. "Appurtenant"—Effect of further words—"Therewith held or used."]**—The words "appurtenant" or "belonging" will ordinarily carry only actual existing easements, & therefore will carry no right of way over

the land of the grantor, though, in certain circumstances, even these words will have a wider construction. Where further words are used, such as "therewith held or used," such words will carry a way formerly enjoyed as an easement, but as to which the right has been suspended by unity of possession. But such words will not carry a way made by the owner of both properties during the unity of possession for his own greater convenience in the use of the two properties jointly. But where, during the unity of possession, a way,



of way over his portion of the soil in favour of the owners or occupiers of B.:—*Held*: on the assignment of B. to deft., a right of way over pltf.'s portion of the soil of the back way into the side road passed, not as a way of necessity, but by implied grant as being in the nature of a continuous & apparent easement.—*BROWN v. ALABASTER* (1887), 37 Ch. D. 490; 57 L. J. Ch. 255; 58 L. T. 266; 36 W. R. 155.

*Annotations*:—*Consd.* *Titchmarsh v. Royston Water Co.* (1899), 81 L. T. 673. *Refd.* *Roe v. Siddons* (1888), 22 Q. B. D. 224; *Nicholls v. Nicholls* (1899), 81 L. T. 811; *Hansford v. Jago*, [1921] 1 Ch. 322; *Cory v. Davies*, [1923] 2 Ch. 95.

157. ————] — *BOLTON v. BOLTON*, No. 641, *post*.

158. ————] — (1) By indenture of lease of Sept. 23, 1878, A. demised to B. a public-house at H., "together with all ways, waters, watercourses, drains, paths, lights, easements, profits, advantages, & appurtenances whatsoever to the premises belonging or in any wise appertaining." At the rear of the premises was a path across the garden to a doorway in the boundary wall which opened on to a private road, the property of A., leading to H. heath. On Oct. 1, 1878, A., pursuant to an agreement of Nov. 1867, granted to deft. C. a lease for 99 years of land which comprised the private road leading from the back of the public-house to the heath, & on Oct. 9, C. built up the doorway in the boundary wall. This way had, by special agreement between himself & his lessee C., for several years been used by D., a former tenant of the public-house whose tenancy had been determined in June, 1878:—*Held*: the way in question not being a way of necessity, did not pass to B. by the general words in the lease of Sept. 1878; & deft. C. was not estopped from denying the existence of the alleged right of way by having allowed D. to use it whilst he was the occupier of the public-house. (2) In Aug. 1878, deft. A. offered for sale by public auction a lease of a public-house. By the conditions of sale it was provided that "the lease to be granted shall contain the covenants, clauses & provisions & be in the form or to the effect set forth in the draft lease which will be produced on the sale & may be seen at the office of the auctioneers for seven days previous to the day of sale," & that "the property is presumed to be correctly described; but, as the premises may be viewed & the draft lease inspected at the office of the auctioneers, the purchaser shall be deemed to have bought with full knowledge of the contents thereof; & no error, misdescription or omission in the particulars shall annul the sale, & no compensation shall be required for any such error, misdescription or omission." There was no reference either in the conditions of sale or in the draft lease to the existence of any right or way from the garden of the public-house to the heath, but at the time of the sale, the auctioneer *bond fide*, but without any authority from A., & acting entirely upon an inference drawn by himself from the appearance of the premises, & believing that there was a right of way through the same & over the private road, & so to the heath, stated publicly that there was such a way, & spoke of it as enhancing the value of the premises:—*Held*: the evidence of what passed at the time of the sale was admissible as against the vendor; but no

action could, after the completion of the purchase, be maintained against him to recover compensation for this innocent misrepresentation by the auctioneer.—*BRETT v. CLOWSER* (1880), 5 C. P. D. 376.

*Annotation*:—*As to* (2) *Apld.* *Angel v. Jay*, [1911] 1 K. B. 666.

159. ————] — *Re PECK & LONDON SCHOOL BOARD'S CONTRACT*, No. 182, *post*.

160. ————] — *Watercourse*.] — *BROWN v. NICHOLS* (1603), Moore, K. B. 682; 72 E. R. 837.

*Annotation*:—*Refd.* *Hinchliffe v. Kinnoul* (1838), 5 Bing. N. C. 1.

161. ————] — If a man erect a house, & build a conduit thereto in another part of the land, yet the conduit shall pass by a grant of the house *cum pertinentiis*.—*NICHOLAS v. CHAMBERLAIN* (1606), Cro. Jac. 121; 79 E. R. 105.

*Annotations*:—*Fold.* *Watts v. Kelson* (1871), 6 Ch. App. 166. *Consd.* *Wheeldon v. Burrows* (1879), 12 Ch. D. 31. *Refd.* *Pyer v. Carter* (1857), 1 H. & N. 918; *Dodd v. Burchall* (1862), 31 L. J. Ex. 364; *Suffield v. Brown* (1864), 4 De G. J. & Sm. 185; *Thomas v. Owen* (1887), 20 Q. B. D. 225; *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557; *Schwann v. Cotton*, [1916] 2 Ch. 459.

162. ————] — A question has often arisen where unity of ownership in land & in a right of way over the land has taken place, as to what subsequent grant by the owner is sufficient to convey the continued enjoyment of the easement, as well as the land itself. It seems from the decisions that, inasmuch as the unity of ownership extinguishes the easement, the right of way cannot pass as simply appurtenant to the land to which it was formerly attached, though it continues to exist in point of user. But, though it does not exist as a right, it will pass by a conveyance of the land, if proper words be used to pass it, as, if all ways "used & enjoyed" with the land are conveyed. Applying this doctrine to the question before us, it seems to me that the right to the watercourse here in dispute passed to deft. under the words of the conveyance (*WILLIAMS, J.*).—*WARDLE v. BROCKLEHURST* (1860), 1 E. & E. 1058; 29 L. J. Q. B. 145; 1 L. T. 519; 6 Jur. N. S. 319; 8 W. R. 241; 120 E. R. 1209, Ex. Ch. *Annotation*:—*Refd.* *Watts v. Kelson* (1871), 6 Ch. App. 166.

163. ————] — *Apparent & continuous*.] — *BUNTING v. HICKS*, No. 55, *ante*.

164. ————] — *KEY v. NEATH RURAL DISTRICT COUNCIL*, No. 1049, *post*.

165. ————] — *Easement of necessity—Way*.] — In an action for a disturbance of a right of way, it appeared that, in the year 1839, A., being the owner of five closes, two of which, called the H. closes, were separated by two of the others from the only available highway, sold the entire property in three lots. M. purchased the H. closes, N. one of the other closes, & D. the remaining closes. Over the latter the tenants of A., from the year 1823, had used a way for the occupation of the H. closes. The deeds of conveyance to the three purchasers were all executed on the same day, but it could not be ascertained in what order of priority they were executed. No special grant or reservation of any particular way was contained in any of them; but in the conveyance to M. were the usual words, "together with all ways, roads, etc., to the closes belonging or appertaining." For several years after the execution of the conveyances, pltf., who occupied the H. closes as tenant

which has never existed as an easement, is in fact used for the convenience of one of the tenements afterwards severed, the authorities show that the words in question are large enough to carry it.—*CHUNDER KOOMAR MOOKERJI*

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*v. KOYLASH CHUNDER SETT* (1881), 1 L. R. 7 Calc. 665.—IND.

a. "All ways appertaining."—An express grant of a right of way for certain tenants for limited purposes

& to a limited extent, "to the rear of the houses" excludes the presumption of an implied grant of the same way for all purposes, which might otherwise be inferred from the use of the words "all ways appertaining."—*GIBBONS &*

D

**Sect. 1.—By express grant: Sub-sect. 3, B. & C.]**

of M., had used the way in question; but, in 1843, deft., who had purchased D.'s closes, disputed pltf.'s right & obstructed the way:—**Held:** (1) assuming that the conveyance to M. was executed before that to D., pltf. was clearly entitled to the way, for where a person having a close surrounded by his land grants the close to another, the grantee has a way over the grantor's land as incident to the grant; (2) assuming that the conveyance to D. was executed before that to M., pltf. was nevertheless entitled to the way, for while the property in the H. closes remained in A., he had that way of necessity, as being the most convenient mode of access to his premises, & it passed by his conveyance to M. under the words "all ways to the closes belonging or appertaining."—**PINNINGTON v. GALLAND** (1853), 9 Exch. 1; 1 C. L. R. 819; 22 L. J. Ex. 348; 22 L. T. O. S. 41; 150 E. R. 1.

**Annotations:**—As to (1) **Refd.** *Wheldon v. Burrows* (1879), 12 Ch. D. 31; *Mid. Ry. v. Miles* (1886), 33 Ch. D. 632. As to (2) **Refd.** *Pyer v. Carter* (1857), 1 H. & N. 916. **Generally, Refd.** *Richards v. Ilose* (1853), 9 Exch. 218; *Pearson v. Spencer* (1861), 1 B. & S. 571; *White v. Bass* (1862), 7 H. & N. 722.

**166. — Easement enjoyed de facto—Way.]**—Pltf. & deft. were tenants under the same landlord of adjoining farms near the sea coast to which a highway ran through deft.'s farm; pltf.'s farm communicated with the highway by a private road which joined the highway at A. From a point on pltf.'s farm & on the private road an ancient lane ran to a spot on the highway nearer than A., to the sea coast; this lane was not only the nearest way from pltf.'s farm to the sea coast but was also level, whereas the private road was steep & hilly. The land, which was a formed roadway bounded on either side by turf banks & hedges, ran wholly through deft.'s land except for a few yards where it started from the private road on pltf.'s farm, but it had no communication on either side with deft.'s land & was only open to deft.'s access at the point where it joined the highway; it had been used for many years by pltf. & had been from time to time repaired by him. Prior to 1873 pltf. & deft. were tenants from year to year on their respective farms; in that year the landlord granted to deft. a lease of his farm, which contained no reference to the lane or to its user by pltf.; but the soil of the lane was admittedly included in the admeasurements of deft.'s farm. In 1878 the landlord granted to pltf. a lease of his farm " & all houses, buildings, & appurtenances thereto belonging " in which no specific mention was made of the lane or of any right of way over it. Deft. having interfered with pltf.'s user of the lane:—**Held:** (1) the lease to deft. did not amount to a demise of the soil of the lane free from pltf.'s right of way, inasmuch as the lessor, not being in possession at the date of the lease, could not make such a demise without derogating from the grant to pltf. under which his then existing tenancy was constituted; (2) there was an implied reservation of the right of way out of deft.'s lease; & (3) the right of way over the lane passed to pltf. by the lease of 1878 under the word "appurtenances."—**THOMAS v. OWEN** (1887), 20 Q. B. D. 225; 57 L. J. Q. B. 198; 58 L. T. 162; 52 J. P. 516; 36 W. R. 440, C. A.

**Annotations:**—As to (2) **Consd.** *Gordon v. Ogilvie* (1899),

**HENDERSON v. FOX** (1859), 4 Nfld. L. R. 281.—**NFLD.**

b. "Shop & premises."—A way not strictly appurtenant will not pass under the words "all that shop &

premises," unless it can be concluded that the parties intended to use those words in a sense more inclusive than their ordinary legal signification.—**KEOUGH v. THORNBURN** (1892), 7 Nfld. L. R. 662.—**NFLD.**

15 T. L. R. 239; *Derry v. Sanders*, [1919] 1 K. B. 223. **Appld.** *Westwood v. Heywood*, [1921] 2 Ch. 130. As to (3) **Follid.** *Hanford v. Jago*, [1921] 1 Ch. 322. **Refd.** *Roe v. Siddons* (1888), 22 Q. B. D. 224; *Nicholls v. Nicholls* (1899), 81 L. T. 811; *Schwann v. Cotton*, [1916] 2 Ch. 125. **Generally, Refd.** *Simpson v. Gilroy* (1922), 128 L. T. 622. **Mentd.** *Tilbury v. Silva* (1890), 45 Ch. D. 98; *Baring v. Abington*, [1892] 2 Ch. 374.

**167. — — — — —]—HANSFORD v. JAGO**, No. 282, *post*.

**168. "Therewith used & enjoyed"—Whether easement enjoyed prior to unity of seisin—Water-course.]—WARDLE v. BROCKLEHURST**, No. 162, *ante*.

**169. — — — — — Way.]—By lease granted in 1814, to take effect from 1820, certain houses, together with a piece of ground, which was part of an adjoining yard, were leased to a tenant, together with all ways with the premises or any part thereof used or enjoyed before. At the time of granting the lease the whole of the yard was in the occupation of one person, who had always used & enjoyed a certain right of way to every part of that yard:—Held:** the lessee was entitled to such right of way to the part of the yard demised to him.—**KOOYSTRA v. LUCAS** (1822), 5 B. & Ald. 830; 1 Dow. & Ry. K. B. 506; 100 E. R. 1394.

**Annotations:**—**Consd.** *Langley v. Hammond* (1868), L. R. 3 Exch. 161; *Kay v. Oxley* (1875), L. R. 10 Q. B. 360. **Follid.** *Barkshire v. Grubb* (1881), 18 Ch. D. 616. **Refd.** *Barlow v. Rhodes* (1833), 3 Tyr. 280.

**170. — — — — —]—BARLOW v. RHODES**, No. 153, *ante*.

**171. — — — — —]—JAMES v. PLANT**, No. 50, *ante*.

**172. — — — — —]—General words in a conveyance passing all ways with the land conveyed, occupied or enjoyed, will not convey to the vendee a way which originated in the user by the vendor of his own land for his own convenience, & which had no existence prior to the unity of possession of the vendor. The case would be different had the way existed prior to the unity of possession of the vendor, & been thereby extinguished or suspended.—THOMSON v. WATERLOW** (1868), L. R. 6 Eq. 36; 37 L. J. Ch. 495; 18 L. T. 515; 32 J. P. 515; 16 W. R. 686.

**Annotations:**—**Follid.** *Langley v. Hammond* (1868), L. R. 3 Exch. 161. **Consd.** *Watts v. Kelson* (1871), 6 Ch. App. 166. **Appld.** *Kay v. Oxley* (1875), L. R. 10 Q. B. 360. **N.F.** *Barkshire v. Grubb* (1881), 18 Ch. D. 616. **Consd.** *Bayley v. G. W. Ry.* (1884), 26 Ch. D. 434; *Roe v. Siddons* (1888), 22 Q. B. D. 224. **Refd.** *Brown v. Alabaster* (1887), 37 Ch. D. 490.

**173. — — — — —]—A. was the occupier of a farmyard, the whole of which had always been owned & occupied by the same persons. The mode of access to all parts of the yard was by a metalled roadway which ran from a public street across the yard. A. surrendered to B., the owner & occupier of adjoining premises, a strip of land forming part of the yard, bounded on one side by the roadway, on the other by B.'s land, "together with all ways thereto belonging & therewith used, exercised & enjoyed":—Held:** no right to use the roadway passed to B.

The words "therewith used, occupied, & enjoyed," apply only to easements which have once existed as legal rights, but have been suspended by unity of possession (**KELLY, C.B.**).—**LANGLEY v. HAMMOND** (1868), L. R. 3 Exch. 161; 37 L. J. Ex. 118; 18 L. T. 858; 16 W. R. 937.

**Annotations:**—**Consd.** *Watts v. Kelson* (1871), 6 Ch. App. 166; *Kay v. Oxley* (1875), L. R. 10 Q. B. 360. **N.F.** *Barkshire v. Grubb* (1881), 18 Ch. D. 616. **Consd.** *Roe*

c. "Premises & appurtenances."—Where C., by deed, conveyed land to S., who owned certain land adjoining the land of C., but not adjoining the land now conveyed, & the deed proceeded—" & I further convey the right



*v. Siddons* (1888), 22 Q. B. D. 224. *Reid. Bolton v. Bolton* (1879), 48 L. J. Ch. 467; *Brett v. Clowser* (1880), 5 C. P. D. 376; *Bayley v. G. W. Ry.* (1884), 26 Ch. D. 434; *Brown v. Alabaster* (1887), 37 Ch. D. 490; *Thomas v. Owen* (1887), 20 Q. B. D. 225; *Kilgour v. Gaddes* (1903), 89 L. T. 444.

174. ———— **Continuous easement.**—

*WATTS v. KELSON*, No. 250, *post*.

175. ———— **Easement of necessity.**—

*WATTS v. KELSON*, No. 250, *post*.

176. ———— **Easement apparent.**—

Deft. was owner in fee of a dwelling-house, together with a cottage & stable belonging to it, called R., & was also owner in fee of an adjoining farmstead & farm, having a private road which led from a high road to the farm buildings, & passed close to one side of the stable of R. By indenture of May 1, 1860, deft. demised R. to H. for ten years. H. entered on the premises, & built over the stable a hay loft, with two openings towards the private farm road, having first obtained permission from deft. to do so & also permission from deft. & the then tenant of the farm to use the farm road for the purpose of bringing hay, straw, etc., to the loft, that being the only access to the openings in the loft. H. & the sub-tenants occupying R. continued during the term to use the road up to May, 1870; at that time pltf. agreed to purchase R. of deft.; & by deed of Aug. 2, 1870, R., etc., was conveyed by deft. to pltf. in fee "together with all . . . ways & rights of way, . . . easements, & appurtenances, to the dwelling-house, cottage, & hereditaments, or any of them appertaining, or with the same or any of them now or heretofore demised, occupied or enjoyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto":—*Held*: the right to use the farm road for the aforesaid purposes passed to pltf. under the above words.—*KAY v. OXLEY* (1875), 1 L. R. 10 Q. B. 360; 44 L. J. Q. B. 210; 33 L. T. 164; 40 J. P. 277.

*Annotations*:—*Folld. Bayley v. G. W. Ry.* (1884), 26 Ch. D. 434. *Apld. Thomas v. Owen* (1887), 20 Q. B. 225. *Consd. International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165. *Apld. May v. Belloyville*, [1905] 2 Ch. 605. *Reid. Brett v. Clowser* (1880), 5 C. P. D. 376; *Barkshire v. Grubb* (1881), 18 Ch. D. 616; *Brown v. Alabaster* (1887), 37 Ch. D. 490; *Roe v. Siddons* (1888), 22 Q. B. D. 224; *Broomfield v. Williams*, [1897] 1 Ch. 602; *Titchmarsh v. Royston Water Co.* (1899), 81 L. T. 673; *Schwann v. Cotton & Hayles* (1916), 35 L. J. Ch. 689. *Mentd. Baring v. Abingdon*, [1892] 2 Ch. 374; *Re Hughes & Ashley's Contract*, [1900] 2 Ch. 595.

177. ———— ———— *]*—A grant by the owner of two tenements of one of them, "together with all ways now used or enjoyed therewith," will pass to the grantee a right of way over a clearly defined path constructed over the other tenement, & at the date of the grant actually used for the purposes of the tenement which is granted, even though the path did not exist prior to the unity of possession.—*BARKSHIRE v. GRUBB* (1881), 18 Ch. D. 616; 50 L. J. Ch. 731; 45 L. T. 383; 29 W. R. 929.

*Annotations*:—*Consd. Re Peck & London School Board's Contract*, [1893] 2 Ch. 315. *Reid. Bayley v. G. W. Ry.* (1884), 26 Ch. D. 434; *Roe v. Siddons* (1888), 22 Q. B. D. 224; *International Tea Co.'s Stores v. Hobbs* (1903), 72 L. J. Ch. 543; *Re Walmsley & Shaw's Contract*, [1917] 1 Ch. 93.

178. ———— ———— *]*—A railway co. purchased, under the powers of their Act, a piece of land on which was a stable. By the conveyance to the co. the premises were granted together

with all "rights, & appurtenances to the hereditaments belonging or occupied or enjoyed as part or parcel thereof." The vendor had many years previously made a private road from the highway to the stable over his own land for his own convenience & had used it ever since. The soil of this road was not conveyed to the co. & no express mention of it was made in the conveyance. *Pltf.* refused to allow the co. to use the road:—*Held*: (1) notwithstanding the unity of possession of the stables & the private road at the date of the conveyance to the co., a right of way passed to the co. under the general words in the conveyance; (2) the fact of the stable having been purchased by a railway co. for the purposes of their undertaking did not preclude them from claiming the right of way so long as they used the premises as a stable, which they might lawfully do till such time as they were required for the special purposes of the railway, or were sold as superfluous land. *Qu.*: whether the railway co. would be entitled to claim the right of way after they had ceased to use the premises as a stable, & had converted them to some purpose connected with the railway.—*BAYLEY v. GREAT WESTERN RY. CO.* (1884), 26 Ch. D. 434; 51 L. T. 337, C. A.

*Annotations*:—*As to* (1) *Consd. Brown v. Alabaster* (1887), 37 Ch. D. 490; *Re Peck & London School Board's Contract*, [1893] 2 Ch. 315. *Apld. May v. Belloyville*, [1905] 2 Ch. 605. *Consd. Schwann v. Cotton*, [1916] 2 Ch. 120. *Reid. Broomfield v. Williams*, [1897] 1 Ch. 602. *Althusen v. Kalling & South Harrow Ry.* (1898), 78 L. T. 285; *Titchmarsh v. Royston Water Co.* (1899), 81 L. T. 673; *Re Walmsley & Shaw's Contract*, [1917] 1 Ch. 93; *Long v. Gowllett*, [1923] 2 Ch. 177. *As to* (2) *Distd. A-G v. Teddington U. C.*, [1898] 1 Ch. 66. *Reid. Foster v. L. C. & D. Ry.* (1894), 71 L. T. 855; *Milner's Safe Co. v. G. N. & City Ry.*, [1907] 1 Ch. 208.

179. "Heretofore held or enjoyed"—*Way.*—*ROE v. SIDMONS*, No. 53, *ante*.

**Reservations in conditions of sale.**—*See SALE OF LAND.*

### C. Effect of Conveyancing Act, 1881.

*See Conveyancing Act, 1881 (c. 41), s. 6.*

180. **Whether Act excluded—Adjoining land already contracted to be sold.**—The owner, subject to a mtge. in fee, of a house & a plot of land adjoining, first leased the house, then contracted to sell the land to deft. & afterwards contracted to sell the house subject to the lease to a person under whom pltf. claimed. The next step was a conveyance of the house by the owner & his mtgee. to pltf. subject to the lease which was followed by a conveyance, also by the owner & his mtgee., of the land to deft. *Pltf.* subsequently recovered possession of the house from the lessee for breach of covenant:—*Held*: no grant of light to the house could be implied over land which the owner had contracted to sell before the sale or conveyance of the house & sect. 6 (2) of the above Act did not apply.—*BEDDINGTON v. ATLEE* (1887), 35 Ch. D. 317; 56 L. J. Ch. 655; 56 L. T. 514; 51 J. P. 484; 35 W. R. 799; 3 T. L. R. 303.

*Annotations*:—*Reid. Birmingham, Dudley & District Banking Co. v. Ross* (1888), 38 Ch. D. 295; *Phillips v. Low*, [1892] 1 Ch. 47; *Quicke v. Chapman*, [1903] 1 Ch. 659; *Hansford v. Jago*, [1921] 1 Ch. 322. *Mentd. List v. Tharp*, [1897] 1 Ch. 260.

181. ———— **Contrary intention—Insertion of particular words limiting rights conveyed.**—*BIRMINGHAM, DUDLEY & DISTRICT BANKING CO. v. ROSS*, No. 201, *post*.

182. ———— **Compulsory sale—Notice to treat**

8 A. II. 707.—**CAN.**

**PART III. SECT. 1, SUB-SECT. 6.—C.**  
*d. Easements passing under Act—Specific reference to one right—Whether other rights excluded.*—*Specific refer.*

of way to cross my land from the highway to the land owned by S., to have & to hold the aforesaid lands & premises with the appurtenances unto & to the use of S., his heirs & assigns forever":—*Held*: the words employed

in the deed were sufficient to pass the interest intended, & that the right of way was thereby made appurtenant to all the lands of S. there situated; not merely to that so conveyed by C.—*SAYLOR v. COOPER* (1883), 2 O. R. 398;

*Sec. 1.—By express grant: Sub-sect. 6, C.]*

**not including easements.]**—The London School Board gave *pltf.* notice to treat for "the land & premises in the schedule with the appurtenances." *Pltf.* had used a way from the premises purchased over other land of his own to a main road, but such way was not a way of necessity, nor was it a marked way, or a metalled road, being merely across a piece of grass land. It would, however, have passed under such general words as "ways at the time of conveyance occupied or enjoyed with" the lands sold. The vendors claimed to limit the general words, including the above, which would be imported by *sect. 6, sub-sects. 1 & 2* of the above Act, unless limited under *sect. 6, sub-sect. 4*, contending that they had not sold any such right of way, nor in fact, had the notice to treat included such easement, though it was within the powers of the board to purchase it. The School Board contended that unless expressly excluded by the contract they were entitled of right to the full general words:—*Held*: they were entitled to exclude from the conveyance the general words implied in a conveyance of land by the above Act, so as to prevent the purchaser from acquiring the right to use the way as one "enjoyed with or reputed as appurtenant to" the land & buildings conveyed.—*Re PECK & LONDON SCHOOL BOARD'S CONTRACT*, [1893] 2 Ch. 315; 62 L. J. Ch. 598; 68 L. T. 847; 41 W. R. 388; 3 R. 511; *sub nom.* *PECK v. LONDON SCHOOL BOARD*, 37 Sol. Jo. 372.

*Annotations*:—*Fold.* *Re Walmsley & Shaw's Contract*, [1917] 1 Ch. 93. *Consd.* *Re Lync-Stephens & Scott-Miller's Contract*, [1920] 1 C. 472. *Reid.* *Nicholls v. Nicholls* (1899), 81 L. T. 811; *Schwann v. Cotton*, [1916] 2 Ch. 120.

**183. ——— Adjoining land described as building land.]**—In a conveyance of a house the description of adjoining land belonging to the grantor as "building land" does not show a "contrary intention" within *sect. 6 (4)* of the above Act so as to exclude the grantee's right to light under *sect. 6 (2)*. The grantee of a house has a *prima facie* right to light as against his grantor, & the burden of showing that that right is limited or restricted lies on the grantor.—*BROOMFIELD v. WILLIAMS*, [1897] 1 Ch. 602; 66 L. J. Ch. 305; 76 L. T. 243; 45 W. R. 469; 13 T. L. R. 278; 41 Sol. Jo. 348, C. A.

*Annotations*:—*Apld.* *Pollard v. Gare*, [1901] 1 Ch. 834. *Fold.* *Quicke v. Chapman* (1902), 71 L. J. Ch. 879. *Distd.* *Long v. Gowlott*, [1923] 2 Ch. 177. *Reid.* *Godwin v. Schweppes*, [1902] 1 Ch. 926. *Mentd.* *Mappin v. Liberty*, [1903] 1 Ch. 118.

**184. ——— ———.]**—Where a landowner contracts to grant a lease of a vacant piece of land when a house of a specified character is built thereon, & accordingly a house is built & a lease of the house & land is granted, the doctrine that a grantor cannot derogate from his own grant must be applied, not to the vacant piece of land, but to the land with the house on it according to the contract, which must be taken for this purpose to have been fulfilled. If the land forms part of a building estate, & the contract is entered into by reference to a plan in which the estate is marked out in building plots, with a building line marked on the plan so as to extend through all the plots, including the land which is the subject of the contract, the application of the doctrine is not thereby limited or restricted, & in the absence of further evidence of the existence of a building

scheme or of any reservation of right to the grantor, the purchaser from him of an adjoining plot will be restrained from building on his land so as to interfere with the access of light to the house as theretofore enjoyed.

It is inconceivable to me that, whatever effect the agreement might have had in fixing the rights of the parties, the words of the statute ought not to be read into that conveyance. It seems to me impossible to say that you shall not import into the conveyance words which the statute has enacted shall be imported into it. There is clearly no intention to the contrary (*KEKEWICH, J.*).—*POLLARD v. GARE*, [1901] 1 Ch. 834; 70 L. J. Ch. 404; 84 L. T. 352; 65 J. P. 264.

**185. ——— ———.]**—A purchaser agreed to purchase "the following land & buildings, material, etc." In the contract the property was described, but there was no mention of any right of way. There was a cart track leading to the premises over the vendor's land which had been used for carting coal, etc., to the premises:—*Held*: the purchaser was not entitled to have an express grant of way inserted in his conveyance, & the operation of *sect. 6* of the above Act must be excluded.—*Re WALMSLEY & SHAW'S CONTRACT*, [1917] 1 Ch. 93; 86 L. J. Ch. 120; 115 L. T. 670; 61 Sol. Jo. 86.

**186. ——— Appurtenances.]**—*HANSFORD v. JAGO*, No. 282, *post*.

**187. What words will pass easements—Sale by auction.]**—Property was put up for sale in lots, & it was stated in the conditions that it was sold "subject to all rights of way & water & other easements," but there was no other mention of easements. Lot 2 was sold, but Lot 1 remained in the hands of the vendors:—*Held*: the purchaser of Lot 2 was not entitled to have the conveyance in such a form as would give him the benefit of the general words as to right of way, etc., in *sect. 6* of the above Act, but the vendors were entitled to limit the generality of those words.—*Re HUGHES & ASHLEY'S CONTRACT*, [1900] 2 Ch. 595; 69 L. J. Ch. 741; 83 L. T. 390; 49 W. R. 67; 44 Sol. Jo. 624, C. A.

**188. Easements passing under Act—Easement not obvious or apparent.]**—By an agreement made Nov. 27, 1897, a farm was let to *pltf.* on a yearly tenancy. *Pltf.* prior to signing the agreement was aware that on Jan. 5, 1896, *defts.* had agreed to purchase six acres forming part of the farm, & on June 25, 1898, the piece of land was conveyed to *defts.* The piece of land was bounded on two sides by the farm land, on one side by a private road leading to the farmhouse, & on the fourth by the public road. There was no gate or opening to the piece of land from either road, & the public road was in a deep cutting about 20 ft. below the piece of land:—*Held*: (1) the way over the private road was not obvious & apparent, & did not pass to *defts.* under the general words imported into the conveyance by the above Act, there being no gate or opening into *defts.* land; (2) the way was not a way of necessity because the *defts.* could, though at some expense, cut a way from the public road.—*TITCHMARSH v. ROYSTON WATER CO., LTD.* (1899), 81 L. T. 673; 64 J. P. 56; 48 W. R. 201; 44 Sol. Jo. 101.

**189. ——— Precarious easement.]**—(1) A water-course, constructed for the purpose of a mill, is constructed for a temporary purpose.

(2) A precarious easement is unknown to the law.

ences in a lease to a grant or reservation of one particular right does not preclude the implication under Conveyancing Act, 1881, s. 6 (2), of the

grant or reservation of other rights; for the mere inclusion in a deed of one or more such rights is not sufficient to express a contrary intention under

*sect. 6 (4)* to exclude the operation of *sect. 6 (2)*.—*STERLE v. MORROW* (1923), 57 L. T. 89.—*IR.*

(3) The owner of an ancient mill & a farm, the cattle whereof were to some extent watered at an ancient watercourse diverted from a natural stream, & running on the mill property alongside the farm, but constructed & maintained solely for the purpose of the mill, conveyed the farm to a purchaser without mentioning any water right:—*Held*: having regard to the special temporary purpose for which the watercourse was constructed, the expense of maintaining it, & the fact that it lay entirely on the mill property, the purchaser had acquired no right, either by implied grant or under the general words of sect. 6 of the above Act, to have it continued for his benefit, & the watercourse being therefore precarious, he could have no right to the use of the water therein.—*BUTROWS v. LANG*, [1901] 2 Ch. 502; 70 L. J. Ch. 607; 84 L. T. 623; 49 W. R. 564; 17 T. L. R. 514; 45 Sol. Jo. 536.

*Annotations*:—As to (2) *Distd. International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165; *Key v. Neath R. D. C.* (1905), 93 L. T. 507; *Whitmores (Edenbridge) v. Stanford*, [1909] 1 Ch. 427; *Schwann v. Cotton*, [1916] 2 Ch. 120. *Reid. Lewis v. Meredith*, [1913] 1 Ch. 571.

190. — *Light reasonably expected to continue*.—(1) A grantee of a new house is not entitled to all the light actually falling on the windows of the house, where that would be inconsistent with the intention to be implied from the circumstances existing at the time of the grant & known to the grantee, as, for instance, where such circumstances show an intention on the part of the grantor to erect buildings on the adjoining land which would interfere with the right to light claimed.

(2) The expression "lights enjoyed" in sect. 6, sub-sect. 2 of the above Act, is confined to the light enjoyed under such circumstances as would reasonably & properly lead to an expectation that the enjoyment of that light would be continued.—*GODWIN v. SCHWEPFES, LTD.*, [1902] 1 Ch. 926; 71 L. J. Ch. 438; 86 L. T. 377; 50 W. R. 409.

*Annotations*:—As to (1) *Consd. Quicke v. Chapman*, [1903] 1 Ch. 659. *Reid. International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165; *Fear v. Morgan*, [1906] 2 Ch. 406; *Westwood v. Heywood*, [1921] 2 Ch. 130.

191. — *Easement incapable of express grant*.—(1) By a building agreement between the Ecclesiastical Comrs. & deft. the right was given to him to enter upon a piece of land belonging to them for the purpose of erecting a number of houses upon it. As each house should be erected & completed to the satisfaction of the comrs. they agreed to grant a lease of it to deft. for 99 years. The lease was to be in a specified form, one of the clauses in which provided that the Comrs. should have power to erect on the land adjoining the demised land any buildings whatsoever, whether they should or should not affect or diminish the light enjoyed by the lessee. It was also provided by the agreement that nothing therein contained should be deemed to operate as an actual demise of the land to deft., or to create as between him & the comrs. the relation of tenant & landlord. On one of the plots deft. erected a house (No. 28), & the comrs. granted to him a lease of that house in the specified form. Dft. sold that house to pltf., & transferred the lease of it to them. He afterwards erected on an adjoining plot a house (No. 30) which when completed obstructed the access of light to some of the windows of pltf.'s house. They brought an action against deft. claiming an injunction & damages:—*Held*: at the time when deft. transferred the lease of No. 28 to pltf., he had not under the building agreement such an interest in the adjoining plot (No. 30), as would enable him to make an express grant of an easement of light over it, & conse-

quently no such grant by him could be implied; (2) the provision of sect. 6, sub-sect. 2 of the above Act, that a conveyance of land with houses on it shall operate to convey with the land (*inter alia*) all lights appertaining to the land or enjoyed therewith, applies only to such lights as the grantor could grant by express words, & does not operate to convey an easement of light which he has no power to grant expressly.—*QUICKE v. CHAPMAN*, [1903] 1 Ch. 659; 72 L. J. Ch. 373; 88 L. T. 610; 51 W. R. 452; 19 T. L. R. 281, C. A.

*Annotations*:—As to (1) *Apld. "Financial Times" v. Bell* (1903), 19 T. L. R. 433. *Distd. Westwood v. Heywood*, [1921] 2 Ch. 130. *Reid. Cable v. Bryant*, [1908] 1 Ch. 259; *Abbey v. Gutters* (1911), 55 Sol. Jo. 364.

192. — — — — — *"FINANCIAL TIMES," LTD. v. BELL* (1903), 19 T. L. R. 433.

193. — *Rights enjoyed de facto*.—The general words incorporated by the above Act in every conveyance not expressing a contrary intention, will pass to the purchaser all ways actually used by him at the date of the conveyance, though used only by permission of the vendor.

Dft. was the owner of two houses adjoining each other, one in his own occupation, the other held by pltf. co. under a lease from deft., & occupied by their managers & servants carrying on their business. The houses were separated by a roadway leading to & forming part of deft.'s yard. By permission of deft., renewed from time to time to successive managers, pltf.'s servants & their predecessors in title had used in business hours a way across the yard to a door opening thereon in the back part of their premises for all purposes of their business. The entrance to the yard was closed by wooden doors, which were always locked by deft. at night, & he kept sole control of the key. Dft. sold to pltf. co. the house leased to them, & conveyed it by a deed containing no general words or reference to any right of way:—*Held*: such a right of way as pltf. had actually enjoyed at the date of the deed passed to them by virtue of the general words inserted in the deed by the above Act, though the enjoyment was wholly permissive & precarious.—*INTERNATIONAL TEA STORES CO. v. HOBBS*, [1903] 2 Ch. 165; 72 L. J. Ch. 543; 88 L. T. 725; 51 W. R. 615. *Annotations*:—*Apld. Lewis v. Meredith*, [1913] 1 Ch. 571; *White v. Williams*, [1922] 1 K. B. 727.

194. — — — — — *Pltf. was the owner of land & buildings including a fellmonger's yard in the occupation of a tenant, bounded on the east side by a river. Between the river & the yard was an open conduit running parallel with the river down to a culvert by which it was carried to deft.'s mill lower down. The premises now owned by pltf. & deft. had been in the ownership of the same person from 1779 until 1907, when pltf. purchased his present holding, while the mill was sold to deft.'s predecessor. According to the evidence, for a long period before 1907 the occupants of the fellmonger's yard had used the water in the conduit for the purposes of their business, but the repairs to the conduit had been carried out by the occupier of the mill, who had diverted the flow of water when necessary for that purpose. The conveyance to pltf. made no mention of any water right, but the mill was conveyed to deft.'s predecessors "with the full right & benefit of passage & running of water to the mill & premises as is now & heretofore used & enjoyed therewith":—*Held*: pltf. was entitled to a right of user of the conduit as enjoyed prior to the conveyance to him in 1907, such right, although permissive at the date of the grant, having become a legal right by virtue of the general words of sect. 6 of the*

*Sect. 1.—By express grant: Sub-sect. 6, C.; sub-sect. 7. Sect. 2: Sub-sect. 1, A. & B.]*

above Act.—*LEWIS v. MEREDITH*, [1913] 1 Ch. 571; 82 L. J. Ch. 255; 108 L. T. 549.

195. ———.]—A former owner of two farms D. & S. laid a pipe conveying water from S., the quasi-servient tenement, to D., the quasi-dominant tenement. In 1908 the then common owner let D. to W. on a year-to-year tenancy, & in 1911 he let S. to deft. on a similar tenancy. The tenancy agreements did not mention water rights:—*Held*: (1) W.'s agreement passed the water right by implication & involved an implied reservation in deft.'s agreement. In June, 1915, the owner conveyed to D. pltf. In Sept. 1915, W.'s tenancy expired. In Oct. 1915, the owner conveyed S. to deft., whose tenancy was still on foot. Neither of these conveyances mentioned any water rights:—*Held*: (2) the implied reservation in deft.'s agreement was not confined to W.'s tenancy but enabled the owner to grant an immediate water right to pltf. without derogating from deft.'s agreement; this water right passed under the general words of sect. 6 of the above Act; (3) even if there had been no such implied reservation in deft.'s tenancy agreement, the implied grant of water right would have bound the S. reversion subject to that agreement; (4) in any case deft. could no longer rely on his tenancy agreement, as he had shown an intention to acquire the fee in lieu of his tenancy, which was therefore merged. *Semble*: a tenancy from year to year cannot be kept on foot in perpetuity by a tenant who acquires the fee.—*WESTWOOD v. HEYWOOD*, [1921] 2 Ch. 130; 90 L. J. Ch. 515; 125 L. T. 761; 37 T. L. R. 851; 65 Sol. Jo. 753.

196. ———.]—Where land in common ownership is sold contemporaneously in lots to two purchasers, a right for one purchaser to go on the land of the other to clear a mill stream & repair its banks, there being no visible path or other sign of such user, will not pass by virtue of the words implied in the conveyance to him under sect. 6, sub-sect. 2, of the above Act, unless there has been before the severance of ownership a *de facto* enjoyment of the right, however precarious, by the occupier of that part of the land altogether apart from the ownership or occupation of the other part.—*LONG v. GOWLETT*, [1923] 2 Ch. 177; 92 L. J. Ch. 530; 130 L. T. 83; 22 L. G. R. 214.

#### SUB-SECT. 7.—DURATION OF GRANT.

197. May be for less than estate in fee simple—*Term of years.*]—A. being seised of an ancient mill, together with a stream of water diverted out of a river, & flowing thence to her mill, & B. being possessed of other mills, together with a stream of water diverted out of the same river, above the stream of A., by means of a head weir, & flowing thence through the lands of A. down to B.'s mills, as appurtenant to the same, B. erected upon other lands below the lands of A., & near the watercourse, two other mills, whereby it becoming necessary for B. to have a larger supply of water, he widened & deepened his watercourse in the soil of A., & raised & heightened the head weir, & thereby diverted the greatest part of the water into the watercourse for the use of his mills, so that the water was prevented from flowing down to the mill of A. so copiously as it had formerly

done, & thereby A.'s mill became of no use. A. having recovered damages in one action against B. on this account, & having afterwards brought a second action for subsequent damages, in order to prevent all further disputes, B. agreed to take a grant from A. of the use & benefit of the watercourse so widened & deepened, & of the liberty of diverting the water out of the river. By lease reciting these facts, A., in consideration of £1,500 paid by B., demised to B. the use of the watercourse so widened & deepened as aforesaid, & the free liberty of diverting so much of the water of the river into & along the watercourse as should be necessary for the use of B.'s mills, *habendum* for the use of 99 years, if three persons therein named should so long live, at an annual rent. Soon after the execution of this deed A.'s mill was destroyed. B., or those claiming under him, continued to enjoy the watercourse & the use of the water during the term, & paid the rent. The lease having determined by the death of the last surviving *cestui que vie*, the person claiming under the grantee continued to enjoy the watercourse in the manner described in the grant, & paid rent for it:—*Held*: the reversion in the lands, upon which A.'s mill formerly stood, having vested in C., the latter might maintain *indebitatus assumpsit* for the use & occupation of the watercourse & the water running therein, against the persons who claimed under B.—*DAVIS v. MORGAN* (1825), 4 B. & C. 8; 6 Dow. & Ry. K. B. 42; 107 E. R. 962.

198. ———.]—*BOOTH v. ALCOCK*, No. 95, *ante*.

199. ———.]—*Uncertain term.*—(1) In a lease for 95 years, a right of way over the demised premises was reserved to the lessor & his heirs, so long as they should retain adjoining lands held in fee, & after he or they should alienate such adjoining lands then reserving to the lessor, his heirs & assigns, a different right:—*Held*: the reservations were valid, & on alienation of the freeholds, the right of way ceased.

(2) Defts., guardians of the poor, wrongfully claiming a right of way to their relieving office over pltf.'s lands, inviting paupers to come that way for relief; the trespass by the paupers causing serious injury to pltf's, an injunction was granted to restrain the guardians, "their servants, workmen & agents," from trespassing.

(3) In considering the injury, the possible as well as the actual use of the injured premises will be regarded.—*ARDLEY v. ST. PANCRAS GUARDIANS* (1870), 39 L. J. Ch. 871.

200. ———.]—*Life estate.*]—A testator in 1830, before Wills Act, 1837 (c. 26), devised one field to P. & another to H., both adjoining, & added that H. should have the privilege or right of road for coals & dung, & necessary things, through a certain gate in P.'s field to the kitchen & garden. The way was the only access for carts & horses to H.'s field, & H. used it for bricks & hay:—*Held*: this was the grant only of a personal privilege for H.'s life, & did not pass to his assigns.—*PYM v. HARRISON* (1876), 33 L. T. 790; 40 J. P. 375, C. A.; *revers.* S. C. *sub nom.* *PYNE v. HARRISON* (1875), 40 J. P. 21.

#### SECT. 2.—BY IMPLICATION OF LAW.

##### SUB-SECT. 1.—DISPOSITIONS BY COMMON OWNER.

###### A. In General.

201. Easements will be implied—*Though servient tenement in lease.*]—A., the owner of two

#### PART III. SECT. 2, SUB-SECT. 1.—A.

*• Easement will be implied—  
Though servient tenement conveyed with-*

*out reservation.*]—T., being owner of 275 acres of land, caused a mill dam & race to be constructed & a mill to be erected thereon. For thirty or forty

years this mill, or others built on its site run by water power only, had existed, & were run by the water passing from a natural stream through the

adjoining houses, granted a lease of one of them to B. He afterwards leased the other to C., there then existing in it certain windows. After this B. accepted a new lease of his house from A.:—*Held*: B. could not alter his tenement so as to obstruct windows existing in C.'s house at the time of C.'s lease from A., though the windows were not twenty years old at the time of the alteration.—*COUTTS v. GORHAM* (1829), *Mood. & M.* 396, N. P.

*Annotations*.—*Fold. Cable v. Bryant*, [1908] 1 Ch. 259. *Refd. Robson v. Edwards* (1893), 62 L. J. Ch. 378; *Westwood v. Heywood*, [1921] 2 Ch. 130.

202. ———.]—(1) Where the owner of ancient lights, adds new lights, the owner of the adjoining land has a right to obstruct the new lights, & if necessary for that purpose, to obstruct the ancient lights also.

(2) The landlord of two adjoining houses granted a lease of one of the houses in consideration of the lessee making certain alterations, & in particular of his adding additional windows. The lessee of the adjoining house afterwards surrendered his lease & took a new lease of the premises:—*Held*: he was not entitled to obstruct the light of the new windows.—*DAVIES v. MARSHALL* (No. 1) (1801), 1 Drew. & Sm. 557; 4 L. T. 105; 25 J. P. 548; 7 Jur. N. S. 720; 9 W. R. 368.

*Annotations*.—*As to* (1) *Refd. Jones v. Taping* (1861), 11 C. B. N. S. 283. *As to* (2) *Apld. Cable v. Bryant*, [1908] 1 Ch. 259. *Refd. Westwood v. Heywood*, [1921] 2 Ch. 130.

203. ———.]—*CABLE v. BRYANT*, No. 1256, *post*.

204. ——— *Though dominant tenement in lease.*

—The implication of a grant of easements of a continuous & apparent character upon the alienation to different persons of tenements previously in the ownership of the same person is not prevented by the fact that the dominant tenement at the time of the alienation is in lease & consequently not in the possession of the alienor.

(2) There being a right to the access of light to windows in the walls of certain cottages, the walls of some of the cottages were set back & windows made in the new walls of the same size, & in the same relative positions as the former windows in the former walls:—*Held*: the easement of light was not thereby destroyed.

(3) In the case of another of the cottages the occupier made an addition thereto, & for the purpose of so doing built a new wall with a window in it outside the old wall & window at a different angle, but the old window remained inside the new one, & still continued to receive the light:—*Held*: the right to the access of light to the old window was not destroyed.

(4) If the alteration in a dominant tenement, or in the mode of using an easement, is not of such a nature that the tenement is substantially changed, or the burden on the servient tenement materially increased, an easement is not destroyed in consequence of the alteration (*LOPES, J.*).—*BARNES v. LOACH* (1879), 4 Q. B. D. 494; 48 L. J. Q. B. 756; 41 L. T. 278; 43 J. P. 817; 28 W. R. 32, D. C.

*Annotations*.—*As to* (1) *Apld. Phillips v. Low*, [1921] 1 Ch. 47. *Refd. Milner's Safe Co. v. G. N. & City Ltd.*, [1907] 1 Ch. 208. *As to* (2) *Consd. Scott v. Pape* (1886), 31 Ch. D. 554. *As to* (3) *Consd. Scott v. Pape* (1886), 31 Ch. D. 554.

race. T. sold to W. the whole property, taking back a mtge. for part of the purchase money, on that part of the land through which the race ran, & on which the mill dam was situated, excepting, however, the mill site. The mill could not be supplied with water power otherwise than by the race running through the mortgaged premises. T. afterwards assigned the mtge. to the plff., & W. mortgaged the

mill & mill site to D.:—*Held*: the right to use the dam & mill race was a necessary, continuous, & permanent easement, & could not be destroyed by plff., although the servient parcel had been first conveyed without any express reservation of such easement.—*YOUNG v. WILSON* (1874), 21 Gr. 144, 611.—*CAN.*

f. ———.]—Where the owner of two

205. *Conveyance by mortgagee selling under statutory powers.*—(1) Though a mtgee. when selling under the statutory power of sale has not the same full power over the property as an absolute owner, he can convey the property to a purchaser with all the legal incidents accompanying the grant, & on a sale of part of the property comprised in the mtge., can give to the purchaser thereof an implied easement of light over the unsold portion.

(2) In an action for an injunction against an adjoining owner & his builder to restrain an interference with light & for trespass, the builder severed in his defence from his employer & appeared separately at the trial, when an injunction was granted with costs against deft. the adjoining owner:—*Held*: under the circumstances, the builder was entitled to complete indemnity, & to an order for the payment of his solr. & client costs by his co-deft.

(3) The sale being of a garden, with a viney upon it, the purchaser acquired at the same time a right to the access of light to this viney over the land retained by the mtgee. (*BYRNE, J.*).—*BORN v. TURNER*, [1900] 2 Ch. 211; 69 L. J. Ch. 593; 83 L. T. 148; 48 W. R. 697; 44 Sol. Jo. 502.

*B. Implied Reservations in Favour of Grantor.*

*Reservations & exceptions of easements generally.*—*See* Sect. 1, sub-sect. 4, *ante*.

206. *Whether reservation will be implied—General rule.*—*Held*: in a lease & conveyance there was, in the circumstances of the case, no implied reservation of a right of way.

It is impossible . . . to contend that an implied reservation can arise upon a conveyance by deed unless there is some very cogent necessity for such an implication such as arises where the easement claimed by way of reservation is either one without which there could be no enjoyment of some property of the grantor retained in his hands as in the case of a way of necessity, or when the subject of the grant . . . is such that it can hardly be supposed that either party did not contemplate the enjoyment by the grantor of an easement reciprocal to one granted (*WILLS, J.*).—*GORDON v. OGILVIE* (1890), 15 T. L. R. 230.

207. ——— *Way.*—*DRELL v. BATHORPE* (1503), *Cro. Eliz.* 300; 78 E. R. 553.

*Annotation*.—*Refd. Derry v. Sanders*, [1919] 1 K. B. 223.

208. ———.]—*THOMAS v. OWEN*, No. 106, *ante*.

209. ——— *Apparent & continuous easement.*—*Testatrix* was the owner of two adjoining houses, A. & B., which were situate back to back. There was a passage leading from house A., which testatrix occupied, through house B., which she let, to a street; & she used this passage, which was not a way of necessity, from time to time but not continuously, as a way to the street. In 1882 she mortgaged house B. without reserving any right of way through this passage; & she died in 1886, having by her will, dated in the same year, devised house A. to plff.'s predecessor in title, & house B. to deft.; the will contained no words descriptive of or appropriate to any right

adjoining lots of land conveys one of them, he impliedly grants all those conditions & apparent easements, including rights of drainage & aqueduct, over the other lot which are necessary for the reasonable use of the property granted, & which are at the time of the grant used by the owner of the entirety for the benefit of the part granted.—*ISAAC v. LEITH* (1891), 20 O. R. 361.—*CAN.*

**Sect. 2.—By implication of law: Sub-sect. 1, B.]**

of way through the passage. At the death of testatrix the mtge. was still subsisting; but after her death deft. paid off the mtge. on house B., & took a reconveyance of the property comprised in the mtge. Pltf. having brought an action to recover damages from deft. for trespass in stopping up the passage & preventing its user by pltf.:—**Held:** (1) as no right of way was reserved by the mtge., & the way through the passage was not a way of necessity, all right of way through the passage was extinguished by the mtge.; (2) no right of way through the passage passed to pltf.'s predecessor in title under the will, & accordingly on both these grounds the action was not maintainable.—**TAWES v. KNOWLES**, [1891] 2 Q. B. 564; 60 L. J. Q. B. 641; 65 L. T. 124; 56 J. P. 68; *sub nom.* **TAWES v. KNOWLES**, 39 W. R. 675, C. A.

**210. ——— Intention presumed from circumstance of grant.]—CORY v. DAVIES**, No. 139, *ante*.

**211. ——— Light.]—COX v. MATTHEWS** (1673), 1 Vent. 239; 3 Keb. 133; 86 E. R. 160.

**Annotations:—Folld.** Swansborough v. Coventry (1832), 9 Bing. 303. **Refd.** Wheeldon v. Burrows (1879), 12 Ch. D. 31. **Mentd.** Mason v. Hill (1833), 5 B. & Ad. 1.

**212. ———.]—Where the owner of two adjacent premises sells one of them there is no implied reservation of a right to light & air in the other.—CURRIERS' Co. v. CORBETT** (1865), 2 Drew. & Sm. 355; 5 New Rep. 458; 12 L. T. 109; 29 J. P. 469; 13 W. R. 538; 62 J. R. 656; *on appeal*, 4 De G. J. & Sm. 764, L. J.

**Annotations:—Folld.** Ellis v. Manchester Carriage Co. (1876), 2 C. P. D. 13. **Consd.** Warner v. McBryde (1877), 36 L. T. 360; Wheeldon v. Burrows (1879), 12 Ch. D. 31; Birmingham, Dudley & District Banking Co. v. Ross (1888), 38 Ch. D. 295. **Mentd.** Robson v. Whittingham (1860), 1 Ch. App. 442; Senior v. Pawson (1866), L. R. 3 Eq. 330; Heath v. Bucknall (1869), L. R. 8 Eq. 1; Aynsley v. Glover (1874), L. R. 18 Eq. 544; Smith v. Smith (1875), L. R. 20 Eq. 500; Stanley of Alderley v. Shrewsbury (1875), L. R. 19 Eq. 616; Kino v. Rudkin (1877), 6 Ch. D. 160; National Provincial Plate Glass Insco. v. Prudential Assee. (1877), 6 Ch. D. 757; Holland v. Worley (1884), 26 Ch. D. 578; Colls v. Home & Colonial Stores, [1904] A. C. 179.

**213. ———.]—In 1855, the owners in fee of a house & adjoining land, granted to trustees a lease of the land for 99 years, & they covenanted to build upon it according to a certain plan. In 1856, the owners conveyed the reversion in fee of the land to the trustees. In 1857, the owners conveyed the house in fee to a person under whom pltf. obtained possession. Deft. subsequently, with the authority of the trustees, built upon the land so as to obstruct the light & air, which for upwards of twenty years had come to the windows of pltf.'s house. If he had built according to the plan in the lease the obstruction would not have been to the same extent. Until the lease was granted there had never been any severance either in the title to or possession or occupancy of the land & house, & the same had been occupied & used together by the proprietors thereof for upwards of fifty years:—**Held:** pltf. could maintain no action against deft. for building on the land so as to obstruct the light & air which formerly came to the windows of pltf.'s house.—**WHITE v. BASS** (1862), 7 H. & N. 722; 31 L. J. Ex. 283; 5 L. T. 843; 26 J. P. 694; 8 Jur. N. S. 312; 158 E. R. 660.**

**Annotations:—Folld.** Ellis v. Manchester Carriage Co. (1876), 2 C. P. D. 13; Wheeldon v. Burrows (1879), 12 Ch. D. 31.

**214. ———.]—Upon a general conveyance of lands, there is no implied grant, by the purchaser of the easement of light necessary for the**

enjoyment of an adjacent house of the vendor. In 1867 pltf. bought houses in M., the backs of which abutted on a street or way on the opposite side of which were certain cottages. In 1867, he purchased these cottages but by a different title. Both sets of premises had existed in their then state for more than twenty years. In 1870, pltf. sold the cottages to D. & ultimately D.'s interest therein became vested in defts., who pulled down the cottages & erected a large building upon the site of them, & also upon a portion of the intervening street or way, & so obstructed the light to pltf.'s windows. The conveyance to D. contained no reservation of any easement to pltf.'s houses; & it professed to convey the land up to the back wall of pltf.'s premises:—**Held:** notwithstanding pltf.'s houses had acquired an absolute & indefeasible right to light at the time of the conveyance of the cottages to D., inasmuch as that conveyance was without reservation, defts. were guilty of no wrongful obstruction of pltf.'s lights.—**ELLIS v. MANCHESTER CARRIAGE CO.** (1876), 2 C. P. D. 13; 35 L. T. 476; 25 W. R. 229.

**Annotations:—Appld.** Warner v. McBryde (1877), 36 L. T. 360. **Folld.** Wheeldon v. Burrows (1879), 12 Ch. D. 31. **Refd.** Barnes v. Loach (1879), 4 Q. B. D. 494.

**215. ———.]—By seven simultaneous leases seven plots of land, marked respectively A., B., C., D., E., F. & G. & forming together one square block, were demised by the owner to J. with a ground plan on each lease, & with covenants for the erection & maintenance of buildings upon each plot according to certain plans. The leases were granted with a view to the erection upon the whole block of one large edifice of which the several parts & the internal arrangements were to be connected together for a common use & occupation; so, however, as to be separable, if desired, into seven separate buildings. J. being in the occupation of the whole while the buildings were being erected, mortgaged C., F. & G., by a sub-lease which recited the building scheme & the original leases of C., F. & G., & contained stipulations for the completion of the buildings on C., F. & G. After the buildings had been substantially completed, J. mortgaged E. by a deed which recited the lease of E., & assigned the buildings thereon, subject to the covenants in the lease, to one who had notice of the general plan of the buildings. J. then mortgaged B. On J.'s bkpcy. the several mtgees. obtained foreclosure decrees in respect of B., C. & E., respectively:—**Held:** (1) though there was no express reservation of the right to light, yet looking at the plans, the covenants in the original leases, & the mtge. deeds, the mtgees. of C. & E. respectively were by reasonable implication precluded from interfering with the light to the windows in B. which looked out upon C. & E. respectively, & might be restrained accordingly in an action by the mtgee. of B.; (2) the mtgee. of B., could maintain such an action although he had surrendered the lease of B. & taken a fresh lease from the original lessor: for, without deciding what effect the merger of the original lease might have, whenever the lease of B. came to an end either by surrender, forfeiture or otherwise, the original lessor would have the same rights to light as the mtgee. would have had if the original lease had subsisted.**

(3) *Semble:* if on a sale & conveyance of land adjoining a house to be built by the vendor, it is mutually agreed that one of the outer walls of that house may stand wholly or partly within the verge of the land sold & shall have in it particular



windows opening upon & overlooking the land sold & if the house is erected accordingly, the purchaser cannot afterwards build upon the land sold so as to prevent or obstruct the access of light to those windows.—*RUSSELL v. WATTS* (1885), 10 App. Cas. 590; 55 L. J. Ch. 158; 53 L. T. 876; 50 J. P. 68; 34 W. R. 277, H. L.; *reversg.* (1883), 25 Ch. D. 559, C. A.

*Annotations*.—As to (1) *Reid*. Bayley v. G. W. Ry. (1884), 25 Ch. D. 434. As to (3) *Reid*. McMann v. Cooke (1887), 35 Ch. D. 681. *Generally*, *Reid*. Beddington v. Atlee (1887), 35 Ch. D. 317; Birmingham, Dudley & District Banking Co. v. Ross (1888), 38 Ch. D. 295. *Mentd*. Neaverson v. Peterborough R. D. C. (1902), 86 L. T. 738; Westhoughton U. C. v. Wigan Coal & Iron Co., [1919] 1 Ch. 159.

**216. — Use of drain.**—(1) Where the owner of two or more adjoining houses sells & conveys one of them to a purchaser, such house is entitled to the benefit & is subject to the burden of all existing drains communicating with the other house, without any express reservation or grant for that purpose.

Pltf.'s & deft.'s houses adjoined each other. They had formerly been one house & were converted into two by the owner of the whole property. Subsequently deft.'s house was conveyed to him, & after that pltf. took a conveyance of his house. At the times of these conveyances, a drain ran under pltf.'s house & thence under deft.'s, & discharged itself into the common sewer. Water from the caves of deft.'s house fell on pltf.'s house, & then ran into a drain on pltf.'s premises & thence through the drain into the common sewer. Pltf.'s house was drained through this drain:—*Held*: pltf. was, by implied grant, entitled to have the use of the drain as it was used at the time of deft.'s purchase of his house.

(2) It was urged that there could be no implied agreement unless the easement was apparent & continuous. Deft. stated he was not aware of this drain at the time of the conveyance to him; but it is clear that he must have known or ought to have known that some drainage then existed, & if he had inquired he would have known of this drain, . . . & we agree . . . that by "apparent signs" must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject (*WATSON, B.*).—*PYER v. CARTER* (1857), 1 H. & N. 916; 26 L. J. Ex. 258; 28 L. T. O. S. 371; 21 J. P. 247; 5 W. R. 371; 156 E. R. 1472.

*Annotations*.—As to (1) *Apprvd*. Ewart v. Cochrane (1861), 5 L. T. 1. *Distd*. Dodd v. Burrell (1862), 1 H. & C. 113. *Follid*. Hall v. Lund (1863), 1 H. & C. 676. *Apprvd*. Watts v. Kelton (1871), 6 Ch. App. 166. *N.F.* Wheelton v. Burrows (1879), 12 Ch. D. 31. *Consd*. Schwann v. Cotton, [1916] 2 Ch. 120. *Reid*. White v. Bass (1862), 31 L. J. Ex. 283; Pearson v. Spencer (1863), 3 H. & S. 761; Chadwick v. Marsden (1867), L. R. 2 Exch. 285. As to (2) *N.F.* Suffield v. Brown (1864), 4 De G. J. & Sm. 185. *Consd*. Crossley v. Lightowler (1867), 2 Ch. App. 478. *Appld*. Morland v. Cook (1868), L. R. 6 Eq. 252. *Reid*. Worthington v. Gimson (1860), 2 E. & E. 618; Polden v. Bastard (1865), L. R. 1 Q. B. 156. *Generally*, *Mentd*. Bunting v. Hicks (1894), 70 L. T. 455; P'lbrow v. St. Leonard, Shoreditch (1895), 72 L. T. 135.

**217. — Use of premises.**—A shop was demised by W. to M. as the same was late in the occupation of C. The shop was only one storey in height, & had a flat lead roof, to which there was access from an adjoining house through a glass door, but the house & shop were distinct tenements. On the occasion of the lease to C. he granted a licence to his lessor, to whom the adjoining house belonged, to use the roof as a flower-garden during the term. W. afterwards became the owner of the adjoining house & of the shops, & C.'s term in the shop was surrendered to him. W. then made the above lease of the shop to M.

& W. afterwards demised the adjoining house to L. with the right to use the roof of the shop & to erect a light building thereon. L. proceeded to erect a glass photographic house on the roof. M. filed his bill praying for an injunction to restrain L. from doing so:—*Held*: the demise to M. included the roof as well as every other part of the shop, & an injunction against L. was accordingly granted.—*MARTYR v. LAWRENCE* (1864), 2 De G. J. & Sm. 261; 4 New Rep. 312; 10 L. T. 677; 28 J. P. 580; 10 Jur. N. S. 858; 12 W. R. 1043; 46 E. R. 375, L. J. J.

*Annotation*.—*Reid*. Francis v. Hayward (1882), 20 Ch. D. 773.

**218. — Water.**—*BUNTING v. HICKS*, No. 55, *ante*.

**219. —**—*WESTWOOD v. HEYWOOD*, No. 195, *ante*.

**220. — Support.**—In 1797 a lease of two adjoining houses was granted ending in 1895. The houses were afterwards sublet separately, & in 1861 each was held under a sublease, which expired a few days before the headlease, the one by A. & the other by B. Up to that year neither house supported any part of the other. A., with the permission of B., had raised the wall between the gardens of the houses by about two feet, & in Oct. 1864 B. agreed to let A. maintain the wall during the remainder of the headlease less the last twenty days thereof in consideration of 5s. a year. In 1870 B.'s sublease having been assigned to C., he, with A.'s permission, built with beams into the wall, & A. agreed that C. might maintain & enjoy the wall during the remainder of the headlease less the last twenty days thereof, in consideration of 5s. a year. In 1871, A., without surrendering his sublease, obtained a new lease for 990 years, to be reckoned from that date, but, as regarded possession, to take effect from one day after the expiration of the subsisting headlease of 1797, *i.e.* 1895. In 1889 C. also obtained a long lease of his house framed in the same way. By the lease of 1871 the lessors reserved the mines & minerals under the demised property, but nothing further. A. thereby covenanted to keep up the value of the demised property, by maintaining & repairing the then existing house, or by rebuilding or improving it, or by erecting one or more other houses in lieu of it or in addition to it; & that he would not do anything which might tend to the annoyance or damage of the other tenants of adjoining land belonging to the lessors, including that which they afterwards let to C. Subsequently A.'s house became vested in pltf.s & C.'s house in deft. It was admitted that the lease of 1871 comprised the whole of the wall referred to in the agreements of 1864 & 1870; & since 1895, when the headlease of 1797 fell in & these agreements came to an end, the wall, treated in 1864 as B.'s, & the erection upon it had been pltf.s' for the rest of their present lease:—*Held*: the lease of 1871 contained no implied reservation on the ground of necessity nor upon any other principle, to the lessors of the right to have the adjoining house supported by pltf.s' wall; & therefore, deft. had not acquired any right to keep the ends of her beams in pltf.s' wall.—*HOWARTH v. ARMSTRONG* (1897), 77 L. T. 62; 13 T. L. R. 529, C. A.

**221. — Where interests in same hereditament**—*Light.*—Where the owner of a house divided it into two tenements, & let one of them:—*Held*: the lessee was liable to an action on the case for obstructing windows existing in the landlord's house at the time of the demise, though of recent

*Sect. 2.—By implication of law: Sub-sect. 1, B. & C.]*

construction, & though no stipulation was made against the obstruction.—*RIVIERE v. BOWER* (1824), Ry. & M. 24, N. P.

**222. ——— Support.]**—By the common law, where A. has two interests in the same hereditament, as houses or minerals, or a water-course & also a mill; or two stories in a house, & demises one part, *e.g.* the lower portion of a house, reserving to himself the upper part, the grantee either for years or in fee will not, except by express stipulation or very direct implication, be permitted to use the portion held by him so as to interfere with the enjoyment by the grantor of the portion which he has retained possession of.—*DUGDALE v. ROBERTSON* (1857), 3 K. & J. 695; 30 L. T. O. S. 52; 3 Jur. N. S. 687; 69 E. R. 1289.

*Annotations:—***Reid.** *Love v. Bell* (1884), 9 App. Cas. 286. **Mentl.** *Sharts v. Johnson* (1863), 8 B. & S. 252, n.; *Proud v. Bates* (1865), 6 New Rep. 92; *Wakefield v. Buccleuch* (1867), L. R. 4 Eq. 613; *Kadon v. Jeffcock* (1872), L. R. 7 Exch. 379; *Aspden v. Seddon* (1875), 44 L. J. Ch. 359; *Westmoreland v. New Sharlston Colliery Co.* (1898), 79 L. T. 716; *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557.

**223. ——— Easement of necessity — Support.]**—Where several houses belonging to the same owner are built together, so that each requires the mutual support of the neighbouring house, & the owner parts with one of the houses, the right to such mutual support is not thereby lost; the legal presumption being that the owner reserves to himself such right, & at the same time, grants to the new owner an equal right; & consequently, if the owner parts with several of the houses at different times, the possessors still enjoy the right to mutual support, the right being wholly independent of the question of the priority of their titles.

Where houses have been erected in common by the same owner upon a plot of ground, & therefore, necessarily requiring mutual support, there is, either by a presumed grant or by a presumed reservation, a right to such mutual support (*POLLACK, C.B.*).—**RICHARDS v. ROSE** (1853), 9 Exch. 218; 2 C. L. R. 311; 23 L. J. Ex. 3; 22 L. T. O. S. 104; 18 J. P. 56; 17 Jur. 1036; 156 E. R. 93.

*Annotations:—***Consd.** *Wheeldon v. Burrows* (1879), 12 Ch. D. 31. **Distd.** *Howarth v. Armstrong* (1897), 77 L. T. 62. **Apld.** *Jones v. Pritchard*, [1908] 1 Ch. 630. **Reid.** *Solomon v. Vintners' Co.* (1859), 4 H. & N. 585; *Suffield v. Brown* (1864), 4 De G. J. & Sm. 185; *Angus v. Dalton* (1878), 4 Q. B. D. 162; *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557; *Pwllbach Colliery Co. v. Woodman*, [1915] A. C. 634.

**224. ———]**—In every grant or lease by the owner of the surface & subjacent strata of land, either of the surface or of the subjacent strata, there is an implied provision that the surface owner shall have a right not to be damaged by the removal of such support from the subjacent strata as is necessary to support the surface in the condition in which it is at the time of the grant or lease, with the buildings thereon, if any.—**RICHARDS v. JENKINS** (1868), 18 L. T. 437; 17 W. R. 30.

**225. ———]**—Where the owner of a tenement severs the tenement & conveys away a portion thereof, upon which houses are erected, there is, upon such conveyance, an implied reservation of the right to the support of the houses from the adjoining portions of the tenement. That right is an easement of necessity, & neither the owner nor persons claiming under him are entitled to do acts upon the adjoining portions of the tenement so as to cause damage or injury to the houses.

Where an easement is in the nature of an easement of necessity, there is no need of an express reservation of such easement in a conveyance of the property to be affected by the easement; & such reservation is a matter of legal presumption to be implied from the nature of the transaction between the grantor & the grantee.

Pltfs. here had an "easement of necessity," for these houses were bound to be injured & let down by the action of deft. For such there was no need of an express reservation of such a right (**MANISTY, J.**).—**SHUBROOK v. TUFNELL** (1882), 46 L. T. 886; *sub nom.* **SHERBROOK v. TUFNELL**, 46 J. P. 694, D. C.; *subsequent proceedings, sub nom.* **SHUBROOK v. TUFNELL**, 9 Q. B. D. 621, C. A.

**226. ——— Use of wharf.]**—(1) The owner & occupier of a freehold dock & wharf adjoining, put them up for sale in separate lots. The wharf only was sold, & was conveyed to the purchaser in fee simple absolutely. For many years previously the bowsprits of vessels in the dock had been allowed to project over a portion of the wharf.—**Held:** notwithstanding the purchaser had notice of the mode of user, there was not, on the grant of the wharf, any implied reservation to the grantor of a right to have the bowsprits projecting over the wharf in the same manner as prior to & at the time of the grant.

(2) *Semble:* the doctrine of the "disposition of the owner of two tenements" (*destination du père de famille*) is not applicable to the severance of tenements by grant for valuable consideration.

(3) A grantor cannot derogate from his own grant; & although on the severance for valuable consideration of two tenements belonging to the same owner, a reservation of an easement of absolute necessity, or of a right inseparable from the tenement retained, may be implied, yet if a grant for value be unlimited in terms & without express reservation, there is no implied reservation of an easement (not having a legal existence prior to the unity of ownership) which at the time of the grant was enjoyed by the tenement retained, even though such easement be continuous & apparent.

A purchaser takes his purchase as it is described & conveyed to him in & by his deed of conveyance; if he buys the fee simple of a tenement, & has it conveyed to him without reservation, notice of the previous mode of user by his vendor for the convenience of the adjoining tenement is immaterial; for the condition of the tenement granted is thenceforth determined by the contract of alienation & deed of conveyance, & not by the previous user of the vendor during his joint ownership.

(4) The easement claimed by pltf. is not "continuous" for that means something the use of which is constant & uninterrupted, neither is it an "apparent easement" for except when a ship is actually in the dock with her bowsprit projecting beyond its limits there is no sign of its existence; neither is it a "necessary easement," for that means something without which the enjoyment of the dock could not be had at all (**WESTBURY, C.**).—**SUFFIELD v. BROWN** (1864), 4 De G. J. & Sm. 185; 3 New Rep. 340; 33 L. J. Ch. 249; 9 L. T. 627; 10 Jur. N. S. 111; 12 W. R. 356; 46 E. R. 888, L. C.

*Annotations:—***As to (1)** **Reid.** *Potts v. Smith* (1868), L. R. 6 Eq. 311; *Kolason v. Levy* (1868), 17 L. T. 641. **As to (3)** **Consd.** *Wheeldon v. Burrows* (1879), 12 Ch. D. 31; *Gordon v. Ogilvie* (1899), 15 T. L. R. 239; *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557. **Reid.** *Crossley v. Lightowler* (1867), 2 Ch. App. 478. **Generally, Reid.** *Morland v. Cook* (1868), L. R. 6 Eq. 252; *Watts v. Kelson* (1871), 6 Ch. App. 166; *Barnes v. Leach* (1879), 4 Q. B. D. 494; *Shubbrook v. Tufnell* (1882), 46 L. T. 886; *Russell v. Watts* (1883), 25 Ch. D. 559; *Schwann v. Cotton*, [1916] 2 Ch. 120.



**227.** ——— **Pollution of stream.]**—*Crossley & Sons, Ltd. v. Lightowler*, No. 404, *post*.

**228.** ——— **Light.]**—*Wheeldon v. Burrows*, No. 253, *post*.

**229.** ——— **Party wall.]**—Prior to 1886 pltf.'s predecessor in title built C. House on his own land with a wall to the west, in which were flues & fireplaces used only for C. House, & on the west side flues & fireplaces not so used, but which might be used for any adjoining house built on an adjoining & then vacant piece of land belonging to deft. In 1886 deft., being about to build a house on his land, agreed in writing with pltf.'s predecessor for the sale to deft. of the western half of the western wall of C. House, that wall being treated as divided from top to bottom, throughout its whole length, by a vertical plane in the centre thereof (which plane, if it had been a physical division, would have divided half of each of the flues, including those used for C. House, from the other half). Deft. then built on his land a house called G., adjoining C. House, & so connected with it that the fireplaces on the west side & the flues connected with them were used for the purposes of G., as had been intended. Pltf. purchased C. House in 1900, & subsequently the flue connected with deft.'s dining-room became defective, in the sense that by reason of cracks which developed in the surrounding masonry smoke found its way therefrom through pltf.'s half of the party-wall into his rooms & occasioned damage. The cracks were caused by a subsidence in deft.'s house, but the cause of the subsidence was undetermined, & there was no evidence of negligence by deft. in building his house or otherwise, or want of reasonable precaution:—*Held*: deft. was not liable for the damage.

Where a man grants a divided moiety of an outside wall of his house with intent to make it a party wall between that house & a house to be built on his neighbour's adjoining land, the law implies the grant & reservation in favour of the grantor & grantee respectively of such easements as may be necessary to carry out the common intention as to the user of the wall, the nature of the easements varying with the particular circumstances of each case. Subject to such easements the owner of each half may deal with it in such manner as he pleases, & if he uses it only for the contemplated purposes & without negligence or want of reasonable care & precaution he is not liable for any nuisance or inconvenience occasioned by such user.

In the first place it appears to me that on principle the owner of a servient tenement cannot so deal with it as to render the easement over it incapable of being enjoyed or more difficult of enjoyment by the owner of the dominant tenement. . . . In the next place that, apart from any special local custom or express contract, the owner of a servient tenement is not bound to

execute any repairs necessary to ensure the enjoyment or convenient enjoyment of the easement by the owner of the dominant tenement (*Parker, J.*).

Again, the grant of an easement is *prima facie* also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment. Thus the grantee of an easement for a watercourse through his neighbour's land may, when reasonably necessary, enter his neighbour's land for the purpose of repairing, & may repair, such watercourse. On this principle each party in the present case may do such acts on the property of the other as are reasonably necessary to the continued enjoyment of the easement; for example, each party would be entitled to repair the other's half of the wall in question so far as was reasonably necessary for the enjoyment of any easement impliedly granted or reserved (*Parker, J.*).—*Jones v. Pritchard*, [1908] 1 Ch. 630; 77 L. J. Ch. 405; 98 L. T. 386; 24 T. L. R. 309.

*Annotations*:—*Consd. Pwllbach Colliery Co. v. Woodman*, [1915] A. C. 634. *Reid. Phelps v. London Corp.*, [1916] 2 Ch. 255; *Hansford v. Jago*, [1921] 1 Ch. 322.

———— **What are easements of necessity.]**—*See Nos. 65–69, ante*.

#### C. Implied Grants in Favour of Grantee.

**230. Easement necessary for enjoyment of property granted—General rule.]**—When the use of a thing is granted everything is granted by which the grantor may enjoy such use (*Twysden, J.*).—*Pomfret v. Ricroft*, No. 482, *post*.

**231. ——— Way.]**—*Jorden v. Atwood* (1605), *Owen*, 121; 74 E. R. 945.

*Annotations*:—*Consd. Doeon v. S. E. Ry.* (1889), 61 L. T. 377. *Reid. Holmes v. Goring* (1824), 2 Bing. 76; *Pinnington v. Galland* (1853), 22 L. T. O. S. 41.

**232. ———.]**—The grantee of lands shall have a way over the lands of the grantor without any express grant.—*Clark v. Cogge* (1607), *Cro. Jac.* 170; 79 E. R. 149.

*Annotations*:—*Consd. Holmes v. Goring* (1824), 2 Bing. 76. *Distd. Crossley v. Lightowler* (1867), 2 Ch. App. 478. *Consd. Titchmarsh v. Hoyston Water Co.* (1899), 81 L. T. 673. *Reid. Pinnington v. Galland* (1853), 9 Exch. 1; *Pearson v. Spencer* (1863), 3 B. & S. 761; *Palmor v. Flossier* (1664), 1 Keb. 625; *Wheeldon v. Burrows* (1879), 12 Ch. D. 31.

**233. ———.]**—In 1728 land was let on a building lease, which expired at Lady-day 1824. In 1819 pltf., by virtue of a demise from an under-lessee, which expired in 1820, was in possession of a house erected on part of this land, & under that demise, exercised, as all his predecessors had done, for more than thirty years, a right of way over a passage on one side of his house, as necessary for the use & enjoyment thereof; particularly for repairing the eastern side. The under-lessee's interest expired in 1822; deft. was in possession of the soil of the passage by virtue of an assignment, in 1791, of the lease of 1728. In 1819 the

working the quarry, cast the soil & refuse upon a portion of the land in the possession of the pltf. & immediately adjoining the quarry:—*Held*: deft. had a right to do so as incidental to his liberty of quarrying; & such right was an easement or in the nature of an easement.—*MIDDLETON v. CLARENCE* (1877), 1 R. 11 C. L. 499.—*IR.*

**231 i. ——— Way.]**—Where C. conveyed to S. land which was inaccessible from the highway without passing over the lands of C. or some other person:—*Held*: a way of necessity was impliedly granted by C. over his land conveyed to S.—*SAYLOR v. COOPER* (1882), 2 O. R. 398.—*CAN.*

#### PART III. SECT. 2, SUB-SECT. 1.—C.

**230 i. Easement necessary for enjoyment of property granted—General rule.]**—B., the owner of land under Transfer of Land Statute, sold to T. part of that land, on which were two houses. At the time of the sale these houses were supplied with water by a pipe from the main through B.'s unsold land:—*Held*: T. acquired a right to enjoy the means of obtaining the water for those houses as existing at the time of the sale to him, & to prevent B. from afterwards plugging the pipe passing through his land.—*TAYLOR v. BROWNING* (1885), 11 V. L. R. 158.—*AUS.*

**230 ii. ———.]**—On partition of a family dwelling-house by a consent decree, pltf. claimed a right to the

passage of light & air necessary for the enjoyment of his share of the building in the way in which it was enjoyed at the time of the partition, though no such right was expressly reserved in the decree:—*Held*: the principles of justice, equity, & good conscience should be applied to the case, & pltf. was entitled to the right claimed, even in the absence of any express provision in the decree reserving such right.—*KADAMBINI DEBI v. KALIKUMAR HALDAR* (1899), 1 L. T. 26 Calc. 516.—*IND.*

**230 iii. ———.]**—M., seized in fee of the lands of A., containing 349 acres, in 1864 demised a portion of them containing four acres & a quarry underlying part of it, to deft. Deft., in

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party possessed of the reversion expectant on the lease of 1728 demised to pltf. the house of which he was in possession, as above, for 57½ years, to hold from Lady-day, 1824, together with all the appurtenances to the same belonging, subject to a covenant for repairs. In 1822 the reversioner demised the soil of the passage to deft. for 61 years, to hold from Lady-day, 1824:—**Held:** under the demise of 1819, pltf. was entitled to a right of way over deft.'s passage.—**HINCHLIFFE v. KINNOUL (EARL)** (1838), 5 Bing. N. C. 1; 1 Arn. 342; 6 Scott, 650; 8 L. J. C. P. 105; 132 E. R. 1004.

**Annotations:—Distd.** *Suffield v. Brown* (1864), 4 De G. J. & Sm. 185. **Consd.** *Brown v. Alabaster* (1887), 37 Ch. D. 490; *Pwllbach Colliery Co. v. Woodman*, [1915] A. C. 634. **Mentd.** *Powell v. Price* (1847), 4 C. B. 105.

**234. ———.] — I'HEYSEY v. VICARY, No. 286, post.**

**235. ———.] — DODD v. BURCHELL, No. 507, post.**

**236. ———.] — (1)** The lessee of an inner close has by necessity a right of way suitable to the business for which the lease was made over an outer close which belongs to the same landlord.

(2) But the lessee of one close cannot as such by user acquire an easement over another close which belongs to the same landlord.

If, in the course of years, from the circumstance that the landlord has no particular occasion to use the close, or that he was not strict in obliging his tenant to adhere strictly to the way, he had allowed the tenant occasionally to make deposits on other parts of the close, still it is utterly impossible that by such a course of proceeding, the tenant as against his landlord, could acquire any easement whatsoever (LORD CAIRNS, C.).—**GAYFORD v. MOFFATT** (1868), 4 Ch. App. 133; 33 J. P. 212, L. C.

**Annotations:—As to (1) Consd.** *London Corpn. v. Riggs* (1880), 13 Ch. D. 798; *Serff v. Acton L. B.* (1886), 31 Ch. D. 679. **Refd.** *Brown v. Alabaster* (1887), 36 W. R. 155. **As to (2) Consd.** *Bayley v. G. W. Ry.* (1884), 26 Ch. D. 431; *Kilgour v. Gaddes*, [1904] 1 K. B. 457. **Refd.** *Harris v. De Pinna* (1886), 33 Ch. D. 238; *Robson v. Edwards*, [1893] 2 Ch. 146.

**237. ———.] — MANSELL v. JONES (1905), 49 Sol. Jo. 350, C. A.**

**238. ——— Light.] — ROSWELL v. PRIOR (1701), Holt, K. B. 500; 12 Mod. Rep. 635; 90 E. R. 1175; sub nom. ROSEWELL v. PRIOR, 1 Id. Raym. 713; 6 Mod. Rep. 116; 2 Salk. 460.**

**Annotations:—Consd.** *Mason v. Shrewsbury & Hereford Ry.* (1871), L. R. 6 Q. B. 578. **Refd.** *Swansborough v. Coventry* (1832), 9 Bing. 305; *Thompson v. Gibson* (1841), 7 M. & W. 456; *Todd v. Flight* (1860), 9 C. B. N. S. 377; *Wheeldon v. Burrows* (1879), 12 Ch. D. 31. **Mentd.** *Scott v. Shepherd* (1773), 2 Wm. Bl. 892; *Cheetham v. Hampson* (1791), 4 Term Rep. 318; *Bush v. Steinman* (1799), 1 Bos. & P. 404; *R. v. Pedley* (1834), 3 L. J. M. C. 119; *Itch v. Basterfield* (1847), 4 C. B. 783; *Smith v. Kenrick* (1849), 7 C. B. 615; *Gandy v. Jubber* (1864), 5 B. & S. 78; *West Ham Central Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. 624; *Bolvedere Fish Guano Co. v. Rainham Chemical Works, Feldman & Partridge, Ind, Coope v. Same*, [1920] 2 K. B. 487.

**239. ——— Derogation from grant.] — (1)** The owner of an estate granted a lease of a plot of ground to A. who covenanted that he, his executors, administrators or assigns, would not

during the term do on the premises anything which should be an annoyance to the neighbourhood or to the lessor or his tenants, or diminish the value of the adjoining property, nor build, nor allow to be built, on the ground any building or erection without first submitting the plans to the lessor & obtaining his approval. The landlord some years afterwards granted a lease of an adjoining plot to B., who entered into a similar restrictive covenant. Within twenty years A. commenced, with the approval of the lessor, to build upon his ground so as to darken the windows of B.'s house. On bill by B. to restrain A. from erecting & the lessor from approving the building objected to:—**Held:** he was not entitled to relief either on the principle that the lessor could not derogate from his grant, or on the ground that the restrictive covenants in A.'s lease enured for B.'s benefit.

(2) The owner of two tenements who grants one of them cannot derogate from his own grant by anything he does on the property which he reserves, the property granted becoming entitled to easements known as easements derived by the disposition of the owner of two tenements (JAMES, L.J.).—**MASTER v. HANSARD** (1876), 4 Ch. D. 718; 46 L. J. Ch. 505; 36 L. T. 535; 41 J. P. 373; 25 W. R. 570, C. A.

**Annotations:—As to (1) Consd.** *Birmingham Joint Stock Bank Co. v. Lea* (1877), 36 L. T. 843. **Refd.** *Kemp v. Bird* (1877), 5 Ch. D. 974; *Henals v. Cowlshaw* (1878), 9 Ch. D. 125; *Nottingham Patent Brick & Tile Co. v. Butler* (1885), 15 Q. B. D. 261; *Reid v. Bickerstaff*, [1909] 2 Ch. 305; *Chambers v. Randall*, [1923] 1 Ch. 149. **Generally, Mentd.** *Foster v. Fraser* (1893), 69 L. T. 136.

**240. ——— Support.] — HUMPHRIES v. BROGDEN, No. 1150, post.**

**241. ———.] — RICHARDS v. ROSE, No. 223, ante.**

**242. ———.] — DALTON v. ANGUS, No. 4, ante.**

**243. ———.] — SHUBROOK v. TUFNELL, No. 225, ante.**

**244. ——— Party-wall.] — JONES v. PRITCHARD, No. 229, ante.**

**245. ——— Apparent & continuous — General rule.] —**By the grant of part of a tenement it is now well known there will pass to the grantee all those continuous & apparent easements over the other part of the tenement which are necessary to the enjoyment of the part granted & have been hitherto & therewith (BOWEN, L.J.).—**FORD v. METROPOLITAN & METROPOLITAN DISTRICT RY. COS.** (1886), 17 Q. B. D. 12; 55 L. J. Q. B. 296; 54 L. T. 718; 50 J. P. 661; 31 W. R. 426; 2 T. L. R. 281, C. A.

**Annotations:—Refd.** *Brown v. Alabaster* (1887), 37 Ch. D. 490. **Mentd.** *Lingke v. Christchurch Corpn.*, [1912] 3 K. B. 595.

**246. ——— Drainage.] — PYER v. CARTER, No. 216, ante.**

**247. ———.] —**Where two properties are possessed by the same owner, & there has been a severance made of part from the other, anything which was used & was necessary for the comfortable enjoyment of that part of the property which was granted, must be considered to follow from the grant.

A., the owner of two adjoining properties con-

**248 i. ——— Apparent & continuous — Drainage.] —**Pltf. owned the eastern half of a double house, & deft. owned the other half, which was situate higher up the hill than pltf.'s. From the sink in deft.'s house a drain was used, which came through the partition wall, under the floor in the basement of pltf.'s house & connected with the sewer in the street. Pltf.'s sink con-

nected with the same drain. There was no other connection between the sewer & the two houses. Both parties derived their title from G., who had devised one house to each of two nieces. Deft. claimed a right of drainage over pltf.'s property, as an implied grant when the severance of ownership took place:—**Held:** although it was a continuous easement,

it was not an apparent & necessary easement to the enjoyment of deft.'s house.—**TANNER v. HISLER** (1898), 40 N. S. R. 250.—**CAN.**

**g. ——— Way.] —**Implication of a grant of easement upon the severance of a tenement may extend to a 'way,' but that is so only where there has been some permanence in the

sisting of a tanyard & a house & garden made a cesspool in a corner of the garden & a drain, to carry the water into it from the tanyard, which gradually sloped down towards the garden. In 1819 he sold the two properties to different persons. The conveyances made no allusion to the existence of the drain & cesspool:—*Held*: the easement passed by an implied grant with the tanyard.—*EWART v. COCHRANE* (1861), 5 L. T. 1; 25 J. P. 612; 7 Jur. N. S. 925; 10 W. R. 3; 4 Macq. 117, II. L.

*Annotations*:—*Apld.* Hall v. Lund (1863), 1 H. & C. 876. *Consd.* Francis v. Hayward (1882), 20 Ch. D. 773; Schwann v. Cotton, [1916] 2 Ch. 120. *Refd.* Pearson v. Spencer (1863), 3 B. & S. 761; Polden v. Bastard (1865), 7 B. & S. 130; Russell v. Watts (1885), 10 App. Cas. 590; Thomas v. Owen (1887), 20 Q. B. D. 225; Pwllbach Colliery Co. v. Woodman, [1915] A. C. 634; Schwann v. Cotton, [1916] 2 Ch. 459. *Mentd.* Baring v. Abingdon, [1892] 2 Ch. 374.

248. ————.]—*WATSON v. TROUGHTON*, No. 40, *ante*.

249. ———— **Unfinished buildings.**—Although the occupiers of contiguous tenements, held under one title, may sometimes set up implied grants, from the original owner, of easements not expressly mentioned, this only applies to such easements as are apparent & continuous, that is to say, clearly indicated by the condition of the premises at the time of the division of title, & if the premises are then unfinished & the buildings are in a skeleton state, so that though there are openings left in the walls, it is uncertain for what purpose they are intended, whether as doors or windows, & if as doors, then in what direction & to what extent the ways thereto are designed to be used, there will be no such implied grants, the easements not being apparent & continuous. A plan attached to the grants, if it leave the matter equally uncertain, will not aid the implication.—*GLAVE v. HARDING* (1858), 27 L. J. Ex. 286; 22 J. P. 531.

*Annotation*:—*Refd.* Worthington v. Simson (1860), 24 J. P. 455.

250. ———— **Water.**—In 1860 the owner of properties A. & B. made a drain from a tank on property B. to a lower tank on the same property, & laid pipes from the lower tank to cattle sheds on property A. for the purpose of supplying them with water, & they were so supplied till 1863, when the owner sold property A. to pltf., with all waters, watercourses, etc., to the same hereditaments & premises belonging or appertaining, or held, used, enjoyed, or reputed as part thereof, or as appurtenant thereto. Pltf. had the use of the water after his conveyance, until deft., a subsequent purchaser of property B., stopped it:—*Held*: (1) the watercourse was a continuous easement necessary for the use of property A., & would have passed by implication; that pltf. was entitled to the use of the water on the conveyance of that property without any words of grant; supposing it only convenient & not necessary, the general words were sufficient to pass it; (2) the right was to have the accustomed flow of water through the pipes, without regard to the purpose for which pltf. used it; the right, therefore, was not lost by his erecting cottages instead of cattle sheds.

(3) *Semle*: if the owner of a house & land makes a formed road over the land for the apparent use of the house, & conveys the house separately

from the land, with the ordinary general words, a right of way over the road will pass.

(4) The conveyance to pltf. granted to him a right of way through the gateway of the vendor which opened into a close afterwards bought by deft., to a wicket-gate to be erected by pltf. at a given point into a piece of garden ground, part of the premises purchased by pltf. Pltf. built a cart-shed on this piece of garden ground close to the point where the wicket-gate was to be, & claimed a right of carriage-way to it:—*Held*: pltf. was not confined to a right of footway, but was entitled to a right of way for all purposes.—*WATTS v. KELSON* (1871), 8 Ch. App. 166; 40 L. J. Ch. 126; 24 L. T. 209; 35 J. P. 422; 19 W. R. 338, L. J.J.

*Annotations*:—*As to* (1) *Expld.* Wheeldon v. Burrows (1879), 12 Ch. D. 31. *Apld.* Bunting v. Hicks (1894), 70 L. T. 455. *Distd.* Burrows v. Lang, [1901] 2 Ch. 502; Kilgour v. Gadden (1903), 89 L. T. 444. *Follid.* Key v. Neath It. D. C. (1905), 93 L. T. 507. *Consd.* Schwann v. Cotton, [1916] 2 Ch. 120. *Apld.* Westwood v. Heywood, [1921] 2 Ch. 130. *Refd.* Rameshur Pershad Narain Singh v. Koonj Behari Pattuk (1878), 4 App. Cas. 121; Russell v. Watts (1883), 25 Ch. D. 559; Long v. Gowllett, [1923] 2 Ch. 177. *As to* (2) *Refd.* Schwann v. Cotton, [1916] 2 Ch. 120. *As to* (3) *Distd.* Brett v. Clowser (1880), 5 C. P. D. 376. *Apld.* Barkshire v. Grubb (1881), 18 Ch. D. 616. *Consd.* Bayley v. G. W. Ily. (1884), 26 Ch. D. 434; Itoe v. Siddons (1888), 22 Q. B. D. 224. *Distd.* Titchmarsh v. Royston Water Co. (1899), 81 L. T. 673. *Refd.* Kay v. Oxley (1875), L. J. 10 Q. B. 360; Bolton v. Bolton (1879), 48 L. J. Ch. 467; Brown v. Alabaster (1887), 37 Ch. D. 490; Thomas v. Owen (1887), 20 Q. B. D. 225.

251. ————.]—*BUNTING v. HICKS*, No. 55, *ante*.

252. ————.]—*WESTWOOD v. HEYWOOD*, No. 195, *ante*.

253. ———— **Light.**—(1) On a grant of part of a tenement, or of one of two adjoining tenements belonging to the same grantor, no reservation of easements will be implied in favour of the grantor, except easements of necessity; but there will pass by implication to the grantee all continuous apparent easements, that is, all such easements as are necessary to the reasonable enjoyment of the property granted, & have in fact been enjoyed during the unity of ownership.

A workshop & an adjoining vacant piece of land belonged to S. The side of the workshop facing the piece of land had in it three windows, not ancient windows, which received their light from over the piece of land. S. put all the property up to auction in several lots under certain conditions, not providing for any reservation. He sold & conveyed the piece of land to pltf. without expressly reserving any right to light in respect of the windows, & shortly afterwards sold & conveyed the workshop to deft. under the same conditions. Pltf. claimed the right to build on the land so as to obstruct the windows, & deft. claimed the access of light to the windows from over pltf.'s land as an apparent continuous easement necessary for the enjoyment of his property. In an action to try the right:—*Held*: no right to light in respect of the windows was impliedly reserved to S. under the conveyance to pltf., it not being a case of necessity, & consequently the latter could build & obstruct the windows.

(2) On the grant by the owner of a tenement of part of that tenement as it is then used & enjoyed, there will pass to the grantee all those continuous & apparent easements, by which, of course, I

adaptation of the tenement from which continuity could be inferred.—*KAN NARAIN SHAH v. KAMALA KANTA SHAH* (1898), 1 L. R. 26 Cal. 311.—*IND.*

*h. Grant of dominant tenement.*—If the title to different parcels comes to

be vested in the same owner, there is an extinguishment of any easements which may previously have existed, a species of merger by which what may have been, whilst the different parcels were in separate hands, legal easements, cease to be so, & become mere ease-

ments in fact, quasi-easements. If the dominant tenement is first granted, all quasi-easements which have been enjoyed as appendant to it over a quasi-servient tenement retained by the grantor pass by implication.—*ATTRILL v. PLATT* (1883), 10 S. C. II. 425.—*CAN.*

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mean quasi-easements, or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, & which have been & are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant (*THESEIGER, L.J.*).—*WHEELDON v. BURROWS* (1879), 12 Ch. D. 31; 48 L. J. Ch. 853; 41 L. T. 327; 28 W. R. 196, C. A.

**Annotations:—**As to (1) *Consd.* *Allen v. Taylor* (1880), 18 Ch. D. 355. *Apld.* *Brett v. Clowser* (1880), 5 C. P. D. 376. *Consd.* *Russell v. Watts* (1885), 10 App. Cas. 590. *Apld.* *Ford v. Met. & Met. Dist. Rys.* (1886), 17 Q. B. D. 12. *Consd.* *Birmingham, Dudley & District Banking Co. v. Ross* (1888), 38 Ch. D. 295; *Union Lighterage Co. v. London Graving Dock Co.* [1902] 2 Ch. 557. *Refd.* *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836; *Broomfield v. Williams*, [1897] 1 Ch. 602; *Mallam v. Rose*, [1915] 2 Ch. 222. As to (2) *Apld.* *Shubbrook v. Tufnell* (1882), 46 L. T. 886. *Consd.* *Brown v. Alabaster* (1887), 37 Ch. D. 490; *Tows v. Knowles*, [1891] 2 Q. B. 564; *Gordon v. Ogilvie* (1899), 15 T. L. R. 239. *Apld.* *Union Lighterage Co. v. London Graving Dock Co.* [1902] 2 Ch. 557. *Consd.* *Ray v. Hazeldine*, [1904] 2 Ch. 17; *Schwann v. Cotton*, [1916] 2 Ch. 459. *Apld.* *Hansford v. Jago*, [1921] 1 Ch. 322. *Consd.* *Cory v. Davies*, [1923] 2 Ch. 95. *Refd.* *Bunting v. Hicks* (1894), 70 L. T. 455; *Strick v. City Offices Co.* (1908), 22 T. L. R. 667; *Derry v. Sanders*, [1919] 1 K. B. 223. *Generally, Mentd.* *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385.

**254. ——— Tramway.]—***BRAZIER v. GLASSPOOL*, [1901] W. N. 237; *on appeal*, [1902] W. N. 162, C. A.

**255. Intention presumed from circumstances of grant—Words repugnant to implication.]—**Covenant by lessor, to give the lessee of a messuage free ingress and egress through a certain passage, with a yard, with the free use of the pump in the said yard, jointly with the lessor, whilst the same should remain there, paying half the expense of keeping it in repair:—*Held*: this is not an absolute demise of the use of the pump; but the lessor might remove it at pleasure, & an action is not maintainable, though it is alleged that the lessor moved it wilfully & without cause.—*RHODES v. BULLARD* (1806), 7 East, 116; 3 Smith, K. B. 173; 103 E. R. 44.

**256. ——— Intention to build—Support.]—**(1) A conveyance of land to a railway co., for the purposes of the line, gives a right by implication to all reasonable subjacent & adjacent support connected with the subject-matter of the conveyance; & therefore, although, in the conveyance to the railway co., the minerals are reserved, the grantor is not entitled to work them, even under his own land, in any manner calculated to endanger the railway. On the same principle, if the owner of a house conveys the upper story, reserving all below, the purchaser will be entitled, on general principles, without stipulation, to prevent any damage to the walls underneath.

(2) But if a meadow is granted to A. for grazing purposes, the minerals & the adjacent land being retained, & if A., having no warranty against subsidence, thinks fit to build a house on the edge of the meadow, & the house falls, he is without remedy, & has himself alone to blame for the consequences. If, however, the grant were made expressly for building purposes, there would then be an implied warranty of support, both subjacent & adjacent.

(3) In the case of a grant to a railway co. for the purposes of the railway, if the line which divides the land granted from the land retained traverses a quarry, it may be that no adjacent support is necessary, & that the grantor may dig or remove the whole contiguous soil. But if the

dividing line traverses a bog, or a bed of sand, it will be incumbent on the grantor to leave untouched such an intervening measure of lateral support as will prevent any part of the land granted from retreating.—*CALEDONIAN RY. Co. v. SPROT* (1856), 27 L. T. O. S. 264; 2 Jur. N. S. 623; 4 W. R. 659; 2 Macq. 449, II. L.

**Annotations:—**As to (1) *Fold.* *Calc. Ry. v. Belhaven* (1857), 20 L. T. O. S. 286. *Consd.* *Rowbotham v. Wilson* (1857), 8 E. & B. 123. *Distd.* *G. W. Ry. v. Fletcher* (1860), 5 H. & N. 689. *Consd.* *Elliot v. N. E. Ry.* (1863), 10 H. L. Cas. 334. *Expld.* *G. W. Ry. v. Bennett* (1867), L. R. 2 H. L. 27. *Distd.* *Aspdon v. Seddon* (1875), 10 Ch. App. 394. *Consd.* *Rigby v. Bennett* (1882), 21 Ch. D. 559; *Birmingham, Dudley & District Banking Co. v. Ross* (1888), 38 Ch. D. 295. *Apld.* *G. W. Ry. v. Cofn Cribbwr Brick Co.*, [1894] 2 Ch. 157. *Consd.* *Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co.* (1901), 85 L. T. 53. *Refd.* *Roberts v. Haines* (1856), 2 Jur. N. S. 999; *Dugdale v. Robertson* (1857), 3 K. & J. 695; *Bonomi v. Backhouse* (1859), 28 L. J. Q. B. 378; *Stourbridge Canal Co. v. Dudley* (1860), 30 L. J. Q. B. 108; *Shafto v. Johnson* (1863), 8 B. & S. 252, n.; *Midland Ry. Co. v. Chockley* (1867), L. R. 4 Eq. 19; *Wakefield v. Buelch* (1867), L. R. 4 Eq. 613; *Metropolitan Board of Works v. Met. Ry.* (1868), L. R. 3 C. P. 612; *Richards v. Jenkins* (1868), 18 L. T. 437; *Robinson v. Grave* (1873), 29 L. T. (Colebeck v. Girdlers Co. (1876), 45 L. J. Q. B. 225; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Pountney v. Clayton* (1883), 11 Q. B. D. 820; *Russell v. Watts* (1885), 10 App. Cas. 590; L. & N. W. Ry. v. Evans, [1893] 1 Ch. 16; *Aldin v. Latimer Clark, Mulrhead*, [1894] 2 Ch. 437; *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836; *Manchester Corp'n. v. New Moss Colliery*, [1906] 7 Ch. 278; L. & N. W. Ry. v. Howley Park Coal & Cannel Co., [1911] 2 Ch. 97. *Generally, Mentd.* *Hammer-smith, etc. Ry. v. Brand* (1869), L. R. 4 H. L. 171; *Mid. Ry. v. Haunchwood Brick & Tile Co.* (1882), 20 Ch. D. 552.

**257. ——— ———.]—**A piece of land on which a cotton mill was to be built was conveyed, the grantor reserving to himself a chief rent, & reserving all mines & minerals under the piece of land, & power to take the same at pleasure, making compensation for damages to be done to the cotton mill. The grantee covenanted to build & keep in repair the cotton mill:—*Held*: the grantor would not be restrained from working & taking the minerals under the piece of land, though the buildings on the piece of land would necessarily be thereby injured.—*ASPDEN v. SEDDON* (1875), 10 Ch. App. 394; 44 L. J. Ch. 359; 32 L. T. 415; 39 J. P. 597; 23 W. R. 580, L. J. J.; *subsequent proceedings, sub nom.* *ASPDEN v. SEDDON, PRESTON v. SEDDON* (1876), 1 Ex. D. 496, C. A.

**Annotations:—***Consd.* *Love v. Bell* (1884), 9 App. Cas. 286. *Refd.* *Dalton v. Angus* (1881), 6 App. Cas. 740; *Hayles v. Pearce & Partners*, [1899] 1 Ch. 567. *Mentd.* *Gill v. Dickinson* (1880), 5 Q. B. D. 159; *Dixon v. White* (1883), 8 App. Cas. 833; *Mundy v. Rutland* (1883), 23 Ch. D. 81; *Re Whiting, Ormond v. De Launay* (1913), 82 L. J. Ch. 309.

**258. ——— ———.]—**The vendor of land adjoining other land of his own under which are mines & minerals, & who knows at the time of the sale that the vendee is about to erect upon the land so purchased substantial buildings, impliedly covenants that he will not use or permit the adjoining land to be used in such a manner as to derogate from his grant. A. sold land to B. for the purpose of an iron foundry. Adjoining the land so sold to B., A. had other land under which was coal. A. afterwards leased the minerals to C., who commenced working the coal within such a distance from the land of B. as to be reasonably calculated to endanger its stability:—*Held*: ground for an injunction against A. & C., although no actual damage had been sustained by B.—*SIDDONS v. SHORT* (1877), 2 C. P. D. 572; 46 L. J. Q. B. 795; 37 L. T. 230.

**259. ——— ———.]—**The corp'n. of L. were the owners of a piece of land which they divided into building lots; ptff. agreed to take one of these lots upon lease, & he began to erect

a building upon it under the superintendence of & according to plans approved by the cornp. surveyor. While the building was in progress deft. agreed to take on lease the adjoining plot; & when pltf.'s building was nearly finished, & the lease was granted to him, deft. obtained his lease. A considerable time afterwards he began building operations, excavating to a depth much below the foundation of pltf., & thereby endangering the safety of the building:—*Held*: the two grants could not be held to be contemporaneous; there was nothing in the circumstances of the case to deprive pltf. of the right to lateral support, & he was entitled to restrain deft. from excavating so as to let down pltf.'s building.—*RIGBY v. BENNETT* (1882), 21 Ch. D. 559; 48 L. T. 47; 47 J. P. 217; 31 W. R. 222, C. A.

*Annotations*.—*Consd.* Birmingham, Dudley & District Banking Co. v. Ross (1888), 38 Ch. D. 295. *Apld.* Phillips v. Low, [1892] 1 Ch. 47. *Consd.* Grosvenor Hotel Co. v. Hamilton, [1894] 2 Q. B. 836. *Refd.* Broomfield v. Williams, [1897] 1 Ch. 602; Jordonson v. Sutton, Southcoates & Drypool Gas Co., [1899] 2 Ch. 217; Union Lighterage Co. v. London Graving Dock Co., [1902] 2 Ch. 557.

**260.** ——— *Light & air.*—(1) A general grant of land, with an intimation by the purchaser of an intention to build, creates a legal easement of light & air, & gives the right to prevent the subsequent obstruction of light by subsequent purchasers of neighbouring land of the same grantor.

(2) In 1854 a conveyance was executed of land contracted to be sold in 1852; between those dates houses were erected:—*Held*: the conveyance conferred on the purchaser the right to light sufficient for the windows in the houses so erected, & to an injunction to restrain interference with it by purchasers, subsequent to the contract, of neighbouring land.—*ROBINSON v. GRAVE* (1873), 29 L. T. 7; 21 W. R. 569, L. J.

*Annotations*.—*As to* (1) *Consd.* Bailey v. Icke (1891), 64 L. T. 789. *Refd.* Tebb v. Cave, [1900] 1 Ch. 642.

**261.** ——— ————]—(1) The maxim that a grantor shall not derogate does not entitle a grantee of a house to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant & known to the grantee.

The cornp. of a town granted a lease to pltfs. of a piece of land & a newly erected building "with the rights, members, & appurtenances to the premises belonging." The building abutted on a passage twenty feet wide, which the cornp. agreed to keep open, & on the other side of the passage were old buildings about 25 feet high. The cornp. demised the land on the other side of the passage to deft., who erected on the site of the old buildings a house eighty feet high, which materially interfered with pltfs.' light. The land on both sides of the passage was part of a larger piece of land laid out by the cornp. under a building scheme for the improvement of the town:—*Held*: (2) there was no grant, express or implied, in the lease to pltfs. of a right to uninterrupted light to the new building; (2) the obligation on the cornp. not to obstruct pltfs.' light which was to be implied from the relation in which they had placed themselves to pltfs. by granting them the lease, must be measured by the circumstances existing at the date of the lease & known to both parties; (4) having regard to the fact that pltfs. knew that the land was being laid out for building, & had stipulated that there should be a passage twenty feet wide adjoining the new building, they had no right to complain of the obstruction caused by deft.'s house, & an injunction was refused.

*Qu.*: whether they would not have been entitled to an injunction if their light had been entirely destroyed.

(5) The rule that a man who grants a house with lights cannot erect new buildings so as to obstruct those lights, applies to the case where the grantor purposely leaves a strip of land intervening between the house & the lands retained.

(6) As to the words of this lease " & also together with all rights, members & appurtenances to the said premises belonging," the case under the Conveyancing Act would have been stronger if it had not been for them; for they point to an intention to convey with the house only such rights, if any, as belong to the premises (COTTON, L.J.).—*BIRMINGHAM, DUDLEY & DISTRICT BANKING Co. v. ROSS* (1888), 38 Ch. D. 295; 57 L. J. Ch. 601; 59 L. T. 609; 36 W. R. 914; 4 T. L. R. 437, C. A.

*Annotations*.—*As to* (1) *Apld.* Burrows v. Lang, [1901] 2 Ch. 502. *Foll.* Godwin v. Schweppes, [1902] 1 Ch. 926. *Consd.* Quicke v. Chapman, [1903] 1 Ch. 659. *Refd.* Fear v. Morgan, [1906] 2 Ch. 406. *As to* (3) *Consd.* Myers v. Catterson (1889), 43 Ch. D. 470. *Foll.* Bailey v. Icke (1891), 64 L. T. 789. *Consd.* Corbett v. Jonas, [1892] 3 Ch. 137; Betts v. Pickfords, [1906] 2 Ch. 87. *Refd.* Phillips v. Low, [1892] 1 Ch. 47; International Tea Stores Co. v. Hobbs, [1903] 2 Ch. 165. *As to* (6) *Consd.* Broomfield v. Williams, [1897] 1 Ch. 602. *Generally, Mentd.* Wallis v. Hands, [1893] 1 Ch. 75; Mellor v. Walmesley, [1905] 2 Ch. 164; Millbourn v. Lyons, [1914] 2 Ch. 231; Harmer v. Jumbil (Nigeria) Tin Areas, [1921] 1 Ch. 200.

**262.** ——— ————]—In 1875 W. conveyed land to the trustees of a religious body who were desirous of erecting a chapel thereon. The deed of conveyance set forth fully the trusts upon which the grantees were to hold the land, including trusts to erect a chapel in such manner as the grantees should, with the sanction of the religious body, deem necessary or expedient, & trusts in certain events to sell, let, or mtge. the land & buildings; the conveyance also contained a covenant by the grantees with W. that all windows in the chapel looking out on other land of W. should be of fluted or ground glass. There were no buildings upon the land at the date of the grant, & no plans or specifications of the proposed chapel were submitted to W. for his approval. In Feb. 1878, the grantees commenced to build a chapel having windows looking out upon the land retained by W. In Nov. 1878, W. entered into an agreement to sell this land; & it was shortly afterwards conveyed by him to defts., who in May, 1890, commenced to build thereon in such a manner as to obstruct the light of the chapel:—*Held*: (1) W. had, in effect, given permission to the trustees of the chapel to erect such a building as they thought fit, & the chapel having been erected in a reasonable manner, neither W. nor his assigns could complain of the position of the chapel or of the way in which it was lighted; (2) it having been within the contemplation of the parties to the conveyance of 1875 that a chapel would be built on the land conveyed, having windows looking out on the land retained by W., he & his assigns were under an implied obligation not to do anything to obstruct such windows.—*BAILEY v. ICKE* (1891), 64 L. T. 789.

**263.** ——— ————]—Having regard to the circumstances existing at the date of the lease & known to both parties:—*Held*: defts. had committed no breach of a covenant for quiet enjoyment by building on adjoining ground & so interfering with pltf.'s light & air.—*ROBSON v. PALACE CHAMBERS, WESTMINSTER Co., LTD.* (1897), 14 T. L. R. 56.

**264.** ——— *Air.*—(1) Under a grant of land expressed in general terms, & not made for any specific purpose, the grantee will not acquire

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a right by way of easement to the access of air, except where such right is enjoyed through a definite aperture in the nature of a window on the property granted, or through a definite channel over adjoining property; but the grantor of land to be used for a particular purpose is under an obligation to abstain from doing anything on adjoining property belonging to him which would prevent the land granted from being used for the purpose for which the grant was made.

Where, therefore, a lease was granted in order that the land demised might be used by the lessee for the purpose of carrying on the business of a timber merchant, & the lessee covenanted to carry on such business:—*Held*: the assigns of the lessor were not entitled to build upon adjoining property acquired by them from him, so as to interrupt the access of air to sheds upon the demised property used for drying timber so as to interfere with the carrying on of the business in ordinary course.

(2) The lessee, after the date of the lease, with the lessor's permission, but at his own cost, constructed certain ventilators in the walls of a building demised by the lease. The lessee gave no consideration for such permission & no deed was executed giving him the right to use the ventilators. The ventilators were obstructed by buildings erected upon adjoining property by assigns of the lessor:—*Held*: the licence being revocable, the lessee was not entitled to an injunction; but, in the absence of reasonable notice of revocation, he was entitled to an inquiry as to damages in respect of the ventilators having been obstructed without such notice.—*ALDIN v. LATIMER CLARK, MUIRHEAD & CO.*, [1894] 2 Ch. 437; 63 L. J. Ch. 601; 71 L. T. 119; 42 W. R. 553; 10 T. L. R. 452; 38 Sol. Jo. 458; 8 R. 352.

*Annotations*:—As to (1) *Consd.* *Tobbs v. Cave*, [1900] 1 Ch. 642. *Apld.* *Betts v. Pickfords*, [1906] 2 Ch. 87. *Consd.* *Cable v. Bryant*, [1908] 1 Ch. 259; *Browne v. Flower*, [1911] 1 Ch. 219; *Harmer v. Jumbil* (Nigeria) *Tin Areas*, [1921] 1 Ch. 200.

**265.** — *Way.* — Deft. B. had granted to G. separate leases of four plots of land fronting on H. road, & four houses which had been erected thereon by G. under a building agreement. The plan on each lease which was made part of the description showed a row of twelve plots with houses thereon, fronting on H. road, including the house demised which alone was coloured, & a strip of land coloured brown running past the back of all the plots to E. road. The position of this strip on the plan suggested that it was intended to give access to the back of the plots, but there were no words on the plan expressing such an intention. This strip of land was included in the building agreement but not in the leases. The leases were executed in May, 1903, & then bore no date except the year 1903, but the dates July 27, 28, 29, & 30, 1904, respectively, were afterwards inserted by agreement between the parties. At the latter dates the houses had been completely erected & surrounded with a fence in which gates or openings had been made in the back fences giving access to & from the brown strip. This strip which belonged to B., had never been fenced or marked off from the rest of B.'s land. Pltf. was a mtgee. of G. who had entered into possession, & claimed a right of way over the brown strip:—*Held*: the alteration of the leases did not make them void, but B. was estopped from denying that the leases were executed at the dates inserted in them with his consent; the circumstances existing at those dates could be looked at in con-

struing the lease & plan, & an implied right of way over the brown strip was granted by the leases to the lessee & those claiming under him.—*RUDD v. BOWLES*, [1912] 2 Ch. 60; 81 L. J. Ch. 277; 105 L. T. 864.

*Annotations*:—*Consd.* *Hansford v. Jago*, [1921] 1 Ch. 322. *Refd.* *Cory v. Davies*, [1923] 2 Ch. 95.

**266.** — — — — — *CORY v. DAVIES*, No. 139, *ante*.

**267.** — *Intention to use property for bleaching works.* — S. demised certain premises to a tenant, who occupied them as bleach works. The works communicated with a stream by an artificial drain, partly covered, & partly open, through which the refuse from the bleaching process was discharged into the stream at intervals of about seven times a fortnight. An arrangement was entered into, by which deft. took the works, the former tenant surrendered his lease, & S. demised the premises to deft. by a lease containing a clause relating to improvements, which should be made by deft. "for the purpose of carrying on the business of bleaching":—*Held*: the demise implied a grant to deft. of a right to use the premises for the same purposes, & in the same manner, as they were used at the time of such demise; therefore no action would lie against deft. by pltf., to whom S. had afterwards conveyed a mill situated lower down the stream, for fouling the water, by discharging into it the refuse of the works, it being proved that the drain, by which such refuse was discharged, was in the same state, & used in the same manner, as at the time of the demise to deft.—*HALL v. LUND* (1863), 1 H. & C. 676; 1 New Rep. 287; 32 L. J. Ex. 113; 7 L. T. 692; 9 Jur. N. S. 205; 11 W. R. 271; 158 E. R. 1055.

*Annotations*:—*Expld. & Distd.* *Pwllbach Colliery Co. v. Woodman*, [1915] A. C. 634. *Consd.* *Schwann v. Cotton*, [1916] 2 Ch. 120. *Refd.* *Birmingham, Dudley & District Banking Co. v. Ross* (1888), 38 Ch. D. 295. *Mentd.* *Thomas v. Owen* (1887), 20 Q. B. D. 225.

**268.** — *Obstruction to light by hoarding.* —

A mtgor. in possession of land, laid out for building, granted a building lease of part of the land to A., pursuant to Conveyancing Act, 1881 (c. 41), s. 18, & the mtgees. were not parties to it. The lease was granted in consideration of buildings recently erected on the demised land. Subsequently the mtgees. conveyed a part of the land, adjoining the houses, to B., who used it as a cricket ground, & erected on his boundary, adjoining the houses, a hoarding to prevent the cricket ground being overlooked by the occupiers of the houses. The hoarding caused a substantial diminution of light to the basement windows of the houses. On action by A. to restrain B. from permitting the hoarding to remain:—*Held*: (1) the mtgees. were bound by the lease as though they had been parties to it; (2) A. was entitled to an unobstructed access of light to his houses, subject only, if at all, to restriction from buildings to be erected on other parts of the land; (3) the hoarding was not a building, & must be removed.—*WILSON v. QUEEN'S CLUB*, [1891] 3 Ch. 522; 60 L. J. Ch. 698; 65 L. T. 42; 40 W. R. 172.

*Annotations*:—As to (2) *Refd.* *Brown v. Peto*, [1900] 2 Q. B. 653. As to (3) *Consd.* *Boyce v. Paddington B. C.*, [1903] 1 Ch. 109.

**269.** *Grant of support to railway—Effect of amalgamation of railways.* — In 1835 L. railway co., constituted under an Act which excepted mines from land purchased, & allowed the land-owners to work them, provided they did no damage to the railway, bought land for their railway. In 1836 Y. co. was constituted under an Act containing provisions as to mines similar



to those of Railways Clauses Act, 1845 (c. 20). Afterwards Y. co. purchased L. railway under the powers of an Act of 1844, which provided, by sect. 4, that on completion of the purchase, L. Railway Act should be repealed, provided that the repeal should not affect anything done under the Act, but that all acts done under it should remain as valid as if there had been no repeal. Sect. 9 provided that all the provisions of Y. Railway Act, so far as they were not repealed, altered or otherwise provided for by the Act of 1844, or by any statute, should apply to L. railway:—*Held*: the provisions as to mines in Y. Railway Act were not, by the Act of 1844 made applicable to L. railway, so as to give the owners of the mines under the lands purchased by L. co. a right to work them to the injury of the railway, if Y. co. did not choose to purchase them, but that the unqualified right to support, which was incident to the grant of the lands for the purposes of the railway, remained unaffected.—*NORTH EASTERN RY. CO. v. CROSLAND* (1862), 4 De G. F. & J. 550; 1 New Rep. 72; 32 L. J. Ch. 353; 7 L. T. 765; 11 W. R. 83; 45 E. R. 1297, L. J.

*Annotations*:—*Apld.* L. & N. W. Ry. v. Walker, [1903] A. C. 289. *Refd.* *Kilbot v. N. E. Ry.* (1863), 10 H. L. Cas. 335.

**270. Grant of support to tramway—Alteration of tramway to railway.**—In 1830, under the powers of a special Act of 1825, land was conveyed to a tramway co. for the purpose of a horse tramway authorised by the Act, which reserved to the owner of land conveyed the subjacent mines, with power to work them, but not so as to injure the tramway. By a special Act of 1855 the tramway was vested in another co., thereby incorporated with power to alter the tramway into a railway of the modern type. That Act incorporated Railways Clauses Consolidation Acts, 1845 (c. 20), & repealed the Act of 1825, but without prejudice to anything done under it, & to all rights & liabilities which, if the repealing Act were not passed, would be incident to or consequent on anything so done. Under that Act of 1855 a line of railway suitable for locomotive engines & carriages was laid down & worked over the land comprised in the conveyance of 1830. In 1892 defts., the present owners of the subjacent mines, gave pltfs., the present owners of the railway, notice under Railways Clauses Consolidation Act, 1845 (c. 20), s. 78, of their intention to work the mines, & on pltfs. declining to pay compensation, proceeded to work the mines, & in so doing caused subsidences of the surface & railway. Thereupon pltfs. brought an action for an injunction, claiming to be entitled, by virtue of the conveyance of 1830, to an easement or right of support, & to be under no liability to purchase the mines under Railways Clauses Consolidation Act:—*Held*: pltfs. were entitled, under the conveyance, to a right of support from the subjacent mines without payment of compensation; such right had not been lost by the alteration of the old tramway into a railway; the Act of 1855 did not operate to alter the express contract entered into in 1830 by the predecessors of pltfs. & defts.; pltfs. were entitled to an injunction.—*GREAT WESTERN RY. CO. v. CEFN CRIBBWR BRICK CO.*, [1894] 2 Ch. 157; 63 L. J. Ch. 500; 70 L. T. 279; 42 W. R. 493; 8 R. 178.

*Annotation*:—*Refd.* *R. v. L. & N. W. Ry.*, [1899] 1 Q. B. 921.

**271. Grant by statutory company—Use of adjoining land for other than statutory purpose.**—A railway co. sold a piece of their surplus land to pltf., together with a house, which they had allowed

him to erect thereon. The house was close to their line of railway, which there ran over a series of arches, through two of which there was some access of light to two of the lower windows of pltf.'s house. The co. retained in their own hands lands on the other side of the railway opposite pltf.'s house; & their conveyance to him contained a recital that all the land acquired by them other than that sold to pltf. would be required by them for the construction of their railway, & it contained no express grant of right, or covenant as to light. Def't.'s predecessor in title afterwards acquired from the co., under a conveyance subject to any right of light which pltf. might have, the fee of the lands opposite pltf.'s house, & erected buildings thereon; & he also took a lease of the arches. Def't. subsequently acquired this property, & blocked up the openings of the two arches nearest pltf.'s house with hoardings:—*Held*: the co., on selling a portion of their surplus lands to pltf., had entered into an implied obligation not to do or permit anything on the land retained by them which would interfere with pltf.'s reasonable enjoyment of the land he purchased, except what was required for the construction of their railway; & the hoarding not being for that purpose, a mandatory injunction ought to be granted.—*MYERS v. CATTERSON* (1889), 43 Ch. D. 470; 59 L. J. Ch. 315; 62 L. T. 205; 38 W. R. 488; 6 T. L. R. 111, C. A.

*Annotations*:—*Apld.* *Wilson v. Queen's Club*, [1891] 3 Ch. 522. *Consd.* *Broomfield v. Williams*, [1897] 1 Ch. 602. *Refd.* *Bailey v. Icke* (1891), 64 L. T. 789. *Mentd.* *Corbett v. Jonas*, [1892] 3 Ch. 137.

**272. Covenant by grantees to build according to approved plans.**—Pltfs. were lessees from defts. of a plot of land which at the date of the lease was partially covered with buildings & was occupied by defts., together with the adjoining property as business premises, & the lease contained a covenant by pltfs. to build on the demised land a warehouse according to approved plans which showed that the back wall of the warehouse was to contain certain windows on the first floor overlooking defts.' premises. Defts., in pursuance of a collateral agreement to clear the demised land of buildings, demolished one end of a cart shed which stood partly on the demised land & partly on the land reserved by defts., but they left remaining certain stanchions & roof beams, which slightly projected over pltfs.' boundary & which were eventually built into the back wall of the warehouse under a verbal agreement between pltf.'s architect & defts. The architect was employed to superintend the building of the warehouse in accordance with the approved plans, & the agreement was made without the express authority or knowledge of pltfs. The wall was built entirely on the demised land. Subsequently pltfs. were called upon by the local authority to block up the windows in the back wall on the ground that the building in of the stanchions & roof beams had converted it into a party wall. In an action for an injunction to restrain defts. from using this wall as a party wall:—*Held*: during the continuance of the lease pltfs. were entitled by implied grant as against defts. to an unqualified right to the access of light coming through the windows in question; the agreement was beyond the scope of the architect's authority; the user of the wall by defts. as a party wall constituted a derogation from their grant & a trespass. Defts. were ordered to disconnect their buildings from the wall.—*BETTS (FREDERICK) LTD. v. PICKFORDS, LTD.*, [1906] 2 Ch. 87; 75 L. J. Ch. 483; 94 L. T. 363; 54 W. R. 476; 22 T. L. R. 315.

*Sect. 2.—By implication of law: Sub-sect. 1, C. & D.; sub-sect. 2.]*

**273. Extent of implication—Absence of evidence as to terms & conditions.]—WHITMORES (EDENBRIDGE), LTD. v. STANFORD, No. 1028, post.**

*D. Rights of Grantees inter se.*

**274. Where simultaneous conveyances—Right to light.]—If a man builds a new house on part of his lands, & after sells the house to one, & the lands to another, he cannot obstruct the lights.—PALMER v. FLETCHER (1863), 1 Lev. 122; 1 Keb. 553, 625; 1 Sid. 167; 83 E. R. 329.**

*Annotations:—Apld. Compton v. Richards (1814), 1 Price, 27; Swansborough v. Coventry (1832), 9 Bing. 305. Consd. Wheeldon v. Burrows (1879), 12 Ch. D. 31. Foll. Allen v. Taylor (1880), 16 Ch. D. 355. Consd. Dalton v. Angus (1881), 6 App. Cas. 740. Apld. Russell v. Watts (1885), 10 App. Cas. 590; Phillips v. Low, (1892) 1 Ch. 47. Consd. Broomfield v. Williams, [1897] 1 Ch. 602. Rejd. Tenant v. Goldwin (1704), 2 Ld. Raym. 1089; White v. Bass (1862), 7 H. & N. 722; Robinson v. Grave (1872), 27 L. T. 648; Ellis v. Manchester Carriage Co. (1876), 2 C. P. D. 13; Birmingham, Dudley & District Banking Co. v. Ross (1888), 38 Ch. D. 295; Myers v. Catterson (1889), 69 L. J. Ch. 315; Smith v. Hancock, [1894] 2 Ch. 377; Hansford v. Jago, [1921] 1 Ch. 322.*

**275. — Reciprocal rights implied—Light.]—(1) Occupier of one of two houses built nearly at the same time & purchased of the same proprietor, may maintain a special action on the case against the tenant of the other, for obstructing his window lights by adding to his own building, however short the previous period of enjoyment by pltf.**

**(2) This purchase must be taken to have been subject to certain conditions at the time of sale, & as these unfinished houses were at that time so far built, as that the openings which were intended to be supplied with windows were sufficiently visible as they then stood, we must recognise an implied condition that nothing would afterwards be done by which those windows might be obstructed. The purchasers must have taken subject to what then appeared. Now, without questioning whether this building were a dwelling house or not, it is sufficient for the purpose of maintaining this action, if the erecting of any building on the wall be the doing an act whereby pltf. has sustained a derogation of any right which he acquired by his purchase. If so, it is what the original owner could not have done, & all lessees claiming under him were equally bound by the transfer (THOMSON, C.B.).—COMPTON v. RICHARDS (1814), 1 Price, 27; 145 E. R. 1320.**

*Annotations:—As to (1) Apld. Glave v. Harding (1858), 27 L. J. Ex. 280. Dist. Wheeldon v. Burrows (1879), 12 Ch. D. 31. Consd. Allen v. Taylor (1880), 16 Ch. D. 355. Apld. Russell v. Watts (1885), 10 App. Cas. 590. Dist. Beddington v. Atlee (1887), 35 Ch. D. 317. Rejd. White v. Bass (1862), 7 H. & N. 722; Watson v. Troughton (1883), 48 L. T. 508. As to (2) Apld. Swansborough v. Coventry (1832), 9 Bing. 305. Generally, Mentd. Boyle v. Tamlyn (1827), 9 Dow. & Tyr. K. B. 430.*

**276. — — — — —]—Pltf. purchased a house of A., & deft. at the same time purchased of A. the adjoining land, upon which an erection of one story high had formerly stood. In the conveyance to pltf., his house was described as bounded by building ground belonging to deft. :—Held: deft. was not entitled to build to a greater height than one story, if by so doing he obstructed pltf.'s lights.—SWANSBOROUGH v. COVENTRY (1832), 9 Bing. 305; 2 Moo. & S. 362; 2 L. J. C. P. 11; 131 E. R. 629.**

*Annotations:—Apld. Robinson v. Grave (1873), 39 L. T. 7.*

**PART III. SECT. 2, SUB-SECT. 1.—D. k. Where simultaneous conveyances.]—The rule of law that where the owner of two tenements sells them to two different persons at the same time the service which one tenement**

**tendered to the other, if it were continuous & apparent at the time of sale, becomes permanent, & the owner of the servient tenement cannot deprive the dominant tenement of the advantage theretofore possessed, is applicable**

**to cases where the sale has been made by the Crown.—HOWITT v. FITZGERALD (1898), 24 V. L. R. 387.—AUS.**

**1. —.]—Where two properties of one owner are sold at the same time,**

**Expld. & Dist. Wheeldon v. Burrows (1879), 12 Ch. D. 31. Consd. Allen v. Taylor (1880), 16 Ch. D. 355. Apld. Russell v. Watts (1885), 10 App. Cas. 590. Dist. Beddington v. Atlee (1887), 35 Ch. D. 317. Apprvd. & Apld. Broomfield v. Williams, [1897] 1 Ch. 602. Consd. Godwin v. Schweppes, [1902] 1 Ch. 926. Apld. Hansford v. Jago, [1921] 1 Ch. 322. Rejd. White v. Bass (1862), 31 L. J. Ex. 283; Crossley v. Lightowler (1866), L. R. 3 Eq. 279; Bunting v. Hicks (1894), 70 L. T. 455; Cory v. Davies, [1923] 2 Ch. 95.**

**277. — — — — —]—BARNES v. LOACH, No. 204, ante.**

**278. — — — — —]—Where the owner of a dwelling-house & adjoining land sells the house to one person & the land to another under contemporaneous conveyances, either purchaser being aware of the conveyance to the other, the purchaser of the land is not entitled to build thereon so as to obstruct the lights of the house.**

**A testator being owner in fee of a piece of land with two dwelling-houses thereon, & of another piece of land immediately adjoining with a warehouse at the further end thereof, devised his real estate to his two sons & another person in trust for sale, giving his two sons, or either of them, an option of purchasing any part of his real estate. By two separate but contemporaneous conveyances, executed by the trustees of the will, the one piece of land & the two dwelling-houses thereon were conveyed for value, "together with all lights thereunto belonging," & all the estate, etc., to the one son in fee, & the other adjoining piece of land & the warehouse were conveyed for value, together with all lights, etc., & all the estate, etc., to the other son in fee. An injunction was granted restraining the successor in title to the purchaser of the last-mentioned piece of land & warehouse from building on his land in such a way as to obstruct his neighbour's lights.—ALLEN v. TAYLOR (1880), 16 Ch. D. 355; 50 L. J. Ch. 178.**

*Annotations:—Apld. Russell v. Watts (1885), 10 App. Cas. 590. Consd. Birmingham, Dudley & District Banking Co. v. Ross (1888), 38 Ch. D. 295. Apld. Myers v. Catterson (1889), 43 Ch. D. 470. Consd. Broomfield v. Williams, [1897] 1 Ch. 602; Mallam v. Rose, [1915] 2 Ch. 222. Apld. Hansford v. Jago, [1921] 1 Ch. 322. Rejd. Rigby v. Bennett (1882), 21 Ch. D. 559; Phillips v. Low, [1892] 1 Ch. 47; Bunting v. Hicks (1894), 70 L. T. 455; Nicholls v. Nicholls (1899), 81 L. T. 811; Cory v. Davies, [1923] 2 Ch. 95. Mentd. Schwann v. Cotton, [1916] 2 Ch. 120.*

**279. — — — — —]—KENSINGTON CO-OPERATIVE STORES, LTD. v. LYONS (J.) & CO., LTD. (1895), 11 T. L. R. 319.**

**280. — — — — — Way.]—There being two tenants of adjoining houses held under the same landlord, the tenant of one of the houses acquired a right of way to his vaults through the adjoining vaults. The landlord sold both properties at one sale, with a condition that they were to be subject to & with the benefit, as the case might be, of all subsisting rights or easements of way or passage so far as any lot might be affected thereby :—Held: the vendor being subject to no liability as to right of way, the purchaser of one tenement could not enforce a right of way as against the other.—DANIEL v. ANDERSON (1862), 31 L. J. Ch. 610; 7 L. T. 183; 8 Jur. N. S. 328; 10 W. R. 366.**

*Annotations:—Rejd. Kilgour v. Gaddes, [1904] 1 K. B. 457. Mentd. Wheaton v. Maple, [1893] 3 Ch. 48; Schwann v. Cotton, [1916] 2 Ch. 120.*

**281. — — — — —]—NICHOLLS v. NICHOLLS, No. 607, post.**

**282. — — — — —]—In 1911 the owner of**



a piece of ground built four cottages on it, leaving in the rear of the back gardens of the cottages a strip some ten to twelve feet wide enclosed between the garden wall & the hedge bounding the property & also closed at its upper end by a wall. The lower end was open to a highway & the strip extended along behind the four cottages, so that access could be obtained from the highway over the strip to the cottages through back doors in the back garden wall. The cottages were let until 1919 to various tenants who used the strip for obtaining access to the cottages by the back doors. The earth closets & cesspools were also emptied from the strip, & in the case of two cottages the only alternative mode of removing the contents was through the cottages in breach of the local bye-laws. On Jan. 2, 1919, the cottages were sold by auction to various persons, amongst whom were *pltf.* & some of *defts.* The evidence showed that at the sale the auctioneer announced that each house would have a back entrance. The cottages were conveyed to the respective purchasers on the same day, & in each a grant was made of the particular cottage "with the garden outbuildings & appurtenances," & included the part of the strip adjoining that cottage. *Pltf.*, whose cottage adjoined the highway, brought this action for a declaration that *defts.* had no right of way over his part of the strip & an injunction accordingly. Although there was no made road over the strip, it was at the time of the sale worn & marked with rough tracks so as to make it apparent that the strip was used as a back approach to the cottages:—*Held*: (1) the right of way being *de facto* enjoyed by the tenants up to the date of the conveyances passed by way of express grant under the word "appurtenances"; (2) the right of way passed in any case under the words to be read into the conveyances under Conveyancing Act, 1881 (c. 41), s. 6 (2), as the use of one of these words, "appurtenances," did not suffice to exclude the others by showing a contrary intention within sect. 6, sub-sect. 4; (3) even if there were no express grant of the right of way, such grant ought to be & could be implied. It was immaterial that there was no formed road in existence at the date of the conveyances, as there were other *indicia* which made it apparent that the right was then being openly enjoyed.—*HANSFORD v. JAGO*, [1921] 1 Ch. 322; 90 L. J. Ch. 129; 125 L. T. 663; 65 Sol. Jo. 188.

*Annotation*:—As to (3) *Appld.* *Cory v. Davies*, [1923] 2 Ch. 95.

**283.** — Way formerly used but incapable of use at time of grant.]—*ROE v. SIDDONS*, No. 53, *ante*.

**284.** Conveyances not simultaneous—Leases of adjoining properties—Right of second lessor on termination of first lease—*Light*.]—A., the owner of two adjoining houses, granted a lease of one to B., there then existing in it a certain window, for a term which expired at Michaelmas, 1875; & afterwards, in 1874, leased the other houses to C.

*Semble*: (1) during the currency of B.'s lease, C. could not build so as to interfere with the light coming to B.'s window; (2) on the expiration of B.'s lease, C. could build so as to interfere with the light coming to the window, as the lease to C. had

been made by A. without any reservation of the right to light.—*WARNER v. MCBRYDE* (1877), 36 L. T. 360.

#### SUB-SECT. 2.—DEVISE BY COMMON OWNER.

**285.** Devise of land with appurtenances—Whether immemorial right of way over land of testator passes.]—*WHALLEY v. TOMPSON*, No. 540, *post*.

**286.** Easement for convenient use of land devised—*Way*.]—A., being a termor of land, built two houses on it. The whole was then released to him in fee, "with all ways, easements, advantages, & appurtenances thereunto belonging, or therewith usually used, leased, held, occupied or enjoyed." By his will he devised one house, & the appurtenances thereunto belonging, to B. & the other to C., in similar terms. During A.'s ownership of both, the entrance from the high road to the principal door of the house afterwards devised to B., was by a set out carriage drive or sweep entering from a high road, passing immediately in front of the house afterwards devised to C., to B.'s door, & then returning round an oval garden in front of C.'s house, but at a greater distance from it, to the same point of the entrance. B.'s house had a coach house opening only into the high road, & a back entrance into the same. After A.'s death, C. made a fence across the oval garden, leaving the further way to B.'s front door by the same carriage drive open. B. brought trespass claiming the way as appurtenant to his house & garden:—*Held*: (1) the way, as used in A.'s time, during the unity of ownership in him, immediately in front of C.'s house, did not pass to B. with the house devised to him, under the word appurtenances, in A.'s will; & (2) it did not pass as a way of necessity, whether taken in the strict sense, or as a way without which the most convenient & reasonable mode of enjoying every part of B.'s premises could not be had.

(3) *Semble*: nothing of absolute necessity to a building, e.g. a gutter *in alieno solo*, to carry off water, etc., is extinguished by unity of ownership.—*PREYSEY v. VICARY* (1817), 18 M. & W. 484; 8 L. T. O. S. 451; 153 E. R. 1280.

*Annotations*:—As to (1) *Reid*, *Pearson v. Spencer* (1861), 1 B. & S. 571; *Cuthbert v. Robinson* (1882), 51 L. J. Ch. 238; *Schwann v. Cotton & Hayles* (1916), 85 L. J. Ch. 689. As to (2) *Reid*, *Pinnington v. Galland* (1853), 9 Exch. 1. *Generally*, *Mend*, *Phillips v. Low*, [1892] 1 Ch. 47; *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557.

**287.** — — — — —]—There is a class of implied grants by devise where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a necessary dependance, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement.

Where the owner of a farm divided it by his will into two portions, devising them to A. & B. respectively, & the portion of B. was landlocked, so that in order to reach it it was necessary that he should have a right of way over the property of A., & the deviser during his life had used a way in a certain direction over that property:—*Held*: a right to use that way passed to B. by the devise.—*PEARSON v. SPENCER* (1863), 3 B. & S. 701; 8

& each of the purchasers has notice of the sale to the other, the right to any continuous easement passes with the sale as an absolute legal right; but the same must have been enjoyed by the vendor at the time of the sale.—*HART v. McMULLEN* (1899), 90 C. L. T. 197; 30 S. C. R. 245.—*CAN.*

#### PART III. SECT. 2, SUB-SECT. 2.

**286** 1. Easement for convenient use of land devised—*Way*.]—Upon the severance of a tenement by devise into separate parts, not only do rights of way of strict necessity pass, but also

rights of way necessary for the reasonable enjoyment of the parts devised, & which had been & were up to the time of the devise used by the owner of the entirety for the benefit of such parts.—*BRIGGS v. SEMMENS* (1890), 15 O. R. 522.—*CAN.*

**Sect. 2.—By implication of law: Sub-sects. 2 & 3.**  
**Sect. 3: Sub-sect. 1.]**

L. T. 166; 11 W. R. 471; 122 E. R. 285; *sub nom.* R. v. PEARSON, 1 New Rep. 373, Ex. Ch.  
**Annotations:—***Consd.* Brown v. Alabaster (1887), 37 Ch. D. 490. *Distd.* West Peckham v. Geary (1889), Trist. 189. *Appl.* Phillips v. Low, [1892] 1 Ch. 47. *Consd.* Milner's Safe Co. v. G. N. & City Ry., [1907] 1 Ch. 208; Hansford v. Jago, [1921] 1 Ch. 322. *Refd.* Dodd v. Burchell (1882), 1 H. & C. 113; Bolton v. Bolton (1879), 11 Ch. D. 968; Brett v. Clowser (1880), 5 C. P. D. 376; Ford v. Met. & Met. Dist. Rys. (1886), 17 Q. B. D. 12; Deacon v. S. E. Ry. (1889), 61 L. T. 377; Nicholls v. Nicholls (1889), 81 L. T. 811; Schwann v. Cotton, [1916] 2 Ch. 459. *Mentd.* Polden v. Bastard (1863), 4 B. & S. 258.

**288. — [J.—**Testator, who died in 1832, devised several freehold houses in the City of London "with their appurtenances" to various devisees. They were adjoining houses & had been built by testator, each of them being partly a dwelling-house & partly a warehouse. They all communicated with a passage, a cul-de-sac, which ran along the backs of the premises into a side street, & had been constructed by testator for the convenience of the several houses, & had always been used in connection with them. Testator did not devise the passage or make an express grant of any rights of way over it to his devisees. Pltfs., who own the two houses abutting on to the passage at its open end, & defts.' predecessors in title, who owned the adjoining house higher up the passage, had for many years used the passage for loading & unloading vans for the purposes of their respective businesses. Pltfs. now sought to restrain defts., who had acquired, & built a railway station upon, the site of the last-mentioned house, from obstructing the passage by using & inviting their passengers to use it as a thoroughfare to or from their station:—*Held*: (1) a grant to the several devisees of a right of way contemplating such user as would be required for business as well as domestic purposes must be implied from the surrounding circumstances; (2) a railway station was not & could not have been in the contemplation of testator, & was, both in construction & mode of occupation something entirely different from any dwelling-house, warehouse, or even manufactory, that could have been erected on the land; (3) defts. having made it impossible that the passage should be used by them for the purposes for which it was designed, & for which it had in fact been used, their right was not, under the present circumstances, exercisable at all.

*Semble*: (4) a right of way thus suspended is capable of being revived.

(5) The construction of an implied grant of a right of way by evidence of user, exemplified.—*MILNER'S SAFE CO., LTD. v. GREAT NORTHERN & CITY RY. CO.*, [1907] 1 Ch. 208; 75 L. J. Ch. 807; 95 L. T. 321; 22 T. L. R. 706; 50 Sol. Jo. 608; *varied, on appeal*, [1907] 1 Ch. 229, C. A.

**289. — [J.—**Use of pump.]—*POLDEN v. BASTARD*, No. 60, *ante*.

**290. — [J.—**Light.]—The owner in fee of a house & an adjoining field over which the light required for the windows of the house passed devised the house to A. & the field to B.:—*Held*: the right to light over the field passed to the devisee of the house, & the devisee of the land had no right to obstruct the light.

If the owner of the house & field by deed, for value, grants the house but retains the field, it is settled law that a right to the light required for the enjoyment of the house passes to the grantee. . . . The conveyance operates as an implied grant of the light. Blocking of the windows by the grantor is regarded as an attempt on his part to derogate from his grant, a form of expression which

assumes that the right to light has passed to the grantee (*CHITTY, J.*).—*PHILLIPS v. LOW*, [1892] 1 Ch. 47; 61 L. J. Ch. 44; 65 L. T. 552; 8 T. L. R. 23.

**Annotations:—***Consd.* Corbett v. Jonas, [1892] 3 Ch. 137; Schwann v. Cotton, [1916] 2 Ch. 459. *Refd.* Nicholls v. Nicholls (1889), 81 L. T. 811; Milner's Safe Co. v. G. N. & City Ry., [1907] 1 Ch. 208.

**291. — [J.—**Water supply.]—Testator, who died in 1902, by his will made in 1898 devised Blackacre, of which he was then in occupation, & the appurtenances to pltf.'s predecessors in title, & Whiteacre & the appurtenances to the predecessor in title of the present owner, whose husband & gardener were defts. Blackacre was supplied with water by an underground pipe leading from a stone well at Greenacre, through Whiteacre. This pipe was openly laid by the testator in 1893, but there was no evidence as to what, if any, arrangement was made with the then owner of Greenacre. The supply was originally used for the house & garden of Blackacre, but after 1894 it was used for the garden only, though the house connection was still available. The well was fed by percolation from some untraceable spring, & the spring was practically continuous. The well had long since been covered by a stone slab & sods, & when the present owner of Greenacre bought in 1912 he was unaware of the existence of the well or the pipe, & was told there were no easements.

The present owner of Whiteacre purchased in 1913 without notice of the existence of the pipe or any easement. In 1914 a new carriage drive was made through Whiteacre, & the pipe being then discovered & found to be in the way, defts. as agents of the owner, who was abroad, cut & removed part of it & stopped the flow of water, whereupon pltf. brought an action for an injunction:—*Held*: (1) the effect of the will was to devise Blackacre with the right of passage of such water as might flow through the pipe, & to devise Whiteacre subject to that right; (2) the pipe easement, not being determinable at the will of the owner of the alleged servient tenement Whiteacre, was not precarious as between the owners of Blackacre & Whiteacre, & was therefore capable of creation by implied grant; (3) defts. were not entitled to rely on an alleged *jus tertii* in the owner of Greenacre to stop the water on the ground that the enjoyment against him had been "*clam*," & that his well was only being fed by percolating water; (4) the easement being one which depended not on implied covenant, but implied grant, the maxim that a grantor cannot derogate from his own grant applied, & the present owner of Whiteacre could not only therefore rely on the equitable defence of being a purchaser for value without notice; (5) the condition that the enjoyment must be *nec vi, nec clam, nec precario*, was a condition necessary to the acquisition of an easement by prescription, & had no reference to, & was in fact in the nature of things excluded, where the acquisition was by grant.—*SCHWANN v. COTTON*, [1916] 2 Ch. 459; 85 L. J. Ch. 689; 115 L. T. 168; 60 Sol. Jo. 654, C. A.

**292. Continuous easement.]—***POLDEN v. BASTARD*, No. 60, *ante*.

**SUB-SECT. 3.—ON ESCHAT.**

**293. Whether easement implied on escheat of estate of common owner.]—**To an action of trespass over close A., deft. pleaded that S., in his life, was possessed of close A. adjoining a highway as tenant of the manor of H. & of close B. adjoining

ing close A., as tenant of the manor of T.; that during his life he had a way of necessity from the said highway over close A. to close B.; that on his death close A. escheated to the lord of H., & close B. to the lord of T., who, by virtue of the premises, from the death of S. & until the time when, etc., necessarily had, & still of right ought to have, the same necessary way over close A. from the said highway to close B., which had been had & used by S. during his lifetime:—*Held*: *pltf.* was entitled to judgment on such plea, *non obstante veredicto*; (1) because a right of way of necessity could only be created by grant, express or implied, & title by escheat was not equivalent to title by grant; (2) because, if even escheat were equivalent to grant, the plea did not allege that the lord of the manor of T. had no other way to close B. from the highway at the time when, etc., than that which S. had during his life.—*PROCTOR v. HODGKINSON* (1855), 10 Exch. 824; 3 C. L. R. 755; 24 L. J. Ex. 195; 156 E. R. 674.

*Annotations*:—*As to* (1) *Refd.* *Pearson v. Spencer* (1861), 1 B. & S. 571; *Deacon v. S. E. Ry.* (1889), 61 L. T. 377.

### SECT. 3.—BY PRESCRIPTION.

#### SUB-SECT. 1.—IN GENERAL.

294. *Presumption of legal origin.*—*HOWELL v. KING*, No. 34, *ante*.

295. —.]—The general principle upon which a presumption should be allowed . . . is this, that that which has been done should be presumed to be rightly done. . . . Applying it to the question of a right of way. If we find the act has been often repeated (for the occasional use of a walk or path across a man's field would be hardly such a use as would establish the right), but if the act must necessarily have been often repeated with the knowledge of the persons acting upon an adverse right, it affords a strong presumption in favour of the right so exercised. The same principle is to be applied to presumptions in the case of light, or of flowing water. In each of these cases there must be a long continuance of enjoyment to warrant the presumption (*ABBOTT, C.J.*).—*BARRLETT v. DOWNES* (1825), 3 B. & C. 616; 1 C. & P. 522; 5 Dow. & Ry. K. B. 526; 3 L. J. O. S. K. B. 90; 107 E. R. 861.

*Annotation*:—*Mentd.* *Wynne v. Griffith* (1826), 8 Dow. & Ry. K. B. 470.

296. —.]—A custom which has existed from time immemorial without interruption within a certain place, & which is certain & reasonable in itself, obtains the force of a law, & is, in effect, the common law within that place to which it extends, though contrary to the general law of the realm. In the case of a custom, therefore, it is unnecessary to look out for its origin; but, in the case of prescription, which founds itself upon the presumption of a grant that has been lost by process of time, no prescription can have had a legal origin where no grant could have been made to support it (*TINDAL, C.J.*).—*LOCKWOOD v. WOOD* (1844), 6 Q. B. 50; 13 L. J. Q. B. 305; 3 L. T. O. S. 139; 8 Jur. 543; 115 E. R. 19, Ex. Ch.; *subsequent proceedings* (1845), 6 Q. B. 67, n.

*Annotations*:—*Consd.* *Mercer v. Denno*, [1904] 2 Ch. 531. *Refd.* *Constable v. Nicholson* (1863), 14 C. B. N. S. 239; *Anglo-Hellenic S.S. Co. v. Dreyfus* (1913), 108 L. T. 36.

### PART III. SECT. 3, SUB-SECT. 1.

m. *Applicability of English law.*—At the time of the passing of 9 Geo. IV. c. 83, the English law of prescription as to ancient lights was a law which could be applied in N.S.W. within the

meaning of sect. 21 & therefore, became part of the law of that colony by virtue of that sect., even if it had not been brought with them to the colony by the first settlers.—*DELOHERY v. PERMANENT TRUSTEE CO. OF NEW*

*Mentd.* *Hoare v. Metropolitan Board of Works* (1874), 1 L. R. 9 Q. B. 296; *A.-G. v. Horner* (1884), 14 Q. B. D. 245.

297. —.]—We must bear in mind the cardinal rules of prescription, first, that no length of enjoyment can establish a title which could have no legal origin, as, for instance, of an estate or interest which the law does not recognise; & next, that "antiquity of time justifies all titles, & supposes the best beginning the law can give them." So that, if evidence be given, after long enjoyment of property to the exclusion of others, of such a character as to establish that it was dealt with as of right as a distinct & separate property, in a manner referable to a possible legal origin, it is presumed that the enjoyment in the manner long used was in pursuance of such an origin, which, in the absence of proof that it was modern, is deemed to have taken place beyond legal memory (*WILLES, J.*).—*JOHNSON v. BARNES* (1872), 1 L. R. 7 C. P. 592; 41 L. J. C. P. 250; 27 L. T. 152; *affd.* (1873), L. R. 8 C. P. 527, Ex. Ch. *Annotations*:—*Refd.* *Saltash Corp. v. Goodman* (1881), 29 W. R. 639; *Brocklebank v. Thompson*, [1903] 2 Ch. 344; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. *Mentd.* *Simpson v. Godmanchester Corp.* (1897), 77 L. T. 409.

298. —.]—For more than forty years without interruption the owner of a house used a cart way from his stables through the yard of an adjoining inn to the public road, paying each year 15s. to the owners of the inn yard. There was no agreement in writing, & no conclusive evidence as to the origin of or the consideration for the payment:—*Held*: (1) the inference of fact drawn from the evidence was that the payment was made for leave to use the way; (2) there had been no enjoyment of right within Prescription Act, 1832 (c. 71), s. 2; & there was no ground for presuming a lost grant.

(3) The common law doctrine is that all prescription presupposes a grant. But if the grant is proved & its terms are known, prescription has no place (*LORD LINDSEY*).

(1) There is certainly no need to resort to the presumption of a lost grant when the facts of the case, so far as they are known, suggest a much simpler & a more natural explanation (*LORD MACNAGHTON*).—*GARDNER v. HODGKINSON'S KINGSTON BREWERY CO.*, [1903] A. C. 229; 72 L. J. Ch. 558; 88 L. T. 698; 52 W. R. 17; 19 T. L. R. 458, H. L.

*Annotations*:—*As to* (4) *Refd.* *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Lyell v. Hothfield*, [1914] 3 K. B. 911. *Generally*, *Mentd.* *Hyman v. Van Den Bergh*, [1907] 2 Ch. 516.

299. —.]—In an action for a declaration that *pltf.* is entitled to an ancient ferry & an injunction restraining *deft.* from disturbing *pltf.* in the enjoyment thereof, where disturbance is not proved, the *ct.* ought to make a declaration of *pltf.*'s title.

*Pltfs.* claimed to be entitled to an ancient ferry from point to point on the river Thames. The lands on both sides of the river shortly below *pltf.*'s ferry had been recently acquired for the public for purposes of recreation, & the lands on the north side had been laid out as a public park, & as a consequence the public resorted to this part of the river in large numbers. *Defts.*, under a licence from the authority owning the park, moored a barge in the river adjoining the park within 600 yards of *pltf.*'s ferry, & for the convenience of the public visiting the park set up a

SOUTH WALES (1901), 1 C. L. R. 283.—*AUS.*

n. *Where English law applicable—Law prior to Prescription Act.*—In cases where English law is applicable, the law of prescription is that existing in

*Sect. 3.—By prescription: Sub-sects. 1 & 2.]*

ferry across the river between the barge & some steps on the opposite side. In an action for disturbance of ferry:—*Held*: defts.' ferry was not a disturbance of pltf's.

The acquisition of rights, as well by prescription at common law as by the presumption of lost grant, depends on the proof of long user or practice for which a legal origin will, if possible, be presumed, & which would have been unlawful without some such presumption (LORD PARKER).—HAMMERTON v. DYSART (EARL), [1916] 1 A. O. 57; 85 L. J. Ch. 33; 113 L. T. 1032; 80 J. P. 97; 31 T. L. R. 592; 59 Sol. Jo. 665; 13 L. G. R. 1255, H. L.; *revisq.* S. O. *sub nom.* DYSART (EARL) v. HAMMERTON & Co., [1914] 1 Ch. 822, O. A.

*Annotation*:—*Mentd.* General Estates Co. v. Beaver, [1914] 3 K. B. 918.

**300. Prescription not applicable**—If root of title proved.]—(1) The law of prescription does not apply to land where the true root of title is proved.

(2) Where a grant was made by the French Crown of the seigniory of an island off the coast of Canada, with the right to establish stations for fishing & hunting on the mainland, with the privilege of taking the timber & land necessary for such stations:—*Held*: it did not confer any seigniory on the mainland.

(3) Where, in consequence of erroneous statements as to the effect of a former grant & a recognition by the Crown, a reputation had arisen that a seigniory existed, contrary to the true facts, & an Act of Parliament was passed dealing with such seigniory as existing, & altering its tenure, & defining its extent by a schedule to be drawn up as therein provided:—*Held*: the Act & schedule were conclusive as to the existence of the seigniory & its boundaries.—LABRADOR CO. v. R., [1893] A. O. 104; *sub nom.* LABRADOR CO. v. R., R. v. LABRADOR CO., 62 L. J. P. C. 33; 67 L. T. 730, P. C.

*Annotations*:—*As to* (1) *Refd.* A.-G. v. Horner (No. 2), [1913] 2 Ch. 140. *Generally, Mentd.* Tennant v. Union Bank of Canada (1893), 63 L. J. P. C. 25.

**301.** ———.]—GAIRDNER v. HODGSON'S KINGSTON BREWERY CO., No. 298, *ante*.

## SUB-SECT. 2.—WHO MAY PRESCRIBE.

**302. Parishioners.**]—Parishioners cannot prescribe either in matter of easement or interest.—FOXALL v. VENABLES (1590), Cro. Eliz. 180; 78 E. R. 436.

**303.** ———.]—GOODDAY v. MICHELL (1595), Cro. Eliz. 441; Owen, 71; 78 E. R. 681.

*Annotations*:—*Refd.* Taylor v. Devey (1837), 7 Ad. & El. 409. *Mentd.* Brooklebank v. Thompson, [1903] 2 Ch. 344.

**304. Inhabitants.**]—(1) In an action for stopping a way, pltf. must prescribe in him who has the inheritance, for an allegation that all occupiers of a certain close ought to have a way for them & their servants, etc. is not sufficient; but inhabitants may prescribe for an easement, etc., in the soil of another.

(2) In an action for stopping a way to the wife's close previous to the marriage, the husband ought

to join.—BAKER v. BREREMAN (1635), Cro. Car. 418; 79 E. R. 964.

*Annotations*:—*As to* (1) *Consd.* A.-G. v. Acton L. B. (1882), 31 W. R. 153. *Refd.* Paine v. Parrish (1691), Carth. 191; Crouther v. Oldfield (1706), 1 Salk. 364; Fitch v. Rawling (1795), 2 Hy. Bl. 393; Lockwood v. Wood (1844), 6 Q. B. 50; Mercer v. Denne, [1904] 2 Ch. 534.

**305.** ———.]—The inhabitants of a town cannot prescribe for an easement in *alieno solo*, as stallage, or claim exemption by grant, & where a charter for a market was granted to A. in 1639, & in 1640 a deed was executed between the grantee of the market, & certain persons representing the inhabitants, which contained a clause exempting the inhabitants from toll, & there was evidence of exemption subsequent to the deed, but no evidence of any exemption before, or of any market being in existence in 1639:—*Held*: it was a misdirection to direct the jury that they must infer the exemption originated in some custom independent of the deed.—LOCKWOOD v. WOOD (1845), 6 Q. B. 67, n.; 1 New Pract. Cas. 293; 15 L. J. Q. B. 36; 6 L. T. O. S. 147; 10 J. P. 424; 10 Jur. 158; 115 E. R. 20; *previous proceedings* (1844), 6 Q. B. 50, Ex. Ch.

**306. Owner in fee.**]—In pleading a prescription for an easement, it must be laid in him who has the fee.—MATCHES v. BOUGHTON (1673), Freem. K. B. 357; 89 E. R. 266; *sub nom.* MATTHEWS v. BOWTEL, 3 Keb. 218; *sub nom.* MATTHEWS v. BOWTEL, 3 Keb. 243, 253.

**307.** ———.]—A prescription can only be annexed to an estate in fee, & therefore, in pleading, it must be expressly alleged that the party was seized in fee.—SCOBLE v. SKELTON (1682), 2 Mod. Rep. 318; 2 Show. 195; Skin. 36; 80 E. R. 1097.

**308.** ———.]—Where a way had been used adversely & under a claim of right, for more than twenty years, over land in the possession of a lessee who held under a lease for lives granted by the Bishop of W.:—*Held*: (1) under Prescription Act, 1832 (c. 71), this user gave no right as against the bishop, & did not affect the see; (2) as the user could not give a title as against all persons having estates in the *locus in quo*, it gave no title as against the lessee & the persons claiming under him, & no title was gained by an user which did not give him a valid title as against the bishop, & permanently affect the see.

(3) The declaration for disturbance of the above-mentioned right of way alleged that pltf. was possessed of a certain wharf, close, & premises, & by reason thereof, ought to have had, & still of right ought to have, a certain way from this wharf, close & premises into, etc., as to the wharf & premises belonging & appertaining:—*Held*: the declaration was sufficient, & the way might be claimed as appurtenant to pltf.'s possession of the land at the time of the injury committed.

(4) If the way shall appear to have been enjoyed by claimant, not openly & in the manner that a person rightfully entitled would have used it, but by stealth as a trespasser would have done—if he shall have occasionally asked the permission of the occupier of the land—no title would be acquired, because it was not enjoyed, "as of right." For the same reason it would not, if there had been unity of possession during all or part of the time, for then claimant would not have enjoyed "as of right" the easement, but the soil

England prior to the passing of the Prescription Act.—BAGRAM v. KHET-TRANATH KARFORMAH (1889), 3 B. L. R. 18.—*IND.*

**PART III. SECT. 3, SUB-SECT. 2.**  
*o. Lessee—Not in other land of*

*lessor.*]—A tenant of land, even if having a permanent right of tenancy on the land, cannot acquire an easement by prescription in other land of his lessor.—NANI CHANDER CHAKRABUTTY v. BAIKANTA NATH BISWAS

(1902), I. L. R. 29 Cal. 363.—*IND.*  
*p. — On behalf of landlord.*]—A lessee of land can acquire an easement on behalf of his landlord, appurtenant to the land he occupies.—STOREY v. CASEY (1884), 3 N. Z. L. R. 283.—*N.Z.*

itself. . . . No title at all is gained by an user which does not give a valid title against all, & permanently affect the see. Before Prescription Act, 1832 (c. 71), . . . in practice the usual course was to state a grant by an owner in fee to an owner in fee (PARKER, B.).—BRIGHT v. WALKER (1834), 1 Cr. M. & R. 211; 4 Tyr. 502; 3 L. J. Ex. 250; 149 E. R. 1057.

**Annotations:**—As to (1) *Consd.* Wright v. Williams (1836), Tyr. & Gr. 375; Palk v. Shinner (1852), 18 Q. B. 568; Winship v. Hudspeth (1854), 10 Exch. 5; Harris v. De Pinna (1886), 33 Ch. D. 238; Fear v. Morgan, [1906] 2 Ch. 406. *Refd.* Kilgour v. Gaddes, [1904] 1 K. B. 457; Richardson v. Graham, [1908] 1 K. B. 39. As to (2) *Consd.* Harris v. De Pinna (1886), 33 Ch. D. 238; Wheaton v. Maple, [1893] 3 Ch. 48. *Refd.* Monmouthshire Canal Co. v. Harford (1834), 1 Cr. M. & R. 614; Tickle v. Brown (1836), 4 Ad. & El. 369; Onley v. Gardiner (1838), 4 M. & W. 496; Harbridge v. Warwick (1849), 3 Exch. 552; Dalton v. Angus (1881), 6 App. Cas. 740; Bass v. Gregory (1890), 25 Q. B. D. 481; Dampier v. Bassett, [1901] 2 Ch. 350; Gardner v. Hodgson's Kingston Brewery Co. (1903), 72 L. J. Ch. 558. As to (4) *Consd.* Fear v. Morgan, [1906] 2 Ch. 406. *Refd.* Salkeld v. Johnson (1848), 2 Exch. 256; Winship v. Hudspeth (1854), 10 Exch. 5; Dalton v. Angus (1881), 6 App. Cas. 740; Hollins v. Vorney (1884), 13 Q. B. D. 324; Dampier v. Bassett, [1901] 2 Ch. 350; Gardner v. Hodgson's Kingston Brewery Co. (1903), 172 L. J. Ch. 558. *Generally, Mentd.* Symons v. Leaker (1885), 53 L. T. 227; Whitte v. Harrow, Harrow v. Marylebone District Property Co. (1902), 86 L. T. 4.

**309.** —.]—An easement, such as a right of way, cannot, under Prescription Act, 1832 (c. 71), s. 2, be acquired by a tenant by user over land occupied by another tenant under the same landlord, even if that user has existed for the period of forty years mentioned in the sect.

The point was early taken that this provision applied to a claim of the right to light under sect. 3 of the Act, but it was held that it did not, & that the access of light need not be enjoyed as of right, in order to confer a title to it under the Act. With regard to easements, such as a right of way, the reason why a prescriptive right of way cannot be acquired by user by one tenant over land in the occupation of another tenant of the same owner is that the enjoyment of the easement in that case would not be as of right (COLLINS, M.R.).

An easement can only be acquired by prescription at common law where the dominant & servient tenements respectively belong to different owners in fee, the essential nature of such an easement being that it is a right acquired by the owner in fee of the dominant tenement against the owner in fee of the servient tenement (MATHEW, L.J.).—KILGOUR v. GADDES, [1904] 1 K. B. 457; 73 L. J. K. B. 233; 90 L. T. 604; 52 W. R. 438; 20 T. L. R. 240, C. A.

**Annotations:**—*Consd.* Derry v. Sanders, [1919] 1 K. B. 223. *Refd.* Cory v. Davies, [1923] 2 Ch. 95.

**310. Tenant for life.**—]—GOODDAY v. MICHELL (1595), Cro. Eliz. 441; Owen, 71; 78 E. R. 681.

**Annotations:**—*Mentd.* Taylor v. Devey (1837), 7 Ad. & El. 409; Brocklebank v. Thompson, [1903] 2 Ch. 344.

**311. Lessee.**—]—GOODDAY v. MICHELL (1595), Cro. Eliz. 441; Owen, 71; 78 E. R. 681.

**Annotations:**—*Mentd.* Taylor v. Devey (1837), 7 Ad. & El. 409; Brocklebank v. Thompson, [1903] 2 Ch. 344.

**312.** —.]—(1) A lessee for years cannot prescribe in his own name. Such a prescription is bad after verdict.

(2) In a possessory action for an injury to an easement, *pltf.* need not set out his title.—DAWNEY v. CASHFORD (1697), Carth. 432; 90 E. R. 851; *sub nom.* DORN v. GASHFORD, 1 Com. 41; 1 Ld. Raym. 266; 1 Salk. 363.

**Annotations:**—As to (2) *Refd.* Crouther v. Oldfield (1706), 1 Salk. 364; Richards v. Fry (1838), 7 Ad. & El. 698; Thruscott v. Martin (1849), 18 L. J. Ex. 291.

**313.** —.]—Lessee for years cannot prescribe

to have cattle watered in a close.—SMITH v. MORRIS (1732), Fortes. Rep. 340; 92 E. R. 881.

**314.** —.]—Where A. & B. are in possession of lands as lessees under C., B. cannot prescribe for a right of way over the land of A.—LARGE v. PITT (1797), Peake, Add. Cas. 152, N. P.

**315.** —.]—A. & B. occupied adjoining premises under C., their landlord, & B.'s premises were supplied with water by means of a pipe from A.'s premises. A. & B.'s premises were put up for sale by auction in different lots, it being made a condition that the premises were to be sold subject to rights of water & other easements subsisting thereon. A. & B. purchased at the sale the premises severally occupied by them:—*Held:* (1) B.'s supply of water from A.'s premises was not an easement which could be enforced against a purchaser, it being simply a licence from the landlord for B. thus to obtain water during his tenancy; (2) A. was, therefore, entitled to a decree for specific performance of his contract to purchase the premises occupied by him, without any reservation to B. of right of water.—RUSSELL v. HARFORD (1866), L. R. 2 Eq. 507; 15 L. T. 171; 14 W. R. 982.

**316.** —.]—By deed in 1791 A. obtained a demise from B. of an underground drain to be then constructed in B.'s land for the purpose of conducting water from A.'s mill so long as an annual rent of £2 2s. should be paid by A. to B. In 1836 the demise of 1791 was put an end to, & liberty was given to A., who was at that time yearly tenant from B. of the land through which the drain ran, to change the drain of 1791, & to substitute a new cut for conducting pure & clean water at the like rent of £2 2s. The new cut was made & used for pure water, & the old drain, as *pltf.* alleged, continued to be used for foul water. In 1866 the land through which the drains ran was sold to C., & in 1867 A.'s yearly tenancy of the land was determined. In an action by A. in 1879 to restrain C. from interfering with his use of the old drain, to which he claimed title by prescription from alleged open & uninterrupted use & enjoyment thereof from 1836:—*Held:* until 1867 A. could not acquire an easement in the land of which he was yearly tenant, distinct from the use & enjoyment of such land, as against B., his landlord, & assuming the open & uninterrupted user from 1836 to have been proved, he had failed to establish any title by prescription as against C.—OUTRAM v. MAUDE (1881), 17 Ch. D. 391; 50 L. J. Ch. 783; 29 W. R. 818.

**317.** —.]—In July, 1852, *pltf.* purchased & took a conveyance of the freehold of a piece of land on which he had, in the same year, built two houses. In Sept. 1892, *defts.*, who had, in 1891, purchased a Crown lease, which had been granted in 1826 by the Comrs. of Woods & Forests under their statutory powers, of certain adjoining buildings for the residue of a term which would expire in 1914, surrendered the lease to the Crown upon the terms of an agreement with the Crown & the Comrs. that they, *defts.*, should erect new buildings in place of the old, & that, on completion, the Comrs. should grant them a new lease. *Defts.* then proceeded to pull down the old buildings & erect new ones, which, *pltf.* complained, would obstruct the ancient lights in his houses. No new lease had yet been granted to *defts.* under their agreement. In an action brought by *pltf.* against *defts.* for an injunction to restrain them from obstructing his ancient lights, *pltf.* contended that he had acquired an indefeasible right to light, not only as against *defts.* as lessees, but also as against the Crown as reversioners:—

**Sect. 3.—By prescription: Sub-sects. 2, 3 & 4. A.]**

**Held:** (1) Prescription Act, 1832 (c. 71), s. 2, did not apply to the easement of light; (2) sect. 3, which applied to light, did not bind the Crown; (3) under the circumstances no lost grant of light could be presumed as against the Crown or its lessees; (4) as plff. could not establish a right against the Crown as reversioner, he could not establish a right against the lessees, inasmuch as an easement, if acquired by prescription, either at common law or under the statute, must be absolute & not for a term of years.

The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with any one except an owner in fee . . . An easement for a term of years may, of course, be created by grant; but such an easement cannot be gained by prescription, & not being capable of being so acquired, it does not fall within the scope of the Prescription Act, 1832 (c. 71) (LINDLEY, L.J.).—**WHEATON v. MAPLE & Co.**, [1893] 3 Ch. 48; 62 L. J. Ch. 963; 69 L. T. 208; 41 W. R. 677; 9 T. L. R. 559; 37 Sol. Jo. 615; 2 R. 549, C. A.

**Annotations:**—As to (2) **Consd.** *Fear v. Morgan*, [1906] 2 Ch. 406. **Refd.** *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508. As to (4) **Consd.** *Kilgour v. Gaddes*, [1904] 1 K. B. 457; *Fear v. Morgan*, [1906] 2 Ch. 406. **Refd.** *Richardson v. Graham*, [1908] 1 K. B. 39; *Cory v. Davies*, [1923] 2 Ch. 95.

*See, also*, Sub-sect. 6, C. (a), *post*.

**SUB-SECT. 3.—WHAT EASEMENTS MAY BE PRESCRIBED FOR.**

**318. Right must be capable of creation by grant.]**—Nothing may be good by prescription, but that which may have beginning by grant, & also prescription is incident to the person, & custom to some place, & holds place in many places, which cannot be by grant (COKE, C.J.).—**ROWLES v. MASON** (1612), 2 Brownl. 102; 123 E. R. 892.

**319. —.]**—**LOCKWOOD v. WOOD**, No. 305, *ante*.

**320. —.]**—**CREYKE v. HATFIELD CHASE LEVEL CORPN.** (1896), 12 T. L. R. 383; 40 Sol. Jo. 531.

**321. Right must be capable of legal origin.]**—**JOHNSON v. BARNES**, No. 297, *ante*.

**322. —.]**—A prescriptive right to a several oyster fishery in a navigable tidal river was proved to have been exercised from time immemorial by a borough corpn. & its lessees, without any qualification except that the free inhabitants of ancient tenements in the borough had from time immemorial without interruption, & claiming as of right, exercised the privilege of dredging for oysters in the *locus in quo* from Feb. 2 to Easter Eve in each year, & of catching & carrying away same without stint for sale & otherwise. This

usage of the inhabitants tended to the destruction of the fishery, & if continued, would destroy it:—

**Held:** (1) the claim of the inhabitants was not to a *profit à prendre in alieno solo*; (2) a lawful origin for the usage ought to be presumed if reasonably possible; (3) the presumption which ought to be drawn, as reasonable in law & probable in fact, was that the original grant to the corpn. was subject to a trust or condition in favour of the free inhabitants of ancient tenements in the borough in accordance with the usage.

(4) It is clear law that while you may by custom claim an easement to be enjoyed over the land of another, you cannot by custom claim a *profit à prendre in alieno solo*. . . . A fluctuating & uncertain body cannot claim a *profit à prendre in alieno solo*, & indeed cannot be the grantee of a several fishery or of any other kind of real property (LORD CAIRNS).

(5) The owner of the *profit à prendre* may take it in person or by his servants. But he may also, whether the profit is in gross or appendant to land, get the benefit of his *profit à prendre*, by selling or letting an interest in it, for a longer or shorter term, to any person capable of taking such an interest, & so long as that interest endures the donee has an irrevocable licence to take so much of the profit (LORD BLACKBURN).

(6) The law is . . . that prescription can only be of something which could have a lawful origin at common law (LORD BLACKBURN).—**GOODMAN v. SALTASH CORPN.** (1882), 7 App. Cas. 633; 52 L. J. Q. B. 193; 48 L. T. 239; 47 J. P. 276; 31 W. R. 293, H. L.; *affg. S. C. sub nom. SALTASH CORPN. v. GOODMAN* (1881), 7 Q. B. D. 106, C. A.

**Annotations:**—As to (2) **Apld.** *Haigh v. West*, [1893] 2 Q. B. 19; *Ellot v. Bristol Corpn.* (1895), 72 L. T. 752. **Consd.** *A.-G. v. Wright*, [1897] 2 Q. B. 318; *Harris v. Chesterfield*, [1911] A. C. 623. **Refd.** *Simpson v. Godmanchester Corpn.* (1895), 65 L. J. Ch. 154. *A.-G. v. Simpson*, [1901] 2 Ch. 671; *A.-G. v. Tonkin* (1901), 18 T. L. R. 49; *Mercer v. Denno*, [1904] 2 Ch. 534; *Nesbitt v. Mablethorpe U. C.*, [1918] 2 K. B. 1. As to (3) **Consd.** *Harris v. Chesterfield*, [1911] A. C. 623. **Refd.** *Neill v. Devonshire* (1882), 8 App. Cas. 135; *Re Free Fishermen of Faversham (Co. or Fraternity of)* (1887), 36 Ch. D. 329; *Re Christchurch Inclosure Act* (1888), 38 Ch. D. 520; *Re Norwich Town Close Estate Charity* (1888), 40 Ch. D. 298; *Re St. Stephen, Coleman Street, Re St. Mary the Virgin, Aldermanbury* (1888), 39 Ch. D. 492; *Tilbury v. Silva* (1890), 45 Ch. D. 98; *Haigh v. West*, [1893] 2 Q. B. 19; *Wheaton v. Maple*, [1893] 3 Ch. 48; *A.-G. v. Simpson*, [1901] 2 Ch. 671; *A.-G. v. Antrobus*, [1905] 2 Ch. 188; *Fitzhardinge v. Purcell*, [1908] 2 Ch. 139; *Foley's Charity Trustees v. Dudley Corpn.*, [1910] 1 K. B. 317; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. As to (4) **Refd.** *Smith v. Andrews*, [1891] 2 Ch. 678; *Haigh v. West*, [1893] 2 Q. B. 19; *Mitcham Common Conservators v. Banks* (1912), 76 J. P. 413. **Generally, Mentd.** *Pooley's Trustee v. Wetham* (1886), 33 Ch. D. 76; *Stanley v. Norwith Corpn.* (1887), 3 T. L. R. 506; *Blount v. Layard* (1888), [1891] 2 Ch. 681, n.; *I. R. Comrs. v. Scott*, *Re Bootham Ward Strays, York*, [1892] 2 Q. B. 152; *Tyne Improvement Comrs. v. Inurie*, *A.-G. v. Tyne Improvement Comrs.* (1899), 81 L. T. 174; *Re Church Patronage Trust, Laurie v. A.-G.*, [1904] 2 Ch. 643; *Re Allen, Hargreaves v. Taylor*, [1905] 2 Ch. 400; *R. v. Income Tax Special Comrs.*, *Ex p. University College of North Wales* (1908), 98 L. T. 446; *Johnston v. O'Neill*, [1911] A. C. 552; *Re Wedgwood, Allen v. Wedgwood*, [1915] 1 Ch. 113.

**PART III. SECT. 3, SUB-SECT. 3.**

**321 f. Right must be capable of legal origin.]**—Plff. sought to recover damages against deft. for obstructing him in the use of a way adjoining plff.'s property, which he claimed to enjoy by virtue of user by himself & those under whom he claimed for a period of forty years:—**Held:** the mere user by plff. of the way in common with other parties, in the absence of any legal right, would not entitle him to recover damages against deft. for obstructing the way.—**ELLS v. BLACK** (1886), 7 H. & C. 222; 7 C. L. T. 326, 390; 14 S. C. R. 740.—**CAN.**

**321 h. —.]**—In an action for tres-

pass deft. pleaded a right of way in gross, claiming the right to land at the shore & use the way in question:—**Held:** in order to succeed in his defence, deft. must show that he used the landing & way "as of right," & even if during portions of each year deft.'s user was such as would in time give him an easement, the fact that, at another portion of the year, the user became permissive, rendered unavailing the previous adverse user. **Semble:** a right such as was claimed could not be gained by prescription.—**HAYES v. HAYES** (1901), 40 N. S. R. 320.—**CAN.**

**q. Projection for ornamentation.]**—There can be no prescriptive right to

a projection which has been erected merely for the purpose of ornamentation.—**NRITTA KUMARI DASRI v. PUDDOMONI BEWAH** (1903), 1 L. R. 30 Calc. 503; 7 C. W. N. 649.—**IND.**

**r. Building overhanging land of another.]**—Where a man erects a building overhanging the land of another, he commits a trespass for which an action will lie against him & he will by prescription acquire a right to the space occupied by such projection & the right to maintain it in its position.—**RATHNAPETLU MUDALIAR v. KOLANDAVELU PILLAI** (1906), 1 L. R. 29 Mad. 511.—**IND.**

**s. Right to appropriate water.]**—



**323.** —.]—A district council discharged sewage from the town of E. in their district through a sewer made in 1874 by their predecessors; the outfall was in a tidal estuary below low-water mark. Pltf. held oyster beds upon the foreshore at E. by a possessory title acquired against the lord of the manor, who had had the foreshore, & a several fishery over it. These beds had been rendered unfit for the storage of oysters by the discharge from defts.' sewer. Since 1892 there had been an increase in the volume & changes in the quality as well as in the method of discharge, of the sewage. In an action commenced by pltf. in 1902 to recover damages against defts. for the pollution of his oyster beds:—*Held*: (1) pltf. had a right to maintain the action; (2) defts. had no prescriptive right to discharge sewage so as to contaminate the oyster beds, they having by their acts of commission since 1892 brought about such contamination; (3) defts., as a local authority had no common law right to discharge sewage into the sea so as to contaminate the oyster beds, & therefore, pltf. was entitled to damages.

It is an unquestionable principle of our law that, where there has been long-continued enjoyment of an exclusive character of a right of a property, the law presumes that such enjoyment is rightful, if the property or right is of such a nature that it can have a legal origin (*FLETCHER-MOULTON, L.J.*).—*FOSTER v. WARBLINGTON URBAN COUNCIL*, [1906] 1 K. B. 648; 75 L. J. K. B. 514; 94 L. T. 876; 70 J. P. 233; 54 W. R. 575; 22 T. L. R. 421; 4 L. G. R. 735, C. A.

*Annotations*:—As to (1) *Folld.* *Owen v. Faversham Corpn.* (1908), 73 J. P. 33. *Reid.* *Jones v. Llanrwst U. C.*, [1911] 1 Ch. 393.

**324.** —.]—In answer to an action by the owner of an oyster fishery for an injunction to restrain a municipal corp'n. from discharging untreated sewage into tidal waters so as to pollute

pltf.'s oyster beds, defts. pleaded that they had a right both at common law & by prescription to discharge their sewage into the sea:—*Held*: on the authority of *Foster v. Warblington Urban District Council*, No. 323, *ante*, defts. had no right to discharge sewage into the sea so as to cause a nuisance, & an injunction ought to be granted.—*OWEN v. FAVERSHAM CORPN.* (1908), 73 J. P. 33, C. A.

**325. Easement for term of years.**—*WHEATON v. MAPLE & Co.*, No. 317, *ante*.

**Under doctrine of a lost grant.**—*See* Sub-sect. 5, B., *post*.

#### SUB-SECT. 4.—PRESCRIPTION AT COMMON LAW.

##### A. Nature of User.

**326. Must be open.**—(1) Pltf. was the owner of a house built on a hill having a descent towards the west. Next to pltf.'s house was one belonging to another person, which adjoined a house belonging to defts. For upwards of thirty years the three houses had been out of the perpendicular, leaning towards the west. There was no evidence how the leaning originated, but it might have been seen by any person passing in the street. It did not appear when the houses were built, or that there had been any connection between them either in title, possession, or occupation. The lease of defts.' house, which was the lowest or westernmost, having expired, & the house being out of repair, defts. agreed with one R. that R. should pull down the house & rebuild it, & that defts. would then grant R. a lease. R. pulled down defts.' house. The house adjoining sank further towards the west, & pltf.'s house, having lost its support, then fell down:—*Held*: defts.' house not adjoining pltf.'s house, pltf. had acquired no right to have his house supported by defts.' house.

An easement to appropriate the water of a stream in a particular way, as by a dam to turn the water in a particular direction, may be acquired by an exclusive enjoyment for twenty years; & where such right is once created it is perpetual, & passes with the inheritance.—*MCLAREN v. DAVIS* (1865), 6 All. 266.—*CAN.*

**t. Licence to use drain.**—A farmer consented to water, which came through a culvert, being carried off by means of a drain which he dug himself, across one corner of his farm. There was no agreement in writing, nor was there any expenditure of public money on the drain, & there was no consideration given for the use of the drain:—*Held*: there was only a licence to use the drain & such licence was revocable. The cause was a recurring one which would ripen into an easement by prescription if permitted to continue long enough to become such.—*TAYLOR v. COLLINGWOOD* (1905), 6 O. W. R. 261; 10 O. L. R. 182.—*CAN.*

#### PART III. SECT. 3, SUB-SECT. 4.—A.

**326 i. Must be open.**—To establish a right of way the facts must show a *bona fide* user of the disputed way for some intelligent & definite purpose & for a period or at time clearly stated.—*O'MARA v. EDEN* (1892), 40 N. S. R. 172, n.—*CAN.*

**326 ii.** —.]—Where the evidence given on behalf of pltf. in an action for obstructing a right of way, showed an open & continuous user by pltf. & her husband extending over a period of 43 years:—*Held*: it was not incumbent upon pltf. to show affirmatively that deft. had notice.—*BAKER v. ACADIA COAL CO., LTD.* (1893), 25

N. S. R. 364.—*CAN.*

**326 iii.** —.]—*TERNAN v. FLINN* (1899), 40 N. S. R. 167.—*CAN.*

**326 iv.** —.]—The enjoyment by pltf. of light & air through apertures in the wall of his house, when it is open & manifest, not furtive or invisible, & when it is not had in such wise as to involve the admission of any obstructive right in the owner of the servient tenement, is an enjoyment "as of right" within Act 15 1877, s. 26.—*MATHURADAS NANDVALAH v. BAI AMTHI* (1883), 1 L. R. 7 Bom. 522.—*IND.*

**326 v.** —.]—If a person walks along the land of another for the beneficial enjoyment of other land, & if the enjoyment of the other's land does not amount to exclusive possession, there is no reason why his walking along the land without the permission of the true owner & in the assertion of a right to walk should not create in favour of the enjoyer a prescriptive right of easement, simply because, he mistakenly supposes that he is the owner of the land or asserts that his act of enjoyment is sufficient to give him the ownership by prescription. The mere claim of the higher right of ownership would not prevent a person from acquiring the lesser right of easement provided he could show that he asserted certain rights of enjoyment over the land in question for the benefit of another land belonging to him. Easements Act, s. 15, does not require that the title should be claimed as an easement, but only requires that the enjoyment should possess two properties, viz. (i) that it must be as of right without interruption & (ii) that it must be as an easement. The first

quality is intended to show that enjoyment by license or under a contract which would not amount to a grant of an easement, would be effectual to create a right by prescription. The other quality is that the enjoyment should be as an easement, & not that it should be in the assertion of a claim of an easement.—*KONDA v. RAMANAMI* (1912), 1 L. R. 38 Mad. 1.—*IND.*

**326 vi.** —.]—A farm solely in the occupation of the grandfather of both pltf. & deft. was afterwards divided by their fathers, who got one receipt from the landlord. There were subsequently judicial rents fixed on both holdings. Pltf. had a right of way by prescription through deft.'s yard, & in 1882 pltf. & deft. both made a raised cart-passage through the yard, which pltf. used without interruption until 1890:—*Held*: pltf. had a right of way over the raised passage.—*MAHONY v. MAHONY* (1897), 31 L. L. T. 100, 165.—*IR.*

**326 vii.** —.]—Where pltf. obtained a presentment under Grand Jury Act, s. 60, to close up a useless road, & had, after he obtained the presentment, incorporated one fork of the road with his own land, but had permitted deft., who had a private right of way over the road, to use the other part of it for ten years afterwards:—*Held*: deft. had acquired a private right of way over the road, & was not affected by the presentment obtained by pltf.—*O'KEEFE v. DROMKEY* (1897), 32 L. L. T. 47.—*IR.*

**326 viii.** —.]—A negative servitude cannot be acquired by prescription, unless there has intervened some act by which the person claiming it has asserted it, & the opposing party has

**Sect. 3.—By prescription: Sub-sect. 4, A. & B.]**

**Qu.** : whether he would have acquired any such right if pltf.'s house had immediately adjoined defts.' house.

(2) Supposing it [the right of support] does exist it must be either as a matter of absolute right, or as a matter of prescription, or under the Prescription Act, or as founded on some supposed lost grant. In any of these cases it can only exist if the benefit was one that was enjoyed as of right, which cannot be unless it was openly & visibly enjoyed. An enjoyment must neither be *vi precario* nor *clam*, it must be open (BRAMWELL, B.).—**SOLOMON V. VINTNERS' CO.** (1859), 5 H. & N. 585; 28 L. J. Ex. 370; 33 L. T. O. S. 224; 23 J. P. 424; 5 Jur. N. S. 1177; 7 W. R. 613; 157 E. R. 970.

**Annotations:**—As to (1) *Refd.* Hunt v. Peake (1860), John. 705; Dalton v. Angus (1851), 6 App. Cas. 740; Lemaitre v. Davies (1851), 10 Ch. D. 281. As to (2) *Consd.* Dalton v. Angus (1851), 7 App. Cas. 740; Union Lighterage Co. v. London Graving Dock Co., [1902] 2 Ch. 557. *Generally, Mentd.* Russell v. Watts (1855), 10 App. Cas. 590.

**327. Must be physically preventible.—Or actionable.]**—*STURGES V. BRIDGMAN*, No. 57, *ante*.

**328. Must not be precarious.]**—*TOMSETT V. WALLIS* (1896), 40 Sol. Jo. 498.

**Under doctrine of lost modern grant.]**—*See* Sub-sect. 5, D. (b), *post*.

**Under Prescription Act, 1832 (c. 71).]**—*See* Sub-sect. 6, C. (b), *post*.

**B. Length of User.**

**Under doctrine of lost modern grant.]**—*See* Sub-sect. 5, D. (c), *post*.

**Under Prescription Act, 1832 (c. 71).]**—*See* Sub-sect. 6, C. (c), *post*.

**329. Presumption of immemorial user.—From long modern user.—Unless contrary proved.]**—(1) When rights are claimed by prescription, the jury ought to be directed, that from modern usage they are warranted in presuming that the right claimed is immemorial, unless they are satisfied of the contrary by other evidence.

(2) A port may be created in modern times, with a right to receive a port duty from all who come within its limits. A port duty *ex vi termini* implies a consideration for it.—*JENKINS V. HARVEY* (1835), 1 Cr. M. & R. 877; 1 Gale, 23; 5 Tyr. 326; 5 L. J. Ex. 17; 149 E. R. 1336; *subsequent proceedings*, 2 Cr. M. & R. 393.

**Annotations:**—As to (1) *Consd.* Brune v. Thompson (1843), 4 Q. B. 543; *Shopard v. Payne* (1861), 16 C. B. N. S.

yielded to that assertion.—*JORDAAN V. WINKELMAN* (1879), Buch. 79.—**S. AF.**

**326 ix. —.]**—Pltf. claimed, *inter alia*, a declaration that he was entitled by virtue of prescriptive user to the unobstructed enjoyment of a road in front of his business premises.—*Held:* in the absence of proof that pltf. or his predecessors had continuously during a period of thirty years, made adverse user as of right of the road claimed, the action must fail.—*WALKER V. GRAHAM'S TOWN, TOWN COUNCIL* (1895), 16 E. D. C. 49.—**S. AF.**

**PART III. SECT. 3, SUB-SECT. 4.—B.**

**332 i. What time sufficient.—Twenty years.]**—Twenty years' user will legitimate an easement affecting private property, but not a nuisance.—*R. V. BREWSTER* (1859), 8 C. P. 208.—**CAN.**

**332 ii. —.]**—An uninterrupted user of the land of another for twenty years, with the knowledge of the owner, constitutes a right of way over the same.—*CAREY V. HAMILIN* (1859), 4 Nfld. L. R. 285.—**NFLD.**

132; *Bryant v. Foot* (1868), L. R. 3 Q. B. 497. *Refd.* *Newcastle Master Pilots v. Hammond* (1849), 4 Exch. 285; *Newcastle-upon-Tyne, Pilots v. Bradley & Potts* (1852), 2 E. & B. 428, n.; *Benjamin v. Andrews* (1858), 5 C. B. N. S. 299; *Northumberland v. Houghton* (1870), 22 L. T. 491; *Norfolk v. Arbuthnot* (1879), 4 C. P. D. 290; *Brookbank v. Thompson*, [1903] 2 Ch. 344. As to (2) *Consd.* *Northumberland v. Houghton* (1870), 22 L. T. 491. *Refd.* *Brecon Markets Co. v. Neath & Brecon Ry.* (1872), L. R. 7 C. P. 555.

**330. —.]**—Pltf. & deft. were the occupiers of adjoining closes. A natural brook flowed through part of deft.'s land, & an artificial channel had at some remote period been cut through his land, by which the water of the brook was diverted so as to irrigate his fields, & afterwards returned to the brook. As far back as living memory went, the occupiers of pltf.'s land had been accustomed in the summer to go upon deft.'s land & place sods in the brook in the artificial channel, so as to turn the water down the channel & thence into a pit on pltf.'s land, where it was used for watering their cattle. In doing this they had never been interfered with, until the hindrance complained of in the action. In an action for preventing the water from flowing to pltf.'s land along the watercourse, the judge directed the jury that if the occupiers of pltf.'s land had at all times, as their need might require, at their will & pleasure & without interruption, exercised the right of turning the water from the brook into their own land, they would be justified in returning a verdict for pltf.—*Held:* this direction was correct, as such enjoyment & acts, which without the existence of the easement would be tortious, were evidence of the right to the water, & the fact of the channel along which the water flowed being artificial did not prevent the right being acquired, there being nothing to show that the artificial channel was made for a mere temporary purpose.—*BREESTON V. WEATE* (1856), 5 E. & B. 986; 25 L. J. Q. B. 115; 26 L. T. O. S. 272; 20 J. P. 452; 2 Jur. N. S. 540; 4 W. R. 325; 119 E. R. 748.

**Annotations:**—*Mentd.* *Sampson v. Hoddinott* (1857), 1 C. B. N. S. 590; *Simpson v. Godmanchester Corpn.* (1895), 64 L. J. Ch. 837; *Roberts v. Fellowes* (1906), 94 L. T. 279.

**331. —.]**—*JOHNSON V. BARNES*, No. 297, *ante*.

**332. What time sufficient.—Twenty years.]**—*DARWIN V. UPTON* (1786), 2 Wms. Saund. 175 c; 85 E. R. 927.

**Annotations:**—*Consd.* *Angus v. Dalton* (1878), 4 Q. B. D. 162. *Refd.* *Blankley v. Winstanley* (1879), 3 Term Rep. 279; *Read v. Brookman* (1789), 3 Term Rep. 151; *Dalton*

**332 iii. —.]**—Defts., being the holders of land situated below a tank, had, for a period of over twenty years, by means of a dam, raised the calingula of the tank higher than its crest level. The effect had been to collect an increased quantity of water in the tank, & from time to time, to throw it back on to pltf.'s lands, which were situated above the tank. Pltf.'s lands were thus submerged. On a suit brought by pltf. against defts., for an order that the dam placed by defts. on the calingula should be removed so that water should be stored in the tank only to the height of the crest level of the calingula.—*Held:* defts. had not exceeded the right which they had been proved to have acquired. *Semble:* notwithstanding that right, pltf. were entitled to take measures to save their lands from being submerged.—*NARAYANA REDDI V. VENKATA CHARIAN* (1900), 1 L. R. 24 Mad. 302.—**IND.**

**332 iv. —.]**—Where there had been twenty years' enjoyment of a way as of right prior to Jan. 1, 1885, the date of the coming into operation of

Land Transfer Act, 1885, & such enjoyment had continued thenceforward to the date of the action.—*Held:* a prescriptive right to the easement had been established, & the owners of the dominant tenement were entitled to have a memorial of the easement entered upon the certificate of title to the servient tenement.—*SMITH V. CHRISTIE* (1904), 24 N. Z. L. R. 561.—**N.Z.**

**332 v. —.]**—Defts.' predecessors in title acquired certain lands in 1881, upon which they, in 1882, erected kennels for hounds. Certain other buildings were also erected, in which they boiled down the carcasses of animals for the purpose of supplying the hounds with food. Defts. were registered under Unclassified Societies Registration Act, 1895. Pltf.'s husband acquired the land adjoining defts.' property in 1886. Prior to this the previous owners of this land had occupied a house near the kennels, but had not made any complaint respecting any nuisance arising therefrom. The house occupied by pltf. & her family was erected further away



v. Angus (1881), 6 App. Cas. 740. *Mentd. Cross v. Lewis* (1824), 2 B. & C. 686; *Edalle v. Payne* (No. 2) (1885), 53 L. T. 21.

333. ———.] — *PRESCOTT v. PHILLIPS* (1798), cited 6 East, at p. 213; 102 E. R. 1268. *Annotation*:—*Mentd. Mason v. Hill* (1833), 5 B. & Ad. 1.

334. ———.] — *STANSELL v. JOLLARD* (1803), *Selwyn's N. P.* 11th ed. Vol. I., p. 457.

*Annotations*:—*Consd. Solomon v. Vintners' Co.* (1850), 4 H. & N. 585; *Dalton v. Angus* (1881), 6 App. Cas. 740. *Refd. Hide v. Thornborough* (1846), 2 Car. & Kir. 250; *Humphries v. Brogden* (1850), 12 Q. B. 739; *Rogers v. Taylor* (1858), 30 L. T. O. S. 321; *Woodall v. Hingley* (1866), 14 L. T. 167.

335. ———.] — (1) The owner of land, through which a river runs, cannot by enlarging a channel of certain dimensions through which the water had been used to flow before any appropriation of it by another, divert more of it to the prejudice of any other landowner lower down the river, who had at any time before such enlargement appropriated to himself the surplus water which did not escape by the former channel.

(2) The general rule of law is . . . that, independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land without diminution or alteration. But an adverse right may exist founded on the occupation of another, & though the stream be either diminished in quantity or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it have existed for so long time as may raise the presumption of a grant, the other party whose land is below must take the stream subject to such adverse right (LORD ELLENBOROUGH, (C.J.)).

(3) I take it, that twenty years' exclusive enjoyment of the water in any particular manner affords a conclusive presumption of right in the party so enjoying it, derived from grant or Act of Parliament (LORD ELLENBOROUGH, (C.J.)).—*BEALEY v. SHAW* (1805), 6 East, 208; 2 Smith, K. B. 321; 102 E. R. 1266.

*Annotations*:—*As to* (1) *Consd. Williams v. Morland* (1824), 2 B. & C. 910; *Mason v. Hill* (1833), 5 B. & Ad. 1. *Refd. Saunders v. Newman* (1818), 1 B. & Ald. 258; *Wilts & Berks Canal Navigation Co. v. Swindon Water Works Co.* (1873), 9 Oh. App. 453, n.; *White v. White*, [1906] A. C. 72. *As to* (2) *Consd. Mason v. Hill* (1833), 5 B. & Ad. 1; *Angus v. Dalton* (1877), 3 Q. B. D. 85. *Refd. Cross v. Lewis* (1824), 2 B. & C. 686; *Canham v. Flisk* (1831), 2 Cr. & J. 126; *Liggins v. Inge* (1831), 7 Bing. 682. *As to* (3) *Consd. Angus v. Dalton* (1877), 3 Q. B. D. 85. *Refd. Cross v. Lewis* (1824), 2 B. & C. 686.

336. ———.] — In an action to try a right of way, the jury inquired whether twenty years' occupation, without permission would create the

right, to which the judge replied that it would not, though it was evidence of a grant, adding, that in the particular case there was clear evidence of permission:—*Held*: there was no misdirection. — *ROBERTS v. WILLIAMS* (1846), 8 L. T. O. S. 138.

337. ———.] — It is sufficient *prima facie* proof of a prescription for a general easement, as a right of way for all purposes, to show the actual exercise of the right for more than twenty years for all the purposes to which the use or enjoyment of the premises at different times required its exercise, although, for some of those purposes, it appears that it was first used in fact within that period.

Hence, where a right of way was pleaded for cattle & carts, & it appeared that the right had been used for cattle for more than twenty years, & had for the first time been used for carts within that period, on the first occasion which had arisen requiring its use in that manner:—*Held*: the evidence was enough to go to the jury, as raising a presumption that the right had existed to the general extent to which it was claimed, although it had not been exercised for a period so long as in itself to create a prescription.—*DARE v. HEATHCOTE* (1856), 25 L. J. Ex. 245.

338. ———.] — Upon a plea of an immemorial right of way, private, there must be evidence of a user for at least twenty years as of right, in order to make out a *prima facie* case in support of it, & if during part of the time, & for more than twenty years before the alleged trespasses, there has been a user of a way less convenient it will be for the jury, on the whole of the evidence, & especially with reference to the non-user for so many years before the time of the trespass, to say whether the alleged way was ever acquired as of right, or whether it was abandoned, that is, whether it existed, & was a subsisting right, at the time of the alleged trespasses.

At common law twenty years' uninterrupted user as of right will be *prima facie* evidence of the right liable to be rebutted. Under Prescription Act, 1832 (c. 71), a twenty years' user as of right down to the time of action is required. There must be twenty years' user as of right, at all events (WILLES, J.).—*DARLING v. CLUE* (1804), 4 R. & F. 320.

339. ———.] — (1) Damages were given on the ground of implied covenant in respect of an obstruction of access of air to a slaughterhouse which had been used for upwards of thirty years.

(2) The right to have an access of air to an

from the kennels than the former house. The number of hounds kept by defts. at their kennels fluctuated from time to time, but no complaint appeared to have been made by plff. or by any of her family till shortly before the action commenced:—*Held*: defts. had acquired a prescriptive right to commit the nuisances complained of, from twenty years uninterrupted user, notwithstanding the fact that defts. were not the same body which had existed prior to Unclassified Societies Registration Act, 1895, & plff.'s occupation of the adjoining property had not commenced till 1886.—*AUCKLAND v. PAKURANGA HUNT CLUB* (1904), 24 N. Z. L. R. 235.—N.Z.

a. — *Twenty-nine years.*—On May 1, 1873, T. conveyed a tract of land known as "the mill lot," to the firm to T. N. & Co., of which he & M. were members, "reserving a right of way at the nearest good crossing place below the mill dam from the said mill road for the use of M., aforesaid, his heirs & assigns forever." At the

time T. owned land on the opposite side of the river, & immediately north of the latter land, & of the mill lot, was land which had been previously sold by T. to M., who had possessed & used it for some years, but the only legal title to which, so far as proved, was conveyed by two deeds from the heirs of T., made in 1880 & 1885 respectively. The way referred to was intended to be used in connection with this land, afterwards known as the McDougall land. In July, 1883, M. acquired full right, title & interest in the mill lot in fee simple, & from that time until Oct. 17, 1885, he was the owner of both the dominant & servient tenements, M., prior to the conveyances to defts., had used the way continuously for a period of 29 years. In an action of trespass brought against defts., who claimed under M., & sought to continue the use of the way, defts. pleaded a way by grant or prescription:—*Held*: the evidence of continuous user was not sufficient in the circumstances to establish the right as claimed.—*MCDONALD v. McDUGALL*

(1897), 30 N. S. R. 298.—CAN.

b. — *Thirty-seven years.*—*MYERS v. JOHNSON*, [1923] 4 D. L. R. 1152; (1922), 52 O. L. R. 658.—CAN.

c. — *Twelve years.*—Where a man erects a building overhanging the land of another, he commits a trespass for which an action will lie against him & he will by prescription acquire a right to the space occupied by such projection & the right to maintain it in its position. A cornice overhanging a neighbour's land cannot be removed by such neighbour, if it has been in existence for more than twelve years.—*RATHINAVELU MUDALIAR v. KOLANDAVELU PILLAI* (1906), 1 L. R. 29 Mad. 511.—IND.

339 i. — *Thirty years.*—Plff. claimed, *inter alia*, a declaration that he was entitled by virtue of prescriptive user to the unobstructed enjoyment of a road in front of his business premises:—*Held*: in the absence of proof that plff. or his predecessors had continuously during a period of thirty years, made adverse

**Sect. 3.—By prescription: Sub-sect. 4, B., C. & D.; sub-sect. 5, A.]**

aperture in a dwelling-house or a building occupied by human beings, or for the purposes of trade or otherwise, exists undoubtedly, because the right to have air coming to a window is not a thing which has been disputed or can be disputed. It appears to me that the right is not one which can be claimed by grant, because it is not a thing which is to be used by the grantee on the soil of the grantor. It is, therefore, not a subject of prescription, because prescription is the implication of a grant, but it has been put upon a covenant, that the law would imply, not to interrupt the free use of the air (FRY, J.).—*HALL v. LICHFIELD BREWERY CO.* (1880), 49 L. J. Ch. 655; 43 L. T. 380; 45 J. P. 53.

**Annotations:—***As to* (1) *Distd.* *Harris v. De Pinna* (1886), 33 Ch. D. 238. *Consd.* *Chastey v. Ackland*, [1895] 2 Ch. 389. *Refd.* *Aldin v. Latimer* (Clark, Muirhead, [1894] 2 Ch. 437. *As to* (2) *Consd.* *Dalton v. Angus* (1881), 6 App. Cas. 740; *Harris v. De Pinna* (1886), 33 Ch. D. 238. *Refd.* *Chastey v. Ackland*, [1895] 2 Ch. 389; *Cable v. Bryant*, [1908] 1 Ch. 259.

**C. How Prescriptive Right Defeated.**

**340. By proof of commencement within legal memory.]—**An action for nuisance does not lie for stopping another's lights though they have continued for forty years.—*BOWRY & POPE'S CASE* (1588), 1 Leon. 108; 74 E. R. 155; *sub nom.* *BURY v. POPE*, Cro. Eliz. 118.

**Annotations:—***Consd.* *Bryant v. Lef ver* (1879), 4 C. P. D. 172; *Dalton v. Angus* (1881), 6 App. Cas. 740. *Refd.* *Palmer v. Fleshier* (1664), 1 Keb. 794; *Russell v. Watts* (1885), 53 L. T. 876.

**341. —.]—**In the case of an injury done to church lands, by a rivulet being penned back upon them by a headstock, the proof of the existence of the headstock for about 20 years, though it would be evidence of a grant in other cases, is not sufficient to warrant the continuance of it. For the grant of the prior incumbent will not bind the successor. But it may be used as evidence to show an ancient grant; yet even that cannot be, if the commencement of the first erection be shown, for that rebuts the presumption of antiquity.—*WALL v. NIXON* (1806), 3 Smith, K. B. 316.

**342. —.]—**The parish church of St. N., Arundel, regarded as one building, is a cruciform church with a central tower; the portion east of this tower is called the Fitzalan Chapel, & occupies the place commonly filled by the chancel. Pltf. claimed this portion of the building as his private property, & built a wall across the west end of it, so as to separate it structurally from the rest of the church. Deft. pulled down part of this wall, alleging that the chapel known as the Fitzalan

Chapel was the chancel of the parish church, & even if it were not, still that the parishioners were entitled either by prescription at common law, or by virtue of a lost grant, or under the Prescription Act, 1832 (c. 71), to light from this chapel. Evidence was given of numerous acts of exclusive ownership by pltf. & his ancestors for more than 300 years; documentary evidence of title to the same effect was produced:—*Held*: the evidence showed that the disputed building was not the chancel of the parish church, but had always been the property of pltf. & his predecessors in title, & the claim to light could not be maintained on any of the grounds set up by deft.

I have some doubt whether this church is a building within Prescription Act, 1832 (c. 71), s. 3 (*BRAMWELL, L.J.*).—*NORFOLK (DUKE) v. ARBUTHNOT* (1880), 5 C. P. D. 390; 49 L. J. Q. B. 782; 43 L. T. 302; 44 J. P. 796, C. A.

**Annotations:—***Refd.* *Proud v. Price* (1893), 62 L. J. Q. B. 490; *Wheaton v. Maple*, [1893] 3 Ch. 48. *Mentd.* *Halliday v. Philipps* (1889), 5 T. L. R. 281; *Fowke v. Borington*, [1914] 2 Ch. 308.

**343. —.]—**By an inclosure award in 1804 certain common lands were allotted to three adjoining owners, including the respective predecessors in title of pltf. H. & of deft.'s lessor, & a private carriage road was awarded to the same persons leading from a certain named point to deft.'s farm. The awarded road was never used or even set out, & part of the homestead & out-buildings of pltf.'s farm had stood for many years upon part of the admitted site of the awarded road. The evidence showed that, until the commencement of the dispute giving rise to this action, deft. & his predecessors in title or occupation had for a period extending so far back as living memory went, openly & uninterruptedly used a private road running across part of pltf.'s farm & in a direction parallel to the admitted course of the awarded road. There had been unity of possession of pltf.'s & deft.'s farms from 1889 to 1905. In an action by pltf. H. & his tenant for an injunction to restrain deft. from using the road in question:—*Held*: in the circumstances & on the evidence this was a case in which a lost grant of a right of way over the road in dispute ought to be presumed, & consequently the action failed.

Nor could he have succeeded upon a claim for prescription at common law because I consider it to be tolerably plain, for various reasons, that the existence of the right of way claimed, if it does exist, originated & commenced at a date long subsequent to the reign of King Richard I.—in fact, very little more than one hundred years ago. Deft., therefore, has to base his claim upon the existence of a grant not produced (*JOYCE, J.*).—

user as of right of the road claimed, the action must fail.—*WALKER v. GRAHAM'S TOWN, TOWN COUNCIL* (1895), 16 E. D. C. 49.—*S. AF.*

**339 ii. —.]—***Semble*: a servitude of public outspan can be constituted in favour of the general travelling public by immemorial user. In an action for a declaration that no right of outspan existed over plaintiff's farm, the evidence showed that although for a period of thirty years some members of the public had used the outspan without hindrance, others had used it with the leave of the owner & upon payment:—*Held*: as proof of user *nece vi, nec clam, nec precario* for thirty years had failed, pltf.'s contention must be upheld.—*DU TOIT v. ABERDEEN DIVISIONAL COUNCIL* (1910), C. P. D. 477.—*S. AF.*

**339 iii. —.]—**A prescriptive

right of way may be acquired in respect of one tenement by user for forty years, against another held for a term of years under the same landlord; & such right is not necessarily determined upon the expiration of the lease, when the tenant of the servient tenement continues in occupation upon the same terms as before.—*FAHEY v. DWYER* (1879), 4 L. R. Ir. 271.—*IR.*

**d. —**Period runs from time when person in possession can prevent trespass.—Inasmuch as there can be no acquisition by prescription of a right of road unless there has been an adverse user, the period of prescription can only begin to run from the time when someone is in possession of the property who can prevent trespass.—*FARNI v. MACDONALD* (1876), Buch. 165.—*S. AF.*

**PART III. SECT. 3, SUB-SECT. 4.—C.**

**e. Consideration given by tenant of dominant tenement.—To tenant of servient tenement.—Whether owner bound.]—**After a right of way had been enjoyed for more than the period necessary to obtain title thereto by prescription the tenant of the dominant tenement, without the knowledge of the owner, gave to the tenant of the servient tenement two pairs of shoes as consideration for the exercise of the right:—*Held*: even if an act of this kind could in any event affect the right that had been acquired the owner of the dominant tenement was not bound by what the tenant did without his authority.—*KER v. LITTLE* (1898), 25 A. R. 387.—*CAN.*

**f. Non-user.]—**Mere non-user, even for a period exceeding the period of prescription, of a street laid out upon

HULBERT v. DALE, [1909] 2 Ch. 570; 78 L. J. Ch. 457; 100 L. T. 777; *affd.*, [1909] 2 Ch. 578, C. A.

**344. Ancient grant without date.**—An ancient grant, without date, does not necessarily destroy a prescriptive right; for it may be either prior to time of memory, or in confirmation of such prescriptive right; which is matter to be left to a jury.—*ADDINGTON v. CLODE* (1775), 2 Wm. Bl. 989; 96 E. R. 581.

*Annotations*:—*Reid*. *Welcome v. Upton* (1839), 5 M. & W. 398.

#### D. Pleading and Evidence.

See Sect. 5, *post*.

### SUB-SECT. 5.—THE DOCTRINE OF A LOST MODERN GRANT.

#### A. Origin and Application of Doctrine.

**345. Origin of doctrine.**—The judges set their ingenuity to work, by fictions & presumptions, to atone for the supineness of the legislature, & to amend, so far as in them lay, the law, which I cannot but think they were bound to administer as they found it. They first laid down the somewhat startling rule that from the usage of a lifetime the presumption arose that a similar usage had existed from a remote antiquity. Next, as it could not but happen that, in the case of many private rights, especially in that of easements, which had a more recent origin, such a presumption was impossible, judicial astuteness to support possession & enjoyment, which the law ought to have invested with the character of rights, had recourse to the questionable theory of lost grants. Juries were first told that from user, during living memory, or even during twenty years, they might presume a lost grant or deed; next, they were recommended to make such presumption; & lastly, as the final consummation of judicial legislation, it was held that a jury should be told, not only that they might, but also that they were bound to presume the existence of such a lost grant, although neither judge nor jury, nor any one else, had the shadow of a belief that any such instrument had ever really existed. In this manner the cts. have endeavoured to supply the deficiency of the law in the matter of rights acquired by possession & enjoyment (*COCKBURN, C.J.*).—*BRAXANT v. FOOT* (1867), L. R. 2 Q. B. 161; 7 B. & S. 725; 36 L. J. Q. B. 65; 16 L. T. 55; 31 J. P. 229; 15 W. R. 421; *affd.* (1868), L. R. 3 Q. B. 497, Ex. Ch.

*Annotations*:—*Mentd.* *Mills v. Colchester Corp.* (1867), L. R. 2 C. P. 476; *Lawrence v. Hitch* (1868), L. R. 3 Q. B. 521; *Kirtton v. Dear* (1869), L. R. 5 C. P. 217; *Veley v. Portwee* (1870), 18 W. R. 1024; *Neville v. Bridger* (1874), 22 W. R. 740; *Maule v. White*, *Maule v. Herbert*, *Maule v. Green* (1895), 60 J. P. 587; A.-G. v. *Horne* (No. 2), [1913] 2 Ch. 140; *Re Haigh with Aspull*, *New Parish*, [1919] P. 143.

**346.** —.]—(1) The principle is, that, when the ct. finds an open & uninterrupted enjoyment of property for a long period unexplained, *omnia praesumuntur rite esse acta*, & the ct. will, if reasonably possible, find a lawful origin for the right in question (*FARWELL, J.*).

(2) It cannot be the duty of a judge to presume a grant of the non-existence of which he is convinced, nor can he be constrained to hold that such a grant is reasonably possible within the meaning of the authorities (*FARWELL, J.*).—*A.-G. v. SIMPSON*, [1901] 2 Ch. 671; 85 L. T. 325;

16 T. L. R. 47; *on appeal*, [1901] 2 Ch. 700, C. A.; *sub nom.* *SIMPSON v. A.-G.*, [1904] A. C. 476, H. L.

*Annotations*:—*As to* (1) *Fold*. *A.-G. v. Antrobus*, [1905] 2 Ch. 188. *Apld.* *Robinson v. Smith* (1908), 24 T. L. R. 573. *Reid*. *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. *As to* (2) *Reid*. *Morpeth Corp. v. Northumberland Farmers' Auction Mart Co. & Donkin* (1920), 90 L. J. Ch. 420. *Generally, Mentd.* *Newcastle v. Workson U.C.*, [1902] 2 Ch. 145; *Queenborough Corp. v. Smeed, Doan* (1904), 68 J. P. 244; *Dibden v. Skirrow*, [1908] 1 Ch. 41; *Re Hatschek's Patents, Ex p. Zereuner*, [1909] 2 Ch. 68; *Folkstone Corp. v. Brockman*, [1914] A. C. 338; *Hammerton v. Dysart*, [1916] 1 A. C. 57.

**347.** —.]—I adhere to the view that I expressed in *A.-G. v. Simpson*, No. 346, *ante*, that the gist of the principle on which such presumptions are made is that the state of affairs is unexplained without such presumption (*FARWELL, J.*).—*A.-G. v. ANTROBUS*, [1905] 2 Ch. 188; 74 L. J. Ch. 599; 92 L. T. 790; 69 J. P. 141; 21 T. L. R. 471; 49 Sol. Jo. 459; 3 L. G. R. 1071.

*Annotations*:—*Reid*. *Robinson v. Smith* (1908), 24 T. L. R. 573; A.-G. v. *Horne* (No. 2), [1913] 2 Ch. 140. *Mentd.* *Whitehouse v. Hugh*, [1906] 1 Ch. 253; A.-G. & *Croydon R. D. C. v. Moorsom-Roberts* (1907), 72 J. P. 123; *North Staffordshire Rly. v. Hauley Corp.* (1909), 8 L. G. R. 375; *Trafford v. St. Faith's R. D. C.* (1910), 74 J. P. 297; *Fuller v. Chippenham R. D. C.* (1914), 79 J. P. 4; A.-G. v. *Sewell* (1918), 88 J. L. R. 425; *Collis v. Amphlett*, [1918] 1 Ch. 232.

**348. Reason for presumption.**—(1) Injunction to restrain obstruction of ancient lights refused, the nature of the alleged injury not requiring preventive interposition before a trial at law, & the legal right being doubtful.

(2) The presumption of a right, from twenty years' undisturbed enjoyment of light, is excluded by the custom of London.

(3) The ct. presumes a grant in ordinary cases, because they presume, that the party would not have abstained, from exercising his right of interference, knowing, that twenty years' abstinence would extinguish it, unless he intended to permit the enjoyment (*PLUMER, M.R.*).—*WYNSTANLEY v. LEE* (1818), 2 Swan. 333; 36 E. R. 643.

*Annotation*:—*As to* (2) *Fold*. *Perry v. James, Salaman v. James, Mercers' Co. v. James*, [1891] 1 Ch. 658.

**349. Application of doctrine—Ancillary to common law prescription.**—(1) The access of air to the chimneys of a building cannot, as against the occupier of neighbouring land, be claimed either as a natural right of property, or as an easement by prescription from the time of legal memory, or by a lost grant, or under Prescription Act, 1832 (c. 71).

*Pltf. & defts.* were occupiers of adjoining houses. For more than twenty years the occupiers of *pltf.'s* house had enjoyed the access of air to the chimneys of it. *Defts.* took down their house, & rebuilt a wall to a greater height, thereby causing *pltf.'s* chimneys to smoke:—*Held*: no action was maintainable by *pltf.* against *defts.*, either on the ground that *pltf.* had acquired an easement which *deft.* had interfered with, or on the ground that the nuisance complained of had been created by *defts.*

(2) The expedient of a lost grant is only applicable to cases where something prevents the application of the common law prescription; we do not say there might not be an express grant or covenant not to interfere with the passage of air over neighbouring property, which could be enforced against the grantor or covenantor, & even against his assigns with notice; whether it could against the assigns without notice it is not necessary to say. But the lost grant doctrine is

sub-division of an estate for the use of purchasers of lots forming part of such estate, does not, in the absence

of adverse user by others, deprive the owners of such lots of their right to use the street.—*WOODHEAD, PLANT & CO.*

*v. CAPE TOWN, TOWN COUNCIL* (1906), 23 S. C. 352.—*S. AF.*

*Sect. 3.—By prescription: Sub-sect. 5, B., C. & D.  
(a) & (b).]*

right or presumption will arise.—*MABERLEY v. DOWSON* (1827), 5 L. J. O. S. K. B. 261.

**363. Servient owner must have power of resisting user.]**—Before the year 1705 a co. of adventurers had begun to construct a sough, now called the Cromford Sough, for the purpose of draining a portion of the mineral field in the wapentake of Wirksworth, in Derbyshire, being remunerated by agreement with the proprietors of the mines, by a portion of the lead ore raised within the district benefited thereby, technically called the title of the sough. The water from this sough flowed into a brook called Bonsall Brook, & their united waters turned an ancient corn-mill. In 1738 they leased this easement, of continuing & maintaining the sough, to certain parties for 999 years. In 1771 A. obtained a lease for 84 years, from the owner of the land through which the sough was made, of the brook, of the stream of water issuing from the sough into it, & of the piece of land on which the corn-mill stood, with the right of erecting mills thereon; & accordingly, in 1772, erected extensive cotton-mills thereon, partly on the site of the ancient corn-mill, & they were worked by the same junction of the two streams. This lease contained a proviso, that if, during the term, the stream issuing from Cromford Sough should, by the bringing up of any other sough, or by unavoidable accident, be taken away or lessened, so that there should not come to the mills sufficient water for working them, & the lessor should not be able otherwise to supply it, it should be lawful for A. to take down the mills, & remove them to another piece of ground therein described, of which a lease should be granted for the rest of the term. In 1789, A. purchased from the lessor the absolute interest in the land leased, & in that through which so much of the sough was made as lay within the manor of Cromford. In the meantime, another co. had, in 1771, commenced the construction of another sough on a lower level, called the Meer Brook Sough, commencing within the manor of Wirksworth, for the purpose of draining a larger portion of the mineral field, under a similar licence from the same mine-owners who had before used the Cromford Sough. In 1836, Meer Brook Sough having been so far extended into Cromford as to drain the Cromford Sough, the water supplying A.'s mills was thereby diverted:—*Held*: under the circumstances, A. had not acquired, by his user of the water issuing from Cromford Sough, such a right to it as to entitle him to maintain an action against the proprietors of the Meer Brook Sough, this being an artificial watercourse made for a particular & temporary purpose, & its water having been originally taken by him with notice that it might be discontinued, & the circumstances not being such as to afford any presumption of a grant by the owners of the mines, & he did not acquire such right by force of Prescription Act, 1832 (c. 71), s. 2. How can it be supposed that the mine-owners could have meant to burthen themselves with

such a servitude, so destructive to their interests, & what is there to raise the inference of such an intention? The mine-owner could not bring any action against the person using the stream of water, so that the omission to bring an action could afford no argument in favour of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower level, & thus taking away the water entirely, a course so expensive & inconvenient, that it would be very unreasonable, & a very improper extension of the principle applied to the case of lights, to infer from the abstinence from such an act, an intention to grant the use of the water in perpetuity, as a matter of right (*ABINGER, C.B.*).—*ARKWRIGHT v. GELL*, (1839), 5 M. & W. 203; 2 Horn & H. 17; 8 L. J. Ex. 201; 151 E. R. 87.

*Annotations*:—*Consd. Magor v. Chadwick* (1840), 11 Ad. & Kl. 571. *Fold. Wood v. Waud* (1849), 3 Exch. 748. *Dist. Beeston v. Weate* (1856), 5 E. & B. 986. *Apld. N. E. lty. v. Elliot* (1860), 1 John. & H. 145. *Consd. Gared v. Martyn* (1865), 19 C. B. N. S. 732; *Angus v. Dalton* (1877), 3 Q. B. 85. *Apld. Burrows v. Lang*, [1901] 2 Ch. 502. *Consd. Whitmore (Edenbridge) v. Stanford*, [1909] 1 Ch. 427. *Redd. Greatrex v. Hayward* (1853), 8 Exch. 291; *Broadbent v. Ramsbotham* (1856), 11 Exch. 602; *Sampson v. Hoddinott* (1857), 1 B. N. S. 599; *Scots Mines Co. v. Leadhills Mines*, (59), 34 L. T. O. S. 34; *Solomon v. Vintners' Co.* (1859), 4 H. & N. 585; *Mason v. Shrewsbury & Hereford lty.* (1871), L. K. 6 Q. B. 578; *Schwann v. Cotton*, [1916] 2 Ch. 459.

**364. —**—The right to the passage of air is not a right to an easement within Prescription Act, 1832 (c. 71), s. 2. The presumption of a grant from long continued enjoyment only arises where the person against whom the right is claimed might have interrupted or prevented the exercise of the subject of the supposed grant:—*Held*: a grant of a right to the free & uninterrupted passage of the currents of wind & air to pltf.'s mill from over the soil of another, cannot be presumed from an uninterrupted user of the mill for twenty years.—*WEBB v. BIRD* (1862), 13 C. B. N. S. 841; 31 L. J. C. P. 335; 8 Jur. N. S. 621; 143 E. R. 332, Ex. Ch.

*Annotations*:—*Apld. Bryant v. Lefever* (1879), 4 C. P. D. 172. *Consd. Sturges v. Bridgman* (1879), 11 Ch. D. 852; *Dalton v. Angus* (1881), 6 App. Cas. 740. *Apld. Harris v. De Pinna*, (1886), 33 Ch. D. 238. *Consd. Aldin v. Latimer Clark, Muirhead*, [1894] 2 Ch. 437; *Chastey v. Ackland*, [1896] 2 Ch. 389; *Simpson v. Godmanchester Corp.*, [1897] A. C. 696. *Redd. Hollins v. Verney* (1884), 13 Q. B. D. 304; *Bass v. Gregory* (1890), 25 Q. B. 1, 481; *Davis v. Town Properties Investment Corp.*, [1903] 1 Ch. 797.

*C. What Grants may be Presumed.*

Lost grants generally, see particular Titles *passim*.

**Royal grants.]**—See CONSTITUTIONAL LAW, Vol. XI., pp. 574, 575, Nos. 745-756.

**Faculties.]**—See ECCLESIASTICAL LAW, pp. 469, 470, Nos. 3214-3219.

*D. Establishment of Presumption.*

*(a) In General.*

**365. Whether court bound to presume — When convinced of non-existence of grant.]**—A.-G. v. SIMPSON, No. 346, *ante*.

**366. Grant affecting rights of large number of public—Compared with grant by single owner.]**—

**PART III. SECT. 3, SUB-SECT. 5.—  
D. (a).**

**g. Continuous user—Whether proof necessary.]**—To sustain a plea of right of way by lost deed, no proof is requisite of such deed having actually existed, but the jury have a right to presume such deed from long & uninterrupted usage of a way exercised as a matter of right, & necessary to the convenient enjoyment of the land to & from which the road leads,—

*JONES v. JONES* (1843), 2 Kerr, 265.—**CAN.**

**h. — Subway.]**—Where in building their road defts. left a subway under a trestle bridge, & pltf., the owner of the land crossed by the railway at this point, had enjoyed the open & continuous user of this subway as of right ever since 1862, but that defts. were now proceeding to fill it up:—*Held*: though pltf. could not prevent the filling up of the subway he was

entitled to damages for his property in the easement. Pltf. was entitled to assume that there was a reservation of the subway in the deed from the original grantor of the right of way to the railway co., which deed was lost, or he was entitled to claim the easement under Prescription Act from long & uninterrupted enjoyment as of right.—*WELLS v. NORTHERN lty. Co.* (1887), 14 O. R. 594.—**CAN.**

**k. — May be rebutted.]**—An

NEAVERSON v. PETERBOROUGH RURAL COUNCIL, No. 360, *ante*.

**387. Effect of Prescription Act, 1832 (c. 71), s. 6.]**—(1) Prescription Act, 1832 (c. 71), s. 1, relating to *profits à prendre*, applies only to cases where a man claims by custom, prescription, or grant, a profit or benefit from the land of another, & not to cases where a copyholder claims a right on his own tenement, according to the custom of the manor.

(2) Although, by sect. 6 of that Act, no presumption in favour of the claims is to be derived from a user short of thirty years the statute does not take from such shorter user its weight as collateral evidence of a grant.

(3) In a suit by a lord to restrain a copyholder from digging vitreous sand on his own tenement, evidence of a custom to dig vitreous sand for 27 years, & of a custom to dig sand generally for a long period, was adduced:—*Held*: the evidence of the custom was sufficient.

(4) A custom in a manor may be proved by one instance.—*HANMER v. CHANCE* (1865), 4 De G. J. & Sm. 626; 6 New Rep. 4; 34 L. J. Ch. 413; 12 L. T. 163; 29 J. P. 324; 11 Jur. N. S. 307; 13 W. R. 556; 46 E. R. 1061, L. C.

*Annotations*:—As to (3) *Consd.* *Portland v. Hill* (1866), L. R. 2 Eq. 765. *Reid*. A.-G. for Isle of Man v. Mylchreest (1879), 4 App. Cas. 294.

#### (b) Nature of User.

**Prescription at common law.]**—See Sub-sect. 4, A., *ante*.

application of *pltf.* for an injunction restraining *deft.* from erecting a building which would deprive *pltf.* of light through certain windows was refused, where the evidence did not warrant the judge in inferring a lost grant, & where serious injury would be inflicted on *deft.* if the erection of the building were delayed.—*CROWE v. CANOT* (1899), 40 N. S. R. 177.—CAN.

1. — *Adverse possession for more than twenty years.*—Where there has been what is equivalent to adverse possession for more than 20 years an easement ought to be presumed to have originated lawfully, that is, in most cases, by a grant; & unity of possession, which would defeat a defence under Limitations Act, might not defeat a claim as upon a lost grant.—*ROBINSON v. WILSON* (1919), 45 O. L. R. 296; 48 D. L. R. 437; 16 O. W. N. 54.—CAN.

m. — *Consent & acquiescence.*—An uninterrupted user for twenty years would be evidence from which, taken with other circumstances, it might be inferred that a grant had existed.—*BIHUBAN MOHAN BANERJEE v. ELLIOTT* (1870), 6 B. L. R. 85.—IND.

n. —]—A lost grant of an easement may be presumed from an enjoyment for twenty years between two tenants, whether holding under the same landlord or not.—*HANNA v. POLLOCK*, [1898] 2 I. R. 532; [1900] 2 I. R. 664.—IR.

o. —]—Prior to 1875, two holdings, of which M. was owner in fee, situate upon either side of a county road, were held together, & upon one of them there was a well. In 1875 the premises were divided. The part on one side of the road was let to G., who had since remained in possession & was a judicial tenant to M.; & the other part, containing the well, was retained by M. There was no agreement that G. was to be entitled to use the water of the well. There was a barn on G.'s part of the premises, which in 1878 was converted into a dwelling-house, & this house was at first occupied by P., a cottier tenant of G.,

& subsequently by *deft.*, who had been nineteen years in occupation as cottier tenant. Since 1878 P., & *deft.* as his successor, had used the water of the well as of right, & had entered & walked over the portion of the land on which the well was for the purpose of approaching the well. In an action of trespass against *deft.*, a cottier tenant of G., the acts of trespass being committed in assertion of *deft.*'s right to take water:—*Held*: it was impossible to presume a lost grant by M. to G., by reason of the user of the well for twenty years.—*MACNAGHTEN v. BAIRD* (1), [1903] 2 I. R. 731.—IR.

p. *Only applicable.*—When enjoyment cannot otherwise be accounted for.]—Where *deft.* had been using a way by permission & paying compensation during the twenty year prescription it cannot have been used as of right. The doctrine of lost grant applied only where the enjoyment cannot be otherwise accounted for.—*SMITH v. MACGILLIVRAY* (1908), 5 E. L. R. 561.—CAN.

q. *Right to carry artificial stream across highway.*—*Interference with right.*—*Pltf.* claimed as an easement the right to carry an artificial stream of water across a highway, formerly in the control of *deft.* village corp., but since 1912 in the control of *deft.* county corp. *Pltf.* was the owner of the abutting lands lying up-stream north of the highway, & through these lands a waterway had been dug leading from a point on the H. River above *pltf.*'s dam, & so forming the head-race to his mills, situate on his lands south of the highway & operated by water power from the river. *Pltf.* complained that *deft.* had, by partly blocking his raceway where it crossed the highway, interfered with the easement. The evidence carried the history & use of the easement only as far back as 1845, at which time the raceway & the highway were in the same plight & condition in which they stood down to 1905. There was no evidence to show the situation before 1845, nor the origin of either the raceway or the highway. The ease-

ment was enjoyed as of right by the predecessors in title of *pltf.* from as early as 1846, & water was brought down through the raceway for the purpose of the mills from that time until 1898. Since that year, the easement had not been actually used for milling purposes. In 1906 & again in 1912 *defts.*, or one of them, by alteration in the highways, obstructed the raceway; & this action was begun in June 1914, to compel *defts.* to restore the raceway to its former condition:—*Held*: *pltf.* had in 1898 acquired a prescriptive right, by the way of lost grant, which had not since been lost, & which had been infringed by *defts.* or one of them.—*ABELL v. WOODBRIDGE VILLAGE & YORK COUNTY* (1917), 39 O. L. R. 382; 37 D. L. R. 352; *revid.*, 45 O. L. R. 79.—CAN.

**Under Prescription Act, 1832 (c. 71).]**—See Sub-sect. 6, C. (b), *post*.

**388. User must be as of right.]**—Where no evidence appeared to show that a way over another's land had been used by leave or favour, or under a mistake or an award which would not support the right of way claimed, such a user for above twenty years exercised adversely & under a claim of right is sufficient to leave to the jury to presume a grant, which must have been made within 20 years, as all former ways were at that time extinguished by the operation of an inclosure Act.—*CAMPBELL v. WILSON* (1803), 3 East, 294; 102 E. R. 610.

*Annotations*:—*Apld.* *Gray v. Bond* (1821), 2 Brod. & Bing. 667. *Consd.* *Rivers v. Adams* (1878), 3 Ex. D. 361; *London Corp. v. Low* (1879), 49 L. J. Q. B. 144; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Slingson v. Godmanchester Corp.* (1895), 64 L. J. Ch. 837; *Gardner v. Hodgson's Kingston Brewery Co.* (1903), 72 L. J. Ch. 558; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. *Reid*. *Dowling v. Wrigley* (1834), Coop. Pr. Cas. 329; *Benjamin v. Andrews* (1858), 5 C. B. N. S. 299; *Palmer v. Guadagni* (1906), 95 L. T. 258.

**389. —.]**—Where the lessees of a fishery had publicly landed their nets on the shore at A. for more than twenty years & had at various times dressed & improved the landing place, both the fishery & the landing place having originally belonged to one person, but no evidence being offered to show that he, or those who under him owned the shore at A. knew of the landing nets by the lessees of the fishery:—*Held*: that it was properly left to the jury to presume a grant of the right of landing to the lessees of the fishery, by

#### PART III. SECT. 3, SUB-SECT. 5.—D. (b).

**388 i. User must be as of right.]**—*Deft.* claimed a right of way through *pltf.*'s station grounds at M. by virtue of open, continuous, & uninterrupted user for more than thirty years:—*Held*: the right must rest upon the presumption of a grant, & if an actual grant would have been illegal & void, a grant implied from twenty years' user could not be valid.—*GRAND TRUNK RY. CO. v. VAILLEAT* (1904), 24 C. L. T. 207; 7 O. L. R. 364; 3 O. W. R. 98.—CAN.

**388 ii. —.]**—A right to the uninterrupted flow of water along a defined channel over the lands of others may exist independently of Limitation Act, 1871, s. 27. When such right is claimed as a hereditary & customary right & evidence is given in support of long user, such evidence may be sufficient to justify the *ct.* in presuming a grant of the easement, & a *ct.* is not justified in dismissing the suit on the ground that there had been no user by *pltf.* within two years prior to suit.—*ARNI JAGIRDAR v. SECRETARY OF STATE FOR INDIA* (1882), 1 L. R. 5 Mad. 226.—IND.

*Sect. 3.—By prescription: Sub-sect. 5, D. (b) & (c), E. & F.; sub-sect. 6, A.]*

some former owner of the shore at A.—*GRAY v. BOND* (1821), 2 Brod. & Bing. 667; 5 Moore, C. P. 527; 129 E. R. 1123.

*Annotations:—Consd. Dalton v. Angus* (1881), 6 App. Cas. 740. *Refd. Proud v. Price* (1893), 62 L. J. Q. B. 490; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140.

**370. — Annual payment in respect of user.]**—*GARDNER v. HODGSON'S KINGSTON BREWERY CO.*, No. 298, *ante*.

**371. — Effect of short period of unity of possession.]**—*HULBERT v. DALE*, No. 343, *ante*.

**372. — For full period of twenty years.]**—*HULLEY v. SILVERSPRINGS BLEACHING CO.*, No. 361, *ante*.

(c) *Length of User.*

**Prescription at common law.]—See Sub-sect. 4, B., *ante*.**

**Under Prescription Act, 1832 (c. 71).]—See Sub-sect. 6, C. (c), *post*.**

**373. What time sufficient — Light.]**—*LEWIS v. PRICE* (1761), 2 Wms. Saund. 175 a; 85 E. R. 926.

*Annotation:—Refd. Dalton v. Angus* (1881), 6 App. Cas. 740.

**374. — —.]**—*DOUGAL v. WILSON* (1769), 2 Wms. Saund. 175 a; 85 E. R. 926.

*Annotation:—Refd. Dalton v. Angus* (1881), 6 App. Cas. 740.

**375. — Acquiescence of owner of servient tenement.]**—*MARERLEY v. DOWSON*, No. 362, *ante*.

**376. — Way.]—KEYMEN v. SUMMERS (1769), Bull. N. P. 74.**

*Annotations:—Refd. Read v. Brookman* (1789), 3 Term Rep. 151; *Largo v. Pitt* (1797), Peake, Add. Cas. 152; *Angus v. Dalton* (1877), 3 Q. B. D. 85.

**377. — —.]**—*CAMPBELL v. WILSON*, No. 368, *ante*.

**378. — —.]**—Def't. pleaded a grant of right of way by deed, subsequently lost. Pl'tf., in his replication, traversed the grant. At the trial, there being conflicting testimony as to the uninterrupted user of the way, the judge directed the jury, that if upon this issue they thought def't. had exercised the right of way uninterruptedly for

more than twenty years by virtue of a deed, they would find for def't.; if they thought there had been no way granted by deed, they would find for pl'tf.:—*Held*: this direction was right.—*LIVETT v. WILSON* (1825), 3 Bing. 115; 10 Moore, C. P. 439; 3 L. J. O. S. C. P. 186; 130 E. R. 457.

*Annotations:—Refd. Tenny d. Whinnett v. Jones* (1833), 10 Bing. 75; *Angus v. Dalton* (1878), 4 Q. B. D. 162.

**379. — Water.]**—*BEALEY v. SHAW*, No. 335, *ante*.

**380. — Relief of flood-water.]**—*SIMPSON v. GODMANCHESTER CORPN.*, No. 29, *ante*.

**381. — Signboard.]**—Pl'tfs., the owners of a public-house, claimed the right to affix a signboard to the wall of def'ts.' house. The signboard had been so affixed for upwards of forty years. The two houses had formerly belonged to the same owner, def'ts.' house having been granted away by him before pl'tfs.' house. When he first became owner of the two houses pl'tfs.' house was not occupied as a public-house. It did not, however, appear whether the signboard was first affixed to def'ts.' house during the common ownership:—*Held*: (1) it could not be assumed that it was first affixed during the common ownership; (2) the easement claimed was a legal one, & a grant of it by def'ts.' predecessors in title to pl'tfs.' predecessors in title must be presumed; (3) an injunction would be granted to restrain def'ts. from removing the signboard.—*MOODY v. STEGGLES* (1879), 12 Ch. D. 261; 48 L. J. Ch. 639; 41 L. T. 25.

*Annotation:—Generally, Mentd. Swainston v. Finn & Metropolitan Board of Works* (1883), 48 L. T. 634.

**382. — Air.]**—The cellar of pl'tfs.' public-house was ventilated by means of a shaft cut therefrom through the rock into a disused well situated in an adjoining yard, owned & occupied by def't., the air from the cellar passing through the shaft & out at the top of the well. The cellar had been so ventilated for forty years at least, without interruption, & with the knowledge of the occupiers of the yard:—*Held*: (1) pl'tfs. could legally claim, as against def't., the easement of the free passage of air from the cellar; (2) a lost grant of the right ought to be inferred.

I am of opinion that the ct. ought to presume a

**PART III. SECT. 3, SUB-SECT. 5.—**  
**D (c).**

**376 i. What time sufficient—Way.]**—Where parcels of land are held under a common landlord by tenancies, each of which has existed for upwards of twenty years, the jury, in an action for obstructing an easement of way, may infer, from twenty years' uninterrupted enjoyment, as of right, of an easement claimed by the owner of one of the tenements over the lands of the other tenement, a grant of such easement by deed from one tenant to the other. Where the tenancies have not been created by writing, & the user is proved to have existed as far back as the memory of the witnesses can reach, the jury may infer that the alleged dominant tenement, when originally demised by the landlord, was demised with the easement appurtenant. When open upon the pleadings the question should be so left to the jury, that if some of the jurors infer a deed & the others infer the creation of a tenancy, with the easement annexed as an appurtenant, the verdict should be for the owner of the alleged dominant tenement, though all the jurors do not agree upon the same alternative. The following questions having been, without objection as to their form, left to the jury, & answered in the affirmative, viz.—(a) did pl'tf. & her predecessors in title enjoy, as of right

& without interruption, the way, the subject-matter of the action, for forty years before action; (b) did the landlord, at the creation of def't.'s tenancy, reserve the right of way in favour of pl'tf.'s holding;—the judge directed the verdict to be entered for the pl'tf.:—*Held*: the verdict was rightly entered.—*TIMMONS v. HEWITT* (1888), L. R. 22 Ir. 627, 641.—IR.

**376 ii. — —.]**—A. & B. were tenants from year to year of a common landlord. A. sued B. for obstructing a right of way. At the trial the presiding judge, having explained to the jury the nature of evidence which would justify the presumption of a grant, & that, in his opinion, twenty years user would, in this case, authorise them so to presume, left to the jury the following questions, counsel not objecting:—(a) did pl'tf., for the twenty years next before this suit, enjoy, as of right & without interruption, the way claimed. Answer, Yes; (b) did he so enjoy it for the forty years next before this suit. Answer, No. On motion to set aside the judgment entered for pl'tf.:—*Held*: although as a general rule it is a more satisfactory course to leave the question of lost grant expressly to the jury, with appropriate directions from the judge, def't. was precluded, by the course adopted by him at the trial, & in the absence of specific objection & requisition, from relying, as ground for setting

aside the verdict & judgment, upon the form in which the first question was left to the jury, & the judgment should therefore stand. *Semble*: there is no objection to presuming a lost grant of a right of way as between tenants from year to year of a common landlord upon sufficient proof of user.—*O'KANE v. O'KANE* (1892), L. R. 30 Ir. 489.—IR.

**379 i. — Water.]**—Prior to 1894, H. & P. were tenants of adjoining farms on the same estate. In 1861, H.'s predecessor for the better drainage of his holding constructed a drain through his lands to a river, & at the same time a weir was constructed on the course of the drain & a conduit by which some of the water was led in a different direction along H.'s side of the boundary between the two farms to the public road, & thence along that road, supplying a tank on P.'s holding & ultimately going to the river. In 1896, H. altered the drainage of his lands & removed the conduit so that it no longer supplied P.'s tank. P. entered H.'s land & restored it. H. sued for damages for trespass & for flooding of his lands:—*Held*: a lost grant of an easement may be presumed from an enjoyment for twenty years between two tenants whether holding under the same landlord or not.—*HANNA v. POLLOCK*, [1900] 2 I. R. 664.—IR.



lost grant here, & I know no case in which the doctrine could be more properly applied (POLLOCK, B.).—*BASS v. GREGORY* (1890), 25 Q. B. D. 481; 59 L. J. Q. B. 574; 55 J. P. 119; 6 T. L. R. 412.

*Annotations*.—*Consd.* Aldin v. Latimer Clark, Multhead, [1894] 2 Ch. 437; *Chastey v. Ackland*, [1895] 2 Ch. 389. *Refd.* Simpson v. Godmanchester Corpn. (1895), 64 L. J. Ch. 837. *Mentd.* Wheaton v. Maple, [1893] 3 Ch. 48.

**383. Effect of acquiescence by tenant for life—On right of reversioner—Diverting water by weir.**—*BRADBURY v. GRINSELL* (1801), 2 Wms. Saund. 175 i; 85 E. R. 932.

*Annotation*.—*Consd.* Roberts & Lovell v. James (1903), 89 L. T. 282.

**384. ——— Way.**—Where there is a tenant for life in possession of settled land, a lost grant of a right of way cannot be implied as against the reversioner merely from the user of the way during the lifetime of the tenant for life, one ground being that reversioner, not being in possession, would have no power to prevent the user, & the circumstance that the reversioner joined with the tenant for life in barring the entail, & in making a resettlement during the period of the user, does not alter the case.—*ROBERTS & LOVELL v. JAMES* (1903), 89 L. T. 282; 19 T. L. R. 573, C. A.

**385. Effect of acquiescence by tenant—On right of landlord—Light.**—Where lights had been put out & enjoyed without interruption for above twenty years during the occupation of the opposite premises by a tenant, that will not conclude the landlord of such opposite premises, without evidence of his knowledge of the fact, which is the foundation of presuming a grant against him; & consequently, will not conclude a succeeding tenant, who was in possession under such landlord, from building up against such encroaching lights.—*DANIEL v. NORTH* (1809), 11 East, 372; 103 E. R. 1047.

*Annotations*.—*Consd.* Gray v. Bond (1821), 2 Brod. & Bing. 667. *Distd.* Cross v. Lewis (1824), 2 B. & C. 686. *Consd.* It. v. Bliss (1837), 7 Ad. & El. 550; *Papendick v. Bridgewater* (1855), 5 E. & B. 166; *Roberts & Lovell v. James* (1903), 89 L. T. 282. *Refd.* Johnstone v. Hall (1856), 27 L. T. O. S. 230; *Wheaton v. Maple*, [1893] 3 Ch. 48; *Derry v. Sanders*, [1919] 1 K. B. 223.

**386. ——— (1)** A grant to open lights may be presumed, although the windows are in a building which does not extend to the boundary of pltf.'s land.

(2) A purchaser of some premises erected a high building, & obstructed the light from entering windows which had been opened at least 38 years. It appeared that neither the vendor, nor any of his agents, had seen these premises for upwards of twenty years, but it did not appear that the tenant had a lease:—*Held*: an action could be maintained against the purchaser.—(*CROSS v. LEWIS* (1824), 2 B. & C. 686; 4 Dow. & Ry. K. B. 234; 2 L. J. O. S. K. B. 136; 107 E. R. 538.

*Annotations*.—*Consd.* Dalton v. Angus (1881), 6 App. Cas. 740. *Refd.* Wheaton v. Maple, [1893] 3 Ch. 48; *Kino v. Jolly* (1904), 74 L. J. Ch. 174.

#### E. Rebuttal of Presumption.

**387. General rule.**—*DALTON v. ANGUS*, No. 4, ante.

#### F. Pleading and Evidence.

See Sect. 5, post.

#### PART III. SECT. 3, SUB-SECT. 5.—E.

**3871. General rule.**—Where the right to an easement depends on the presumption of a lost grant, the presumption arises after the interrupted enjoyment of the easement for twenty years, & it cannot be rebutted by showing that in fact no such grant was made. But the presumption of a lost

grant may be rebutted by showing that the grantor was under a legal incapacity to make the grant, & this incapacity extends not only to insufficiency of the amount of the grantor's estate, but also to incapacity by reason of the quality of that estate.—*THWAITES v. BRAHE* (1895), 21 V. L. R. 192.—*AUS.*

#### SUB-SECT. 6.—UNDER PRESCRIPTION ACT, 1832, AND SIMILAR ACTS.

##### A. In General.

See Prescription Act, 1832 (c. 71).

**388. Effect of Act.**—To an action of trespass *quare clausum fregit* deft. pleaded a right of way across the *locus in quo* for the occupiers of B. field, on foot & with cattle & carriages enjoyed as of right & without interruption for twenty years before the commencement of the suit, under Prescription Act, 1832 (c. 71). The replication traversed so much of the alleged right of way as was claimed to be with carriages, & as to the residue of the plea, set forth (Trent Navigation Act, 23 Geo. 3, c. 48) under which the Trent Navigation Co., before the commencement of the twenty years, made a haling path for towing vessels along the river, across the *locus in quo* into B. field; that after the commencement of the twenty years, under the powers of the Dunham Bridge Act, 11 Geo. 4, c. lxvi., another haling path was set out nearer to the river, but also across the *locus in quo* & into B. field, & that thereupon the Navigation Co. abandoned the former haling path, which thenceforth ceased to be used as such; that before & at the commencement of the twenty years, the occupiers of the B. field used & enjoyed, as of right & without interruption, by virtue & under the first Act of Parliament, a way along the first mentioned haling path, across the *locus in quo*, on foot & with cattle, which right of way ceased & determined on the abandonment of that haling path; but that from that time until the commencement of the suit, the occupiers of B. field claiming right to the way, as a continuation of the right before enjoyed by them under the Act of Parliament, continued to use the same way; which way, & the use & enjoyment thereof along the haling path as aforesaid is the same way, & the same use & enjoyment thereof as in the plea mentioned except as to the user with carriages. On demurrer:—*Held*: the replication was good; it disclosed facts showing that deft.'s user, although as of right & without interruption during the twenty years, within Prescription Act, 1832 (c. 71), ss. 2 & 5, was not such as would, before that statute, have been sufficient to prove a claim by prescription or non-existing grant.

The Act does not alter the nature of the right necessary to give a legal title. The party who avers the right must mean such as could be inferred to exist by custom, prescription or non-existing grant (*ALDERSON, B.*).—*KINLOCH v. NEVILLE* (1840), 6 M. & W. 705; 10 L. J. Ex. 248; 151 E. R. 633.

*Annotations*.—*Consd.* Tono v. Preston (1883), 24 Ch. D. 739. *Refd.* Gardner v. Hodgson's Kingston Brewery Co., [1901] 2 Ch. 198.

**389. ——— (1)** In a suit to restrain deft. from building so as to obstruct pltf.'s ancient lights, it was proved that for a period of more than twenty years, extending to within a very short time before the bill was filed, there had been unity of possession of the properties of pltf. & deft., but there was no evidence of there ever having been any unity of title; & it was proved that before the unity of possession commenced the access of light to the windows had been enjoyed as far back as

**387 II. ———.**—*DELOHERY v. PERMANENT TRUSTEE CO. OF NEW SOUTH WALES* (1904), 1 C. L. R. 283.—*AUS.*

#### PART III. SECT. 3, SUB-SECT. 6.—A

*r. Whether Act applicable to colony.*—*VICKERY v. MARR* (1865), 4 N. S. W. S. C. R. 66.—*AUS.*

*Sect. 3.—By prescription: Sub-sect. C, A., B. & C. (a) & (b) i.]*

living memory went:—*Held*: pltf. had established his title to the access of light, by proof of enjoyment from time immemorial, independently of Prescription Act, 1832 (c. 71); for the statute does not take away any of the modes of claiming easements which existed before its passing; the fact that some of the windows had been considerably enlarged did not take away the right to an injunction; & pltf. ought not to be put upon the terms of restoring the windows to their former size.

(2) It is every day practice to plead enjoyment for twenty years before action, enjoyment for forty years before action, enjoyment from time immemorial, a lost grant, & it has always been understood that a right may be supported on the third ground, although it may be incapable of being supported under the first or second. There are no negative words in the statute to take away rights existing independently of it (MELLISH, L.J.).

(3) I am of opinion that this is a case for an injunction. I think that pltf. has proved his right to the ancient windows. Here are rooms in an inn which is used & enjoyed for the purposes of an inn, & deft. proposes to erect a building within five feet of them. Of course that would altogether obstruct the light coming to them. He proposes to build on a waste piece of ground, & pltf. has filed his bill before the building is even commenced. It is fortunate in this case that the building proposed to be erected is so near his house that pltf. is not in the difficulty in which pltf. often are, viz., as to its being doubtful whether the proposed building would obstruct the lights or not. Here it is so near that it is absolutely certain that it would obstruct the lights, & therefore, very properly, the pltf. filed his bill immediately. I cannot understand why the deft. is to be allowed to build upon a mere bit of waste land so as to block up the rooms of this public-house which are necessary for its enjoyment. It appears to me that this is properly a case for the ct. to interfere by injunction (MELLISH, L.J.).—*AYNSLEY v. GLOVER* (1875), 10 Ch. App. 283; 44 L. J. Ch. 523; 32 L. T. 345; 30 J. P. 484; 23 W. R. 457, L. J.J.

*Annotations:—As to (1) Consd. Fowles v. Walker* (1880), 49 L. J. Ch. 598; *Dalton v. Angus* (1881), 6 App. Cas. 740; *A.-G. v. Queen Anne Garden & Mansions Co.* (1889), 60 L. T. 759; *Smith v. Baxter*, [1900] 2 Ch. 138. *Reid. Moore v. Hall* (1878), 3 Q. B. D. 178; *Greenwood v. Hornsey* (1886), 33 Ch. D. 471; *Warren v. Brown*, [1900] 2 Q. B. 722; *Gardner v. Hodgson's Brewery Co.*, [1903] A. C. 229; *Colls v. Home & Colonial Stores*, [1904] A. C. 179. *As to (2) Consd. Hyman v. Van Den Bergh*, [1908] 1 Ch. 167. *Generally, Mentd. Stanley of Alderley v. Shrewsbury* (1875), L. R. 19 Eq. 616; *Webster v. Whewall* (1880), 42 L. T. 868; *Holland v. Worley* (1884), 26 Ch. D. 578; *Dicker v. Popham*, Radford (1890), 63 L. T. 379; *Martin v. Price*, [1894] 1 Ch. 276; *Cowper v. Laidler*, [1903] 2 Ch. 337; *Wood v. Conway Corpn.*, [1914] 2 Ch. 47; *Slack v. Leeds Industrial Co-op. Soc.* [1923] 1 Ch. 431.

390. —.]—*DALTON v. ANGUS*, No. 4, *ante*.

— *Easement of light.*—*See Part VIII., Sect. 3, sub-sect. 2, post.*

*B. Application of Act.*

391. *Extent of Prescription Act, 1832 (c. 71), s. 2—Applicable to all easements.*—*SIMPSON v. GODMANCHESTER CORPN.*, No. 29, *ante*.

392. — *Whether confined to rights of way & water—Air.*—*WEBB v. BIRD*, No. 364, *ante*.

393. — *Applies to right of support.*—*DALTON v. ANGUS*, No. 4, *ante*.

394. —.]—Where ancient buildings

belonging to different owners adjoin each other there is a right of support from the building as well as from the land; & this right of support can be claimed under the provisions of the Prescription Act, 1832 (c. 71).—*LEMAITRE v. DAVIS* (1881), 19 Ch. D. 281; 51 L. J. Ch. 173; 46 L. T. 407; 46 J. P. 324; 30 W. R. 360.

*Annotations:—Consd. Tone v. Preston* (1883), 24 Ch. D. 739. *Apprvd. Selby v. Whitbread*, [1917] 1 K. B. 736. *Reid. Simpson v. Godmanchester Corpn.* (1895), 64 L. J. Ch. 837.

395. —.]—Defts. were the owners of a house in London which adjoined a house owned by pltf. Both houses were about 200 years old & had been built together. The buildings in many respects might be regarded as one building divided by a partition wall, the front walls & the roof being continuous. The buildings were in fact built for the purpose of mutual support. Defts. decided to rebuild their premises, & accordingly served upon pltf. a party-wall notice under London Building Act, 1894, & each party appointed their respective surveyor to settle matters of differences between them. Defts.' house on being rebuilt was set back about thirteen feet from the original line of frontage in accordance with an agreement which defts. made with the London County Council. Defts. conveyed to the County Council the strip of land left vacant by the setting back of their premises, & the County Council dedicated the strip to the public. The flank wall of pltf.' premises, which was formerly the party wall, was, in consequence of defts.' premises being set back thirteen feet from the original line of frontage, left exposed for that distance, & pltf.' building, which had been supported by defts.' building, was rendered unsafe by the withdrawal of that support. Pltf. brought an action to recover damages at common law for the withdrawal of support afforded to pltf.' building by defts.' building which had been pulled down:—*Held*: an easement of support to buildings from buildings could be acquired under Prescription Act, 1832 (c. 71), as well as by grant, & pltf. had acquired such an easement by prescription against defts., but such rights were inconsistent with & were superseded by the rights which pltf. had as adjoining owners under London Building Act, 1894, & therefore pltf. could not maintain their claim for damages at common law.—*SELBY v. WHITBREAD & Co.*, [1917] 1 K. B. 736; 86 L. J. K. B. 974; 116 L. T. 690; 81 J. P. 165; 33 T. L. R. 214; 15 L. G. R. 279.

396. — *Not applicable to light.*—*PERRY v. EAMES, SALAMAN v. EAMES, MERCERS' CO. v. EAMES*, No. 358, *ante*.

397. —.]—*WHEATON v. MAPLE & CO.*, No. 317, *ante*.

*C. Easements other than Light.*

*(a) Who may Prescribe.*

*See Sub-sect. 5, B., ante.*

398. *Statutory company—Easement ultra vires statutory powers.*—A co. incorporated by Act of Parliament for the purpose of making & maintaining a canal, & having powers under their Act to take water for the purpose of supplying the canal cannot by user acquire, under Prescription Act, 1831 (c. 71), s. 2, a prescriptive right to take the water for any other purpose.

An easement to take water to fill a canal ceases when the canal no longer exists.

A co. was incorporated for the purpose of making a canal, & empowered to supply the canal with water from certain rivers. In 1824 the co. made a



cut & erected on it a water wheel for pumping water into the canal. The co. occasionally used the water wheel to drive a bone crushing mill. In 1853, 16 & 17 Vict. c. cxix., for converting the canal into a railway, reincorporated the co. for the purpose (*inter alia*) of making the railway. By sect. 10, it was enacted that easements, etc., vested in the canal co., should after the passing, etc., be vested in the co. thereby incorporated for their absolute benefit. The canal having been stopped up & converted into a railway:—*Held*: on the conversion of the canal into a railway the right of the co. to the flow of water in the cut for driving the wheel ceased, & the railway co. could not convey to a purchaser any right to such flow.—*NATIONAL GUARANTEED MANURE Co. v. DONALD* (1859), 4 H. & N. 8; 28 L. J. Ex. 185; 7 W. R. 185; 157 E. R. 737.

*Annotations*:—*Consd.* *Mason v. Shrewsbury & Hereford Ry.* (1871), L. R. 6 Q. B. 578; *Preston Corp'n. v. Fullwood L. B.* (1885), 53 L. T. 718. *Refd.* *Rigby v. Bristol Corp'n.* (1860), 29 L. J. Ex. 359; *Acton L. B. v. North & South Western Junction Ry.* (1893), 37 Sol. Jo. 357.

*See, also*, No. 355, *ante*.

#### (b) Nature of User.

##### i. In General.

Prescription at common law, *see* Sub-sect. 1, A., *ante*.

Under doctrine of lost modern grant, *see* Sub-sect. 5, D. (b), *ante*.

**399. General rule—Continuity.**—In an action where a right of way was claimed under the Prescription Act, 1832 (c. 71), in respect of twenty years' user as of right, it appeared that the way had only been used by the party claiming it, *deft.*, for the removal of wood upon an adjoining close. The wood was cut upon this close at intervals of several years, the last cutting having been in the year before the action was commenced, the one next previous twelve years before, & the next at another interval of twelve years. Between these intervals the road was occasionally stopped up, but *deft.* used it as often as he wished while the wood was being cut:—*Held*: there had not been an uninterrupted enjoyment of the way for twenty years within the meaning of the above Act, which did not apply to so discontinuous an easement as that claimed.

It is sufficient for the present case to observe that the statute expressly requires actual enjoyment as of right for the full period of twenty years. No user can be sufficient which does not raise a reasonable inference of such a continuous enjoyment. Moreover, as the enjoyment which is pointed out by the statute is an enjoyment which is open as well as of right, it seems to follow that no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term, whether acts of user be proved in each year or not, the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, & ought to be resisted if such right is not recognised, & if resistance to it is intended (LINDLEY,

L.T.).—*HOLLINS v. VERNEY* (1881), 13 Q. B. D. 301; 53 L. J. Q. B. 430; 51 L. T. 753; 48 J. P. 580; 33 W. R. 5, C. A.

*Annotations*:—*Apld.* *Smith v. Baxter*, [1900] 2 Ch. 138. *Refd.* *Croyko v. Hatfield Chase Corp'n.* (1896), 12 T. L. R. 383; *Hyman v. Van Den Bergh*, [1907] 2 Ch. 516.

**400. User must be known to servient owner—Support.**—Two houses of *pltf.*, one ancient, the other modern, stood on ground which had been, within twenty years, excavated by him for the purpose of getting coal. The owner of the adjoining land having worked underground to his own boundary, *pltf.*'s houses sank in consequence, & an action was brought for the injury:—*Held*: (1) as neither of the houses had stood on excavated ground, or been supported in part by *deft.*'s land for twenty years before the injury complained of, a grant by *deft.* of a right to such support could not be presumed, & *pltf.* had no remedy for the damage done.

(2) The existence of the excavation below the ancient house was unknown to both parties. *Semble*: as 3 & 4 Will. 4, c. 71, s. 2, requires that easements, to become absolute, must have been enjoyed for twenty years under a claim of right, *pltf.*, under the above circumstances, would not be entitled to the support of the adjoining land, even though, such an excavation had existed for twenty years.—*PARTRIDGE v. SCOTT* (1838), 3 M. & W. 220; 1 Horn & H. 31; 7 L. J. Ex. 101; 150 E. R. 1124.

*Annotations*:—*As to* (1) *Apld.* *Birmingham Corp'n. v. Allen* (1877), 6 Ch. D. 284. *Consd.* *Dalton v. Angus* (1881), 6 App. Cas. 740. *Refd.* *Humphries v. Brogden* (1850), 12 Q. B. 739; *Solomon v. Vintners' Co.* (1859), 4 H. & N. 585; *Manley v. Burn* (1915), 85 L. J. K. B. 505. *As to* (2) *Refd.* *Bonomi v. Backhouse* (1858), E. B. & E. 622; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557. *Generally, Refd.* *Acton v. Blundell* (1843), 12 M. & W. 324; *Bibby v. Carter* (1859), 4 H. & N. 153.

**401.** — — — — — *UNION LIGHTERAGE CO. v. LONDON GRAVING DOCK CO.*, No. 68, *ante*.

**402.** — — — — — *Noxious discharge into sewer.*—*Pltf.*s were a sanitary authority, & for more than twenty years before action brought *defts.* had discharged into *pltf.*'s sewers the waste liquors from their borax works. This effluent contained borax in solution. *Pltf.*s utilised part of the area under their control for a sewage farm on which various crops were raised, & they alleged that this noxious effluent had injuriously affected their farm & the crops thereon. There was evidence that the discharge from *defts.*' works was intermittent, & as a rule made at night, & neither *pltf.*s nor their predecessors had notice of it. No perceptible damage to the crops on the farm had been noticed prior to 1908. *Defts.* claimed a prescriptive right to continue the discharge of their effluent & denied that it was noxious or caused any injury to the farm. In an action by *pltf.*s claiming an injunction to restrain the *defts.* from continuing the discharge of this noxious chemical solution:—*Held*: as the enjoyment of the alleged easement had been secret & unknown & unsuspected by *pltf.*s or their predecessors, it was not of such a character as would establish a prescriptive right.—*LIVERPOOL CORPN. v. COGHILL (H.) & SON*, [1918] 1 Ch. 307; 87 L. J. Ch.

#### PART III. SECT. 3, SUB-SECT. 6.—C. (b) i.

**399 i. General rule—Continuity.**—A party claiming the right of user by prescription over the property of another must show not only that the right has existed from ancient days, but also that it has been exercised as of right, & has not been interrupted.—*MALLIK JAWAD-UL-HUQ v. RAM PRASAD*

*DAS* (1869), 3 B. L. R. A. C. 281. *IND.*

*a. Must be open & unequivocal.*—The actual user of an easement by prescription must be such as to carry to the mind of a reasonable person in possession of the servient tenement the facts that a continuous right to enjoyment is being asserted & ought to be resisted if denied.—*WATSON v. JACKSON*

(1914), 30 O. L. R. 517; 31 O. L. R. 481; 19 D. L. R. 733; 6 O. W. N. 509.—*CAN.*

*t. — — —*—In order to found a prescriptive right of way the acts of possession relied on must be of such a character, or done in such circumstances, as to indicate unequivocally to the proprietor of the servient tenement the fact that a right is asserted

**Sect. 3.—By prescription: Sub-sect. 6, C. (b) i., ii. & iii.]**

186; 118 L. T. 336; 82 J. P. 129; 34 T. L. R. 159; 16 L. G. R. 91.

**403. Must be actionable—Obstruction of stream.]—MURGATROYD v. ROBINSON, No. 51, ante.**

**404. — Or capable of physical resistance—Noise & vibration.]—SANDER v. MANLEY & ROGERS, [1878] W. N. 181.**

**405. — — — —.]—STURGES v. BRIDGMAN, No. 57, ante.**

**406. Must be certain & uniform.]—HULLEY v. SILVERSPRINGS BLEACHING CO., No. 361, ante.**

## ii. User as of Right.

See Prescription Act, 1832 (c. 71), ss. 2 & 5.

**407. General rule.]—(1)** The words "enjoyed by any person claiming right," applied to easements, in Prescription Act, 1832 (c. 71), s. 2, & "enjoyment thereof as of right," in sect. 5 of the above Act, mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or on many, but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use, without danger of being treated as a trespasser, as a matter of right, whether the right so claimed shall be strictly legal, as by prescription & adverse user, or by deed, or shall have been merely lawful so far as to excuse a trespass.

(2) To a plea of forty or twenty years' enjoyment of a way, a licence, if it cover the whole time, must be pleaded. But a parol or other licence, given & acted on during the forty or twenty years, may be proved under a general traverse of the enjoyment as of right, & this, whether such licence be granted for a single time of using, or for a definite period.

**Semble:** (3) where issue is joined on the allegation of an interruption acquiesced in, the party alleging the interruption, having proved a non-user during part of the time, may, in order to show that such nonuser was not a voluntary forbearance, give evidence that, two years before the nonuser commenced, the party claiming the way paid a consideration for being allowed to use it.—**TICKLE v. BROWN** (1836), 4 Ad. & El. 369; 1 Har. & W. 769; 6 Nev. & M. K. B. 230; 5 L. J. K. B. 119; 111 E. R. 826.

**Annotations:—As to (1)** *Follid. Beasley v. Clarke* (1836), 2 Bing. N. C. 705; *Gardner v. Hodgson's Kingston Brewery Co.* (1903), 88 L. T. 698. *Refd. Clay v. Thackrah* (1839), 9 C. & P. 47; *Mogor v. Chadwick* (1840), 9 L. J. Q. B. 159; *Caved v. Martyn* (1865), 19 C. B. N. S. 732; *Angus v. Dalton* (1877), 3 Q. B. D. 85; *Hollins v. Verney* (1884), 13 Q. B. D. 304; *Hyman v. Van Den Bergh*, [1907] 2 Ch. 516; *Lyall v. Hothfield*, [1914] 3 K. B. 911. **As to (2)** *Refd. I'ye v. Mumford* (1848), 17 L. J. Q. B. 138; *Tone v. Preston* (1883), 24 Ch. D. 739; *Tomsett v. Wallis* (1896), 40 Sol. Jo. 498. **As to (3)** *Apld. Onley v. Gardiner* (1838), 4 M. & W. 496; *Gardner v. Hodgson's Kingston Brewery Co.* (1903), 88 L. T. 698. **Generally, Mentd.** *Papendiek v. Bridgewater* (1855), 5 E. & B. 166; *Howe v. Malkin* (1878), 40 L. T. 196.

**408. Permission of servient owner—Crossing over**

& the nature of the right.—**M'INROY v. ATHOLE (Duke)**, [1891] A. C. 629.—**SCOT.**

**a. Must be lawful.]—**Prescription based upon a series of unlawful acts, cannot be supported whether the acts were unlawful at common law or by statute.—**TRAILL v. McALLISTER** (1890), L. R. 25 Ir. 524.—**IR.**

**PART III. SECT. 3, SUB-SECT. 6.—C. (b) ii.**

**407 i. General rule.]—**To establish a prescriptive right under 10 Edw. VII.,

c. 34, s. 35, twenty years' uninterrupted user as of right immediately prior to the bringing of the action must be proven.—**HUNTER v. RICHARDS** (1912), 22 O. W. R. 408; 3 O. W. N. 1432; 28 O. L. R. 567; 12 D. L. R. 267.—**CAN.**

**b. Permission of servient owner.]—**Prior to 1894 H. & P. were tenants of adjoining farms on the same estate. In 1861 H.'s predecessor for the better drainage of his holding constructed a drain through his lands to a river, & at the same time a weir was constructed

railway.]—(1) Trespass for breaking & entering, on Jan. 1, 1830, & on divers other days & times, etc., one close, called the Railroad, & one other close formerly used as a railroad, etc. Pleas, amongst others, that A., B., & C. were owners of the closes on each side of the *locus in quo*, which was a railway made by pl'tfs. under the authority of an Act of Parliament; that the adjoining closes contained minerals, & that, according to the custom of the country, the minerals could only be conveniently conveyed by means of a railroad across the *locus in quo*. The plea then justified the trespasses for that purpose, & for the convenient & necessary occupation of the adjoining closes. Replication, protesting the soil & freehold, *de injuria absque residuo causae*. Another plea alleged that the occupiers of the adjoining closes had, for twenty years, as of right, & without interruption used & been accustomed to use the privilege & easement of passing & repassing, etc., & laying down railroads across pl'tf.'s railroad. Replication to this plea, traversing the claim of right. New assignment of other & different purposes, to which there was judgment by default. The particulars complained of trespasses committed by defts. in Apr. & May, 1830, in a close "which now is or heretofore was a rail or tramroad," & destroying the plates of same, & laying down others. The evidence was, that defts., in Feb. 1829, took up some of the plates of pl'tfs.' railway, & altered the course of part of it, carrying it over their own land, & made a transverse railroad, which crossed the site of the old railroad, & also the new railroad:—**Held:** the particulars were sufficient.

(2) Upon the issue with regard to the more convenient occupation of the adjoining closes, there was much evidence on both sides, pl'tfs. giving evidence to show, that, in constructing the transverse railroad, defts. had an ulterior object in view. The judge left it to the jury to say whether the transverse railroad was constructed *bonâ fide* for the more convenient occupation of the closes, or for some other object:—**Held:** this direction was right.

(3) Upon the issue with regard to the twenty years' enjoyment of the easement:—**Held:** defts. were bound to show an uninterrupted enjoyment, as of right, during that period, & pl'tfs. might prove, under that issue, applications by defts. during the twenty years for leave to cross their railroad, & it was not necessary for them to reply such licence specially under Prescription Act, 1832 (c. 71), s. 8.—**MONMOUTH CANAL CO. v. HARFORD** (1834), 1 Cr. M. & R. 614; 5 Tyr. 68; 4 L. J. Ex. 43; 149 E. R. 1226.

**Annotations:—As to (3)** *Follid. Beasley v. Clarke* (1836), 2 Bing. N. C. 705; *Tickle v. Brown* (1836), 4 Ad. & El. 369; *Onley v. Gardiner* (1838), 4 M. & W. 496. **Consd.** *Gardner v. Hodgson's Kingston Brewery Co.*, [1900] 1 Ch. 592. *Refd. Hollins v. Verney* (1884), 13 Q. B. D. 304.

**409. — Right of way.]—TICKLE v. BROWN, No. 407, ante.**

**410. — — —.]—**In trespass the plea alleged,

on the course of the drain & a conduit by which some of the water was led in a different direction along H.'s side of the boundary between the two farms to the public road, & thence along that road, supplying a tank on P.'s holding & ultimately going to the river. In 1896 H. altered the drainage of his lands & removed the conduit so that it no longer supplied P.'s tank. P. entered H.'s land & restored it. H. sued for damages for trespass & for flooding of his lands:—**Held:** the drain was merely an artificial drain & not permanent, but open to alteration

that the way in question was used for forty years as of right, by the occupier, etc., of the farm. On a replication traversing the use as of right:—*Held*: pltf. might give in evidence, under Prescription Act, 1832 (c. 71), s. 5, that the way had been used by leave & licence, & that an acknowledgment had been given by those to whom the use of such way had been allowed.—*BEASLEY v. CLARKE* (1836), 2 Bing. N. O. 705; 5 Dowl. 50; 2 Hodg. 100; 3 Scott, 258; 5 L. J. C. P. 281; 132 E. R. 271.

*Annotations*:—*Reid*. *Onley v. Gardiner* (1838), 1 Horn. & H. 381; *Pyc v. Mumford* (1848), 11 Q. B. 668; *Gardner v. Hodgson's Kingston Brewery Co.*, [1900] 1 Ch. 592; *Hyman v. Van Den Bergh*, [1907] 2 Ch. 516.

411. ———. ———.] — *KINLOCH v. NEVILLE*, No. 388, *ante*.

412. Repairs executed as of right — *Way*.] — *CLAY v. THACKRAH*, No. 424, *post*.

413. Evidence that user not of right — *Watercourse*.]—Case for disturbing a watercourse which of right ought to flow into pltf.'s close to irrigate it. Plea: denial of the right. On the trial it appeared that the watercourse was not ancient, but that the water had flowed in its present course for more than twenty years, past pltf.'s close. There was evidence that during that period pltf., & those under whom he claimed, had been constantly in the habit of drawing off the water to irrigate his close, & that the owners of the watercourse resisted it. On one occasion, when pltf.'s servant drew off the water, he was summoned before a justice for so doing. Pltf.'s son by his direction attended & defended the servant, & paid a fine of 1s. The conviction was under a local Act, from which there was a power of appeal. Pltf. did not appeal. The conviction was tendered in evidence & rejected. In summing up, the judge explained that the enjoyment to defeat an adverse right must be for twenty years, without interruption acquiesced in for a year. One of the jury asked what would be the effect in law of a state of perpetual warfare between the parties, which question the judge did not answer. The jury found that "the watercourse had been enjoyed as of right for twenty years, & without interruption for a year," & were directed to find for pltf.:—*Held*: (1) the evidence was improperly rejected, as the conviction, unappealed against, was, under the circumstances, evidence of an acknowledgment by pltf., that the usage, to draw off the water for irrigation, was not as of right; (2) interruptions, though not acquiesced in for a year, might show that the enjoyment never was of right, but contentious throughout, though, if once the enjoyment as of right had begun, no interruption for less than a year could defeat it; (3) a new trial was granted.—*EATON v. SWANSEA WATERWORKS CO.* (1851), 17 Q. B. 267; 20 L. J. Q. B. 482; 17 L. T. O. S. 154; 15 Jur. 675; 117 E. R. 1282.

*Annotations*:—*As to (1) Reid*. *R. v. Fairlie* (1857), 8 E. & B. 486; *Rolle v. Whyte* (1868), 8 B. & S. 116. *As to (2) Reid*. *Lyall v. Hothfield*, [1914] 3 K. B. 911. *Generally*, *Reid*. *Glover v. Coleman* (1874), L. R. 10 C. P. 198; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Hollins v. Vorney* (1884), 13 Q. B. D. 304; *Presland v. Bingham* (1889), 60 L. T. 433.

414. Enjoyment contentious throughout —

at H.'s pleasure, & P.'s enjoyment must be regarded as permissive only.—*HANNA v. POLLOCK*, [1900] 2 L. R. 364.—*IR*.

*o. Adverse*.]—In order to constitute an adverse possession of land, it must be exclusive, continuous & clearly defined; there must be something to show the person having the legal title that a possession has been

taken of some definite portion of the land, hostile to his title.—*Doe d. ST. JOHN CORN. v. LITTLEDALE* (1861), 5 All 121.—*CAN*.

*d. ———*.]—In order that the enjoyment should be "of right," there must be an adverse exercise of it as against the servient holder.—*MODHOOSOODUN DEY v. BISSEONATH DEY* (1875), 15 B. L. R. 361.—*IND*.

*Watercourse*.]—*EATON v. SWANSEA WATERWORKS CO.*, No. 413, *ante*.

415. Agreement to do act inconsistent with easement—*Support from wall*.]—In 1856 A. built on a wall belonging to B., the rest of the building being on land laid out by B. for a street. By a deed made in 1864, A. covenanted with B. that A. would on three months' notice macadamise the street & keep it in repair. This deed was recited in another deed made between A. & B. in 1877, in which the proposed street was referred to. The street was never made, & the design had been abandoned:—*Held*: A.'s enjoyment of support from the wall was not as of right, & no easement was acquired.—*TONE v. PUNSTON* (1883), 24 Ch. D. 739; 53 L. J. Ch. 50; 49 L. T. 99; 32 W. R. 166.

416. Enjoyment under mutual mistake of legal right—*Watercourse*.]—Defts. in 1834 demised to pltf. the coal under the O. estate for fifty years, with powers to sink pits, make soughs, etc., erect engines, & make drains, etc., for supplying such engines with water, & also to do certain other acts on the surface for the better draining & working the demised mines & any other mines of which pltf. might become lessees under the lands of any other persons. In 1836 pltf. took a lease for 35 years of the O. Colliery from a neighbouring landowner. In 1846 pltf. made a drain about a mile long, chiefly on the O. estate, by which they diverted a small natural stream on the O. estate & brought it down to the O. Colliery, where they made reservoirs for the water at considerable expense. They did not ask leave to make the drain, but defts.' agent saw the work going on & encouraged it. In 1872 pltf. became owners in fee of the O. Colliery. In 1884, when the lease from defts. expired, defts. stopped the drain & diverted the water. Pltf., claiming a right by prescription to the water, commenced this action to restrain them from doing so: *Held*: if the making the drain was not authorised by the lease, as to which the ct. gave no opinion, it was made & enjoyed, either under the belief of both parties that it was authorised by the lease, or under a comity between landlord & tenant, & there was no enjoyment as of right so as to give the tenant a right to the water after the lease had expired.—*CHAMBER COLLIERY CO. v. HOPWOOD* (1886), 32 Ch. D. 549; 55 L. J. Ch. 859; 55 L. T. 449; 51 J. P. 164; 2 T. L. R. 507, C. A.

*Annotations*:—*Reid*. *Brinckman v. Matley* (1901), 73 L. J. Ch. 160; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140.

417. Annual payment in respect of right — *Way*.] — *GARDNER v. HODGSON'S KINGSTON BREWERY CO.*, No. 298, *ante*.

User unknown to servient owner.]—*See* Nos. 68, 400, 402, *ante*.

User during unity of possession.]—*See* Sub-sect. 6, C. (b) iii., *post*.

### iii. User during Unity of Possession.

*See* Prescription Act, 1832 (c. 71), ss. 2 & 4.

418. No enjoyment as of right—*Way*.]—*BRIGHT v. WALKER*, No. 308, *ante*.

419. ———. ———.]—(1) Under Prescription Act,

### PART III. SECT. 3, SUB-SECT. 6.—C. (b) iii.

*a. No enjoyment as of right—Water*.]—A lease made in 1775, by A. to T., comprised two closes, Blackacre & Whiteacre. A mill was subsequently built on Blackacre, which was supplied by a stream through Whiteacre, & S., a tenant of the mill under T., & subsequent tenants, enjoyed this

**Sect. 3.—By prescription: Sub-sect. 6, C. (b) iii. & (c) i.]**

1832 (c. 71), the enjoyment of an easement as of right, for twenty years next before the commencement of the suit, means a continuous enjoyment for twenty years next before the commencement of the suit, as of right, of the easement, without an interruption acquiesced in for a year. If, therefore, during any part of the twenty years there is unity of possession, the enjoyment is defeated.

(2) It is not necessary, under sect. 5, that such unity of possession should be specially pleaded.

(3) Proof of unity of possession may be given in evidence under a traverse of the plea.—*ONLEY v. GARDINER* (1838), 4 M. & W. 496; 1 Horn & H. 381; 150 E. R. 1525; *sub nom.* *OLNEY v. GARDINER*, 8 L. J. Ex. 102.

**Annotations:—***As to (1) Follid.* *Damper v. Bassett*, [1901] 2 Ch. 350. *Reid.* *Battishill v. Reed* (1856), 18 C. B. 696; *Outram v. Maude* (1881), 17 Ch. D. 391; *Symons v. Leaker* (1885), 15 Q. B. D. 629; *Hyman v. Van Den Bergh*, [1907] 2 Ch. 516. *As to (3) Reid.* *Clayton v. Corby* (1842), 2 Q. B. 813.

**420.** ————*]*—In 1823, M. built two adjoining houses, behind each of which was a piece of ground appropriated as a yard, but no wall divided the yards. In 1832, M. permitted deft. to occupy one of the houses without payment of rent, & he was accustomed to pass over the yard of the other house, which was let from time to time to different tenants, to a public highway. M. continued owner of both houses until his death in Dec. 1838. In Aug. 1839, the trustees under his will conveyed the last-mentioned house & the ground behind it to a person through whom pltf. derived his title. In Sept. 1839, the trustees conveyed the other house & ground to deft., who continued to occupy it, & use the way across pltf.'s yard without interruption until the year 1853:—*Held*: there was no user of the way "as of right" for twenty years, within the meaning of Prescription Act, 1832 (c. 71), s. 2.—*WINSHIP v. HUDSPETH* (1854), 10 Exch. 5; 2 C. L. R. 1042; 23 L. J. Ex. 268; 23 L. T. O. S. 162; 2 W. R. 523; 156 E. R. 332.

**421.** ————*]*—(1) The enjoyment of an easement as of right, for twenty, or forty, years next before the commencement of the suit, within Prescription Act, 1832 (c. 71), means a continuous enjoyment as of right, for twenty, or forty, years next before the commencement of the suit, of the easement as an easement, without interruption acquiesced in for a year; & such right is defeated by unity of possession during all or part of the period of enjoyment, though such unity of possession has its inception after the completion of the twenty, or forty, years.

Therefore, where pltf. had enjoyed a way as of right, & without interruption, from 1880 to 1855, when the action was brought:—*Held*: his claim under the above statute was defeated by a unity of possession from 1843 to 1853.

(2) In an action by a reversioner for the removal of the caves from his house, & the erection of a building with eaves & a gutter overhanging his wall, evidence of diminution of the saleable value of pltf.'s premises in consequence of the nuisance

was rejected, & it appearing that the cost of replacing the tiles which had been removed would not exceed 30s., & deft. having paid 40s. into ct. on account thereof, the jury were directed to find for deft., if they thought the sum paid in was sufficient to cover the actual damages sustained by pltf.:—*Held*: the evidence tendered was properly rejected, & the direction right, the true measure of damages in such a case being, not the diminution in the saleable value, although the nuisance might be of a permanent character, but such damages as the jury might think sufficient to compel deft. to abate the nuisance.—*BATTISHILL v. REED* (1856), 18 C. B. 696; 20 J. P. 775; 4 W. R. 603; 139 E. R. 1544; *sub nom.* *BATHSHILL v. REED*, 25 L. J. C. P. 290.

**Annotations:—***As to (1) Follid.* *Damper v. Bassett*, [1901] 2 Ch. 350. *Consd.* *Hyman v. Van Den Bergh*, [1907] 2 Ch. 516. *Reid.* *Hollins v. Vernoy* (1884), 13 Q. B. D. 304. *As to (2) Reid.* *Whitehouse v. Fellows* (1861), 10 C. B. N. S. 765; *Tunncliffe & Hampson v. West Leigh Colliery Co.*, [1905] 2 Ch. 390.

**422.** ————*]*—Pltfs., being respectively the owner in fee & the tenant of Whiteacre, brought an action of trespass against the owner & occupier of the adjoining farm Blackacre, in driving a horse & cart from Blackacre across certain fields belonging to Whiteacre. Deft. set up a private right of way under Prescription Act, 1832 (c. 71), & alleged an uninterrupted user for forty years. It appeared that A. was tenant of Whiteacre from 1860, & of Blackacre from 1877 till 1898:—*Held*: (1) the unity of possession of the alleged servient & dominant tenements for the greater part of the forty years preceding the action was fatal to deft.'s claim under the Act; (2) in the circumstances the user of the right of way for the last forty years would be no evidence of right as against pltfs.—*DAMPER v. BASSETT*, [1901] 2 Ch. 350; 70 L. J. Ch. 657; 81 L. T. 682; 49 W. R. 536; 17 T. L. R. 537; 45 Sol. Jo. 537.

**Annotation:—***As to (1) & (2) Reid.* *Hyman v. Van Den Bergh*, [1907] 2 Ch. 516.

**423.** ———— **Two tenements held from same landlord.]—***KILGOUR v. GADDES*, No. 309, *ante*.

**424.** ———— **Repair of watercourse—Tenements held under different landlords.]—**To an action of trespass on land deft. pleaded that for twenty, thirty, forty, & sixty years he & the occupiers of a mill had, as an easement, gone on the land to repair the banks of a stream which flowed to the mill. Replication, denying the rights claimed. It appeared that within forty years B. had been lessee of the mill under one landlord, & of the land under another:—*Held*: (1) this was such a unity of possession as prevented his having an easement on the land; (2) this unity of possession need not be specially replied, & with a special replication the lease of the land to B. & letters written by B. while lessee of the mill, & before he became lessee of the land, were receivable in evidence; (3) B.'s lease of the land having expired more than thirty years ago, the acts of the occupiers of the mill in repairing the banks ever since that time, without any leave asked by them, or any notice from the other side of any adverse claim, must be taken to be done as of right.—*CLAY v. THACKRAH* (1839), 9 C. & P. 47; 2 Mood. & R. 244, N. P.

right of water from 1818. In 1836, C., who was entitled to the reversion expectant on T.'s lease, appointed Whiteacre to K. for life, from the expiration of that lease, retaining Blackacre. The lease of 1775 expired in 1840. K., in 1841, demised Whiteacre to deft.; & in 1843, C. demised Blackacre to pltf., with the right to water sufficient

for the mill as enjoyed by S. In an action for the diversion of the water, commenced in 1860, there was evidence of uninterrupted enjoyment from 1818 to 1860:—*Held*: (1) as, during the lease of 1775, there was a unity of possession in T., the enjoyment by S., his tenant, pending that lease, was not an enjoyment "as of right," within

the meaning of the Prescription Act. (2) The user for more than twenty years, since 1840, conferred no title to the easement, under Prescription Act, Sect. 2, the reversion of the servient tenement, during that period, being vested in K., the tenant for life.—*WILSON v. STANLEY* (1861), 12 L. C. L. R. 345.—*IR*.

## (c) Length of User.

## i. Computation of Time.

**Prescription at common law.]—See** Sub-sect. 4, B., *ante*.

**Under doctrine of lost modern grant.]—See** Sub-sect. 5, D. (c), *ante*.

**425. Twenty years next before suit—Way.]—**MONMOUTH CANAL CO. v. HANFORD, No. 408, *ante*.

**426. ———.]—**ONLEY v. GARDINER, No. 419, *ante*.

**427. ———.]—**(1) A plea of twenty years' enjoyment of a way, under Prescription Act, 1832 (c. 71), s. 2, must be supported by user for that period down to the commencement of the action.

(2) Proof of user commencing forty years ago, but discontinued four or five years before the commencement of the action, is insufficient.—PARKER v. MITCHELL (1840), 11 Ad. & El. 788; 3 Per. & Dav. 655; 9 L. J. Q. B. 194; 4 Jur. 915; 113 E. R. 613.

**Annotations:—As to (1)** *Refd.* Watson v. Stanley (1861), 5 L. T. 244. *As to (2)* *Consd.* Carr v. Foster (1842), 2 Gal. & Dav. 753. *Apprvd. & Foll.* Lowe v. Carpenter (1851), 6 Exch. 825. *Consd.* Hollins v. Verney (1884), 13 Q. B. D. 304. *Refd.* Hyman v. Van Den Bergh, [1907] 2 Ch. 516.

**428. ———.]—**Pleas of twenty & forty years user respectively, under Prescription Act, 1832 (c. 71), are not supported by proof of user for forty years & upwards before the commencement of the action to within fourteen months of it. Some act of user must be shown to have been exercised in the years in which the action is brought. *Semble*: some act of user ought to be shown to have been exercised at least once a year.—LOWE v. CARPENTER (1851), 6 Exch. 825; 20 L. J. Ex. 374; 17 L. T. O. S. 203; 15 Jur. 883; 155 E. R. 779.

**Annotations:—Consd.** Glover v. Coleman (1874), L. R. 10 C. P. 108; Hollins v. Verney (1884), 13 Q. B. D. 304. *Refd.* Watson v. Stanley (1861), 5 L. T. 244; De La Warr v. Miles (1881), 44 L. T. 487.

**429. ———.]—**DARLING v. CLUE, No. 338, *ante*.

**430. ——— Watercourse.]—**(1) A claim to empty & discharge water from a copper mine, which had been impregnated with metallic substances in pits sunk in the party's own soil, into the watercourses of a neighbour, is a claim to a watercourse within Prescription Act, 1832 (c. 71), s. 2. In pleading the enjoyment of such a right for forty years, it is correct to state it "for the full period of forty years next before the commencement of the suit."

(2) Where an enjoyment of a right for the period of forty years is alleged in a plea, it is no sufficient answer to say, that there is an outstanding tenancy for life, without showing that the reversion is in the person who sets up that tenancy, because, although, in the computation of the twenty years' prescription, under Prescription Act, 1832 (c. 71), s. 7, the term of the tenant for life is absolutely excluded, in the computation of the forty years under sect. 8, it is only excluded conditionally, upon the resistance to the claim by the reversioner within three years after the determination of the tenant for life.

(3) Where a tenant for life, with power to grant leases for three lives, does grant such a lease. *Qu.*: whether it is correct to plead that, by

**PART III. SECT. 3, SUB-SECT. 6.—**  
C. (c) i.

**f. Twenty years.]—Held**: where there has been uninterrupted enjoyment for more than twenty years, when the parties entitled to the reversion were seized *piero jure*, the ct. will not interfere.—WATSON v. STANLEY

(1861), 5 L. T. 241.—**IR.**  
g. ———.]—Limitation Act, R. S. O. (1911), c. 75, ss. 35, 36, renders it necessary for a person seeking to establish a prescriptive right to an easement under the statute to prove uninterrupted enjoyment for 20 years immediately previous to & terminating

virtue of the power so reserved to him, he did by indcature enfeof certain persons for three lives.—WRIGHT v. WILLIAMS (1836), 1 M. & W. 77; 1 Gale, 410; Tyr. & Gr. 375; 5 L. J. Ex. 107; 150 E. R. 353.

**Annotations:—As to (1)** *Consd.* Richards v. Fry (1838), 7 Ad. & El. 698; Flight v. Thomas (1840), 11 Ad. & El. 688. *Apprvd.* Cooper v. Hubbuck (1862), 12 C. B. N. S. 456. *Refd.* Flight v. Thomas (1841), 8 Cl. & Fin. 231; Ward v. Robins (1846), 15 M. & W. 237; Pye v. Mumford (1848), 11 Q. B. 666; Carlyon v. Lovering (1857), 1 H. & N. 784; Watson v. Stanley (1861), 5 L. T. 244; Hollins v. Verney (1884), 13 Q. B. D. 304; Clark v. Somersdshiro Drainage Comrs. (1888), 36 W. R. 890; Gardner v. Hodgson's Kingston Breweries Co., [1900] 1 Ch. 592; Colls v. Home & Colonial Stores, [1904] A. C. 170; Hyman v. Van Den Bergh, [1908] 1 Ch. 167.

**431. ———.]—**In case, the declaration stated, that plff. was lawfully possessed of a mill, & by reason thereof of right ought to have & enjoy the benefit of the water of a watercourse which ran & flowed, by means of a weir therein erected a little above plff.'s mill, being kept at a certain height, unto the mill of plff., for supplying it with water for the working thereof; & complained, that deft. wrongfully pulled down the weir, & placed & kept it at a lower height than it ought to have been. Deft. pleaded, that, before & at the times when he was the occupier of a certain close adjoining to the watercourse, & that he & all others the occupiers for the time being of the close for twenty years next before the commencement of the suit, enjoyed, as of right & without interruption, the right of from time to time, as occasion required, removing a part of the weir, & placing & keeping it at a lower height than the rest, to such an extent & for such a time as was necessary for diverting enough of the water to irrigate the close; that, at the times when irrigation was necessary for the close, wherefore deft. removed the part of the weir, & placed & kept it at such lower height, to such an extent & for such time as, & no more or longer than, was necessary for diverting the water for the irrigation of the close:—*Held*: this plea was good, & it was not an argumentative traverse of the right alleged in the declaration, inasmuch as it set up a right which, under Prescription Act, 1832 (c. 71), was not complete until the commencement of the suit, & therefore, was not inconsistent with plff.'s right to have the weir at a greater height at the time of the act complained of.—WARD v. ROBINS (1846), 15 M. & W. 237; 7 L. T. O. S. 111; 153 E. R. 837.

**Annotations:—Apld.** Lowe v. Carpenter (1851), 6 Exch. 825. *Consd.* Cooper v. Hubbuck (1862), 12 C. B. N. S. 456; Hennison v. Cartwright (1864), 5 B. & S. 1. *Refd.* Watson v. Stanley (1861), 5 L. T. 244; Hollins v. Verney (1884), 13 Q. B. D. 304.

**432. ——— Eavesdropping.]—**BATTISHILL v. REED, No. 421, *ante*.

*See, also*, Nos. 462, 465, 879, *post*.

**433. Against whom time computed—Reversioner.]—**When there is evidence of the user of a way over the land of plffs. during the existence of several successive leases, it is a question rightly left to the jury, whether it was by the permission & sufferance of the tenant only, or under a claim of right.—BISHOP v. SPRINGETT (1831), 1 L. J. K. B. 13.

**434. ———.]—**BRIGHT v. WALKER, No. 308, *ante*.

In some action or suit in which the right is called into question.—WATSON v. JACKSON (1914), 31 O. L. R. 481; 19 D. L. R. 733; 6 O. W. N. 509.—**CAN.**  
h. ———.]—Under C. S. U. C. c. 88, ss. 37, 40, & 41, where one enjoys an easement as against the Crown & over Crown property for a period of twenty

*Sect. 3.—By prescription: Sub-sect. 6, C. (c) i., ii. & iii., (d) & D. Sect. 4.]*

**435.** ———.]—(1) The user of a way during the occupation of tenants does not bind the landlord unless he was aware of it; but if the user has been for a great length of time, it may be presumed that he was aware of it.

(2) If, in an action of trespass, deft. pleads a foot-way, his plea is supported by proof of a carriage-way, as a carriage-way always includes a foot-way.

(3) A gate being kept across a way is not conclusive that it is not a public way, as the way may have been granted to the public with a reservation of the right of keeping a gate across it to prevent cattle straying.—*DAVIES v. STEPHENS* (1830), 7 C. & P. 570, N. P.

*Annotation:—As to (1) Refd. Thornhill v. Weeks (1914), 78 J. P. 154.*

**436.** ———.]—Case for the obstruction of a right of way. Verdict for plff. A thirty years' user of the way for the purpose of getting water, was proved by plff., but deft.'s farm was held under a lease for life from the Archbishop of York, & on the part of deft. it was contended that that circumstance defeated the evidence of user. Motion to enter the verdict for deft., on the ground that twenty years' user gave no right against the Archbishop, & that no title at all was gained by an user which did not give a valid title against all:—*Held*: the rule would be refused.—*SMITH v. INESON* (1848), 11 L. T. O. S. 104.

**437.** ———.]—Upon a traverse of the right of way in an action for obstruction, plff. proved enjoyment for twenty years; but during certain portions of the twenty years the servient tenement was held under leases for years exceeding three years. The user, however, commenced antecedently to the granting of any of the leases, & no proceedings were taken by the reversioner within three years after the determination of such terms, to resist plff.'s claim:—*Held*: (1) there was evidence for the jury of the right claimed, & Prescription Act, 1832 (c. 71), s. 8, applied only to cases where an enjoyment for forty years was relied upon as giving an absolute & indefeasible right, & not to cases where twenty years' user only was set up; (2) if sect. 8 of the above Act could be applied to the latter case at all, the condition imposed by that sect., of resistance within three years after the determination of the term, was applicable also; (3) there was no ground for excluding from the computation of twenty years the periods during which the servient tenement was out on lease.—*PAIK v. SHINNER* (1852), 18 Q. B. 568; 22 L. J. Q. B. 27; 19 L. T. O. S. 228; 17 Jur. 372; 118 E. R. 215.

*Annotation:—As to (1) Refd. Kilgour v. Gaddes (1903), 89 L. T. 444.*

**438.** ———.]—Where a right of way is claimed by virtue of forty years' enjoyment under Prescription Act, 1832 (c. 71), the period during which the servient tenement has been vested in a tenant for life, with remainder in fee, cannot be deducted from the period of forty years' enjoyment—for the remainderman is not "a person entitled to the reversion expectant on a term"

years, he thereby establishes a right by prescription in such easement. To establish the easement by prescription it is not necessary to show that the present owner was in undisturbed possession for the full twenty years; but the undisturbed possession of his predecessors in title may be invoked in order to complete the term of prescription.—*MCGEE v. R.* (1802), 22

C. L. T. 87; 7 Exch. C. R. 309.—*CAN.*

#### PART III. SECT. 3, SUB-SECT. 6.—C. (c) ii.

**k. Nearly forty years.**—Nearly forty years before the commencement of the action, the predecessors in title of defts. laid pipes for conveying water along the railway line of plffs. predecessors,

within sect. 8.—*SYMONS v. LEAKER* (1885), 15 Q. B. D. 629; 54 L. J. Q. B. 480; 53 L. T. 227; 49 J. P. 775; 33 W. R. 875; 1 T. L. R. 564, D. O.

**439.** ———. Tenant for life.]—*WRIGHT v. WILLIAMS*, No. 430, *ante*.

**440.** ———. Married woman—Effect of Married Women's Property Act, 1882 (c. 75).]—*HULLEY v. SILVERSPRINGS BLEACHING CO.*, No. 361, *ante*.

**441.** ———. Remainderman.]—In an action to restrain the removal of shingle from, & the placing of bathing-machines upon, a part of the foreshore of the sea at M., plff. claimed to be tenant in possession of the *locus in quo* under a building agreement granted him by the lord of the manor of M., who was tenant for life of the property under a settlement. By his statement of defence deft. set up a forty years' uninterrupted user & enjoyment of the *locus in quo* by himself & his predecessors in title for the purposes complained of, & denied that plff. was, or ever had been, in possession of the *locus in quo* "save subject to the right of deft." The judge decided that the words "person entitled to any reversion" in Prescription Act, 1832 (c. 71), included a person entitled as a remainderman; that plff. being in possession of the *locus in quo* under the agreement at least as tenant at will to the reversioner, was also a person "entitled to any reversion" within the sect., & could, therefore, maintain the action. On appeal:—*Held*: (1) on the true construction of the building agreement plff. had no estate whatever in the *locus in quo*, but only a right of entry thereon for the purposes of that agreement, & therefore, could not maintain the action; (2) it was, therefore, unnecessary to decide the question raised on sect. 8 of the above Act; but the Ct. of Appeal intimated that it must not be concluded that they agreed with the decision of the ct. below on that point.—*LAIRD v. BRIGGS* (1881), 10 Ch. D. 22; 45 L. T. 238, C. A.

*Annotations:—As to (1) Refd. Frampton v. White (1896), 40 Sol. Jo. 275; Roberts & Lovell v. James (1903), 89 L. T. 282. As to (2) Refd. Symons v. Leaker (1885), 15 Q. B. D. 629.*

#### ii. Enjoyment for less than Statutory Period.

**442. Inchoate easement unknown to law.**—There is no such thing known to the law as an inchoate easement.—*GREENHALGH v. BRINDLEY*, [1901] 2 Ch. 324; 70 L. J. Ch. 740; 84 L. T. 763; 49 W. R. 597; 17 T. L. R. 574; 45 Sol. Jo. 576.

*Annotations:—Refd. Hymau v. Van Den Bergh (1907), 77 L. J. Ch. 154; Smith v. Colbourne, [1914] 2 Ch. 533.*

#### iii. Interruption of Enjoyment.

**443. Interruption from natural causes—Water-course.**—*HALL v. SWIFT*, No. 525, *post*.

**444. Must be acquiesced in for a year—Water-course.**—*EATON v. SWANSEA WATERWORKS CO.*, No. 413, *ante*.

**445.** ———. Way.]—*ONLEY v. GARDINER*, No. 419, *ante*.

**446.** ———.]—*BATTISHILL v. REED*, No. 421, *ante*.

**447.** ———. Acquiescence question for jury.]—(1) Where a deft. sets up an enjoyment of a right of way, or other easement, under Prescription Act, 1832 (c. 71), s. 2, & it appears that there has

using them for such purpose almost continuously up to the time the action was brought:—*Held*: defts., not having used & enjoyed their easements for forty years, had not acquired a title thereto by prescription under R. S. O. 1887, c. 111, s. 35.—*CANADA SOUTHERN RY. CO. v. NIAGARA FALLS TOWN* (1892), 22 O. R. 41.—*CAN.*



been an interruption of such enjoyment, the question whether such interruption has been acquiesced in or not for one year, as specified in sect. 4, is one to be left to the jury & settled by them.

(2) It is not necessary to bring an action or to commence a suit in order to prove that the interruption has not been acquiesced in.—*BENNISON v. CARTWRIGHT* (1864), 5 B. & S. 1; 3 New Rep. 508; 33 L. J. Q. B. 137; 10 L. T. 268; 28 J. P. 501; 10 Jur. N. S. 847; 12 W. R. 425; 122 E. R. 733.

*Annotations:—As to (1) Apld. Glover v. Coleman* (1874), L. R. 10 C. P. 108. *Generally, Rejd. Norfolk v. Arbutnot* (1880), 5 C. P. D. 390; *Gardner v. Hodgson's Kingston Brewery Co.*, [1901] 2 Ch. 198.

**448. Must be adverse obstruction—Question for jury.]—**(1) The "interruption" which defeats a prescriptive right under Prescription Act, 1832 (c. 71), is an adverse obstruction, not a mere discontinuance of user by claimant himself.

(2) In a case under sect. 1 if proof be given of a right enjoyed at the time of action brought, & thirty years before, but disused during any part of the intermediate time, it is always a question for the jury whether, at that time, the right had ceased or was still substantially enjoyed. The inference to be drawn from the facts proved, on this point, is not a "presumption" within sect. 6.

Where a commoner had ceased to use the common during two years of the thirty, having no commonable cattle at the time, but had used it before & after:—*Held*: a jury were justified in finding a continued enjoyment of the right during thirty years.—*CARR v. FOSTER* (1842), 3 Q. B. 581; 2 Gal. & Dav. 753; 11 L. J. Q. B. 284; 6 Jur. 837; 114 E. R. 629.

*Annotations:—As to (1) Rejd. Clayton v. Corby* (1844), 8 Jur. 212; *Hollins v. Verney* (1884), 13 Q. B. D. 304; *Smith v. Baxter*, [1900] 2 Ch. 138. *As to (2) Consd. Lowe v. Carpenter* (1851), 6 Exch. 825. *Fold. Glover v. Coleman* (1874), L. R. 10 C. P. 108.

**449. Intermittent user by dominant owner—Way.]—***HOLLINS v. VERNEY*, No. 399, *ante*.

(d) *Pleading and Evidence.*

See Sect. 5, *post*.

*D. Light.*

See Part VIII., *post*.

#### SECT. 4.—BY STATUTE.

**450. By implied intention.]—***NEWGATE MARKET FARMERS v. ST. PAULS (DEAN & CHURCH)* (1700), 12 Mod. Rep. 372; 88 E. R. 1387.

**451. — Support for bridge.]—**Where, by an Act of Parliament, certain comrs. were empowered to purchase land for building a bridge, which became subsequently vested in the corpn. of a borough:—*Held*: the corpn. could not be said to have acquired under the Act of Parliament a right to support of the bridge by way of easement over adjoining land for which they had not

paid.—*SUNDERLAND CORPN. v. HORNE* (1855), 3 W. R. 508; 19 J. P. Jo. 372.

**452. — Support for canal.]—**By a private Act of Geo. 2, the undertakers, who were not made a corpn., were authorised to make an existing brook navigable, & to maintain & use such navigation, & to make such new cuts & canals as might be necessary for the purpose, the undertakers first giving satisfaction to the owners of lands which should be made use of, or prejudiced, or damaged, by the carrying on, effecting, or preserving the navigation; which satisfaction might be by a yearly payment or by a sum in gross. The undertakers were authorised to charge tolls for the use of the navigation, & the public were to have a right to use it on payment of the tolls. No express power to purchase land was given, but persons under disability were empowered to sell. The Act contained no reference to minerals. The brook was made into a canal, but no conveyances to the undertakers were made—compensation being made to landowners by annual payments. The navigation subsequently became vested in ptfs. Dftfs., who were owners of coal under the canal, worked it so as to cause a subsidence, & ptfs. brought their action for an injunction on the ground that they had a right to support:—*Held*: where an express statutory right is given to make & maintain something requiring support, the statute, in the absence of a controlling context, must be taken to mean that the right of support shall accompany the right to make & maintain; if the Act does not provide any means of obtaining compensation for the loss occasioned to the landowner by his having to leave support, this is a strong argument against the Legislature having intended to give such right; but if it contains provisions under which compensation can be obtained, it needs a strong context to show that the right to support is not given; under the Act in the present case compensation could have been successfully claimed for the damage occasioned to the landowners by making their mines unworkable; the Legislature, therefore, must be taken to have intended to give a right of support, & ptfs. were entitled to an injunction.—*LONDON & NORTH WESTERN RY. CO. v. EVANS*, [1893] 1 Ch. 16; 62 L. J. Ch. 1; 67 L. T. 630; 41 W. R. 149; 9 T. L. R. 50; 2 R. 120, C. A.

*Annotations:—Apld. G. W. Ry. v. Cefn Cribbwr Brick Co.*, [1894] 2 Ch. 157. *Fold. Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co.* (1901), 85 L. T. 53. *Apprvd. Clippons Oil Co. v. Edinburgh & District Water Trustees*, [1904] A. C. 64. *Rejd. Bradford Corpn. v. Pickles*, [1894] 3 Ch. 53; *Bishop Auckland Industrial Co-op. Flour & Provision Soc. v. Butterknowle Colliery Co.* (1904), 73 L. J. Ch. 635. *Mentd. Jordon v. Sutton Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614; *Musselburgh Real Estate Co. v. Musselburgh Provost*, [1905] A. C. 491; *Woolcombers v. Bradford Corpn.* (1906), 70 J. P. 434; *Cannon Brewery Co. v. Central Control Board (Liquor Traffic)*, [1918] 2 Ch. 101; *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508; *Newcastle Breweries v. R.*, [1920] 1 K. B. 854; *Re Ellis & Rudlip-Northwood U. D. C.*, [1920] 1 K. B. 343.

**453. — — —.]—**By a private Act ptfs. were incorporated as a co. for carrying on &

containing a clause providing for its cancellation in the event of it being found that the easement existed or might be exercised thereover. Water from this municipal drain or ditch had been flowing on to & through the property in question for over 30 years & it was contended on ptfs. behalf at the trial that an easement by prescription existed:—*Held*: Sect. 79, ch. 113, R. S. B. C. 1897, & Sect. 26, ch. 42, 1903-4 had created a statutory easement.—*GRAY v. DANIELS* (1908), 8 W. L. R. 316.—*CAN.*

#### PART III. SECT. 4.

**450 i. By implied intention.]—**Where a lane set out upon private land has once been made under Melbourne Corpn. Act, 14 Vict. No. 20, the Act confers, by necessary implication, a statutory right of user of the lane upon all persons who are or may be, required under the Act, to contribute to the expenses of forming it, & upon their successors in title, & the owner in fee of the land, over which the lane runs can never resume the control of the same so as to deprive any of such

persons of the right.—*DREW v. MOURRAY* (1890), 16 V. L. R. 484.—*AUS.*

**450 ii. — — —.]—**Action brought for a declaration that an easement by prescription existed over land bought by ptff. from deft. & that ptff. was therefore by virtue of a clause in the agreement of sale & purchase entitled to cancel the agreement:—*Held*: a ditch having been constructed by statutory authority draining a highway into & over private property which had been sold under an agreement

**Sect. 4.—By statute. Sect. 5: Sub-sect. 1.]**

maintaining a navigable canal; & it was enacted that they should for that purpose have power to purchase lands for making the canal & the several works thereby authorised to be made, & to enter into & upon the lands of any person or persons, & to construct & do all other matters which the co. should think necessary & convenient for making & using the canal & other works, the co. doing as little damage as might be in the execution of the several powers thereby granted, & making satisfaction in manner thereafter mentioned for all damages to be sustained by the owners of & persons interested in such lands as should be taken, used, or prejudiced in or by the execution of the Act, provided, nevertheless, that nothing in the Act should entitle the co., on purchasing any lands for making the canal or for any other purposes aforesaid, to any mines of coal, ironstone, or other minerals which should be found in cutting or making the canal & other works aforesaid or that should be under the same, but that all such mines should appertain & belong to such person or persons as would have been entitled to the same in case the Act had not been made.

Ptfs. duly acquired the lands necessary, & constructed & completed the canal & works under the powers of the Act.

The purchase-money & compensation properly payable upon taking the lands were duly ascertained, & there had been no default in payment.

Defts. were the owners of a colliery which they were working, & the land under which their mines were situate was traversed for a considerable distance by the canal. Defts., in the ordinary course of working their mines, were desirous of working the coal subjacent or adjacent to the canal:—*Held*: (1) defts. were entitled to get so much of the subjacent & adjacent coal as they could get without destroying or injuring the proper support of the canal & works; (2) they were not entitled to get the coal to the destruction or injury of that support; (3) the whole compensation having been assessed at once at the time of the purchase by ptfs.—i.e., compensation for the right of support as well as for the conveyance of the surface of the land—defts. could not now be entitled to compensation for that in respect of which they had already been compensated.—*GLAMORGANSHIRE CANAL NAVIGATION CO. v. NIXON'S NAVIGATION CO., LTD.* (1901), 85 L. T. 53; 17 T. L. R. 647, C. A.

**454. — Support for water pipe.]**—By sect. 38 of a local Act the Edinburgh Water Co. were authorised to take & use grounds & premises for the purpose of forming reservoirs & to make the necessary cuts for conducting water to the city & to lay the necessary pipes for that purpose, giving one month's notice of their intention to the owners & occupiers of such grounds & premises & making satisfaction to such owners & occupiers in manner thereafter directed. In 1823 a strip of ground was opened by the co. & a pipe laid, part of which passed through the lands of appts. & their predecessors. The pipe was continuously used without question down to the commencement of this action in 1898, when it was threatened with injury by appts. working certain minerals lying under the pipe. The co. having raised an action

for an interdict to restrain appts. from working the minerals adjacent to the pipe so as to injure it, it did not appear that any payment or satisfaction had been made by the co., in respect of laying the pipe:—*Held*: after nearly eighty years' enjoyment of the way—leave it must be presumed that whatever was necessary to obtain the right to support for the pipe had been done.—*CLIPPENS OIL CO. v. EDINBURGH DISTRICT WATER TRUSTEES*, [1904] A. C. 64; 73 L. J. P. C. 32; 89 L. T. 589, H. L.

**455. Agreement by limited owner—Scheduled to private Act.]**—Under a settlement dated July 7, 1888, C. was in 1900 tenant for life in possession of a settled estate in the Isle of Thanet & was then a bachelor, & D. was then tenant for life in remainder. By an agreement dated Apr. 20, 1900, & made between C. & D. of the one part & the W. & B. Water Co. of the other part the co. was authorised to make an adit or tunnel under the settled estate, to be completed by Dec. 31, 1914, or such later date as the grantors should appoint, & it was agreed that upon completion the grantors should by deed grant to the co. the right in perpetuity to maintain & use the adit & that the co. should pay to the grantors in perpetuity a rent of 1s. a yard per annum & should supply a certain quantity of water free to farms on the estate. The grantors were defined as C. & D. & their successors in title under the settlement. By sect. 42 of the co.'s private Act the agreement was confirmed & made binding on the parties thereto & was set out in a schedule to the Act, but the settlement was not otherwise referred to nor any special powers conferred upon the grantors. The adit was not completed by the agreed date, which had been extended to June 30, 1915. It was now proposed that the completion should be postponed till Dec. 31, 1930, & that the co. should in consideration of the extension of time pay an increased rental & supply an increased amount of free water to the estate. C. was now married & had 3 daughters:—*Held*: though when an agreement confirmed by a private Act confers powers on a grantor outside any statutory powers special reference to such powers ought to be made in the Act, the confirmation of the agreement sufficiently expressed the intention of Parliament to confer such powers, & C. & D. jointly could further extend the time for completion of the works & grant a perpetual easement in consideration of a perpetual rentcharge which could be increased beyond the amount specified in the agreement.—*WESTGATE & BIRCHINGTON WATER CO. v. POWELL-COTTON* (1915), 85 L. J. Ch. 459; 113 L. T. 680.

**Land purchased under compulsory powers.]**—See *COMPULSORY PURCHASE OF LAND*, Vol. XI., pp. 118, 119. Nos. 117-123; pp. 152-154, Nos. 347-359.

**SECT. 5.—PLEADING AND EVIDENCE.****SUB-SECT. 1.—PLEADING.**

**456. Under Prescription Act, 1832 (c. 71)—What must be specifically pleaded—Deed or agreement permitting enjoyment—If deed or agreement prior to fixed period of user.]**—*TICKLE v. BROWN*, No. 407, *ante*.

**PART III. SECT. 5, SUB-SECT. 1.**

**1. General rule.]**—In an action to recover damages for injuries caused to ptff.'s reversion in a dwelling-house, by interference with an easement, it is

not sufficient to allege in the statement of claim that ptff. is entitled to such easement; ptff. must show how he is so entitled, whether by grant, or prescription, or otherwise, & must set

out the facts upon which he relies as entitling him to such easement.—*FARRELL v. COOGAN* (1883), L. R. 12 Ir. 14.—*IR.*

*m. Necessity for particulars—O*



457. ——— **Reversion expectant on life estate.**—WRIGHT v. WILLIAMS, No. 430, *ante*.

458. ——— **Unity of possession.**—ONLEY v. GARDINER, No. 419, *ante*.

459. ——— ———]—CLAY v. THACKRAH, No. 424, *ante*.

460. ——— ———]—In trespass *quare clausum fregit*, to a plea of enjoyment of a right of way over pltf.'s close, by the occupiers of a close called W., for twenty years next before the commencement of the suit, under Prescription Act, 1832 (c. 71), s. 2, pltf. replied that before the period of twenty years mentioned in the plea, one C. was seised in fee, as well as of the close mentioned in the declaration as of the close called W., & continued so seised during part of the period of twenty years, to wit, until etc., when he died so seised. On special demurrer:—*Held*: the replication was bad, for that unity of seisin was not inconsistent with the right as alleged in the plea, & unity of possession, if that were meant by the replication, might have been given in evidence under a traverse of the right as alleged in the plea.—JENKINS v. WALL (1842), 10 M. & W. 699; 12 L. J. Ex. 273.

461. ——— **Enjoyment as of right.**—A plea under Prescription Act, 1832 (c. 71), ss. 2 & 5, alleging an easement enjoyed for twenty years, must state, in the words of sect. 5, that the enjoyment was had "as of right."

A plea stated that H., under whom defts. justify, was occupier of a close, & that he, while such occupier, & all other prior occupiers of the close, for twenty years next before action brought, & before the times when, etc., "have had, used & actually enjoyed without interruption, & of right ought to have had," etc., & that H., at the times when, etc., of right ought to have had, etc., & still of right ought to have, etc., for himself, etc., occupiers of the close, a certain way to pass, etc., as to the close of H. with the appurtenances belonging & appertaining: which averment pltf. traversed. After verdict for defts. on this issue, & on motion for judgment *non obstante veredicto*:—*Held*: the plea was bad.—HOLFORD v. HANKINSON (1844), 5 Q. B. 584; 1 Dav. & Mer. 473; 2 L. T. O. S. 367; 8 Jur. 463; 114 E. R. 1370; *sub nom.* HALFORD v. HANKINSON, 13 L. J. Q. B. 115.

462. ——— **Term excluded from computation of period of enjoyment.**—Where a deft. pleads an enjoyment of an easement as of right for thirty years, under Prescription Act, 1832 (c. 71), & pltf. relies on the existence of a life estate, or any of the other portions of time which, by sect. 7 of the above Act are to be excluded from the computation of the thirty years, not being inconsistent with the actual fact of enjoyment, he is bound, under sect. 5 of the above Act, to plead such life estate, etc., specially.—PYE v. MUMFORD (1848), 11 Q. B. 666; 5 Dow. & L. 414;

17 L. J. Q. B. 138; 11 L. T. O. S. 62; 116 E. R. 623.

*Annotation*:—*Refd.* Hyman v. Van den Bergh, [1907] 2 Ch. 516.

463. **Pleading alternative modes of acquisition.**—LYNSLEY v. GLOVER, No. 389, *ante*.

464. ———]—(1) In an action to restrain the obstruction of an alleged private right of way, pltf. ought to show in his statement of claim whether he claims the right by prescription or by grant. (2) He ought also to allege with reasonable certainty the *termini* of the way & its course. If pltf. omits to do this his statement of claim is embarrassing, & the ct. will order it to be amended.—HARRIS v. JENKINS (1882), 22 Ch. D. 481; 52 L. J. Ch. 437; 47 L. T. 570; 31 W. R. 137.

*Annotation*:—*As to* (1) *Distd.* Pledge v. Pontfret (1905), 74 L. J. Ch. 357.

465. ———]—(1) Prescription Act, 1832 (c. 71), ss. 3 & 4, must be read together, with the result that a right to access of light is not absolute & indefeasible, even after twenty years' enjoyment, unless & until some action or suit is commenced in which this right is called in question; until that occurs the right remains inchoate.

(2) In an action to restrain interference with light, the only material period to be considered is the period of twenty years prior to the issue of the writ.

(3) It is competent for the tenant in occupation of the dominant tenement to give the "consent or agreement" mentioned in sect. 3 of the above statute, though by doing so he may prejudicially affect the landlord's inchoate right. Rights under sect. 3 are acquired or lost by virtue of the acts or acquiescence of the occupier, & not by virtue of his title.

(4) But in a case in which there is no express defence provided by the Act for the servient tenement, the right may still be claimed on any ground available before the Act; thus the Act says nothing about unity of title, or unity of possession, & it is, therefore, open to pltf. to plead his enjoyment from time immemorial, when the unity of possession or title is the only bar to his plea under the Act (FARWELL, L.J.).—HYMAN v. VAN DEN BERGH, [1908] 1 Ch. 167; 77 L. J. Ch. 151; 98 L. T. 478; 52 Sol. Jo. 114, C. A.

466. **Trial without pleadings—Plaintiff relying on lost grant.**—(1) In an action to restrain the obstruction of ancient lights in respect of premises which have been rebuilt, evidence of pltf.'s intention to preserve ancient lights upon the rebuilding is unnecessary.

(2) "Interruption" in Prescription Act, 1832 (c. 71), s. 3, bears the same meaning as in sect. 4, & refers to an adverse obstruction, & not to a mere discontinuance of user.

(3) The question whether there has been an actual enjoyment of the use of light under the statute for the statutory period is a question of

*alleged obstruction.*—In an action for breach of covenant, by obstructing the tenants of pltf. in the enjoyment of an easement, pltf. was required to furnish a bill of particulars of the obstruction, the times of their occurrence, the names of the tenants obstructed, & the mode of the obstruction.—WILDRIDGE v. CLARKE (1849), 11 L. L. R. 589; 1 Ir. Jur. 151.—IR.

*n. Where lost grant alleged.*—In an action of trespass to try a right of way, deft. justified under a lost deed of grant from a former owner. The plea stated that the grant was made "by C., afterwards Baron M., to the then Bishop of C."—*Held*: that this general statement of the grantor's

name did not make the defence embarrassing, within sect. 83 of C. L. P. Act, 1853.—STEELE v. IRWIN (1860), 12 Ir. Jur. 177.—IR.

*o. Whether amendment allowed—Averring different cause of action.*—Where pltf., in the first & second counts of his summons & plaint, averred possession of a certain messuage & close, & a right of way appurtenant thereto, & the third count alleged trespass, to which the defences filed were a traverse of the right of way & were a traverse of the damage: the ct., on the affidavit of pltf.'s attorney, allowed the summons & plaint to be amended, by inserting an entirely new cause of action, viz., that pltf., as one of the

public, was entitled to the way as a public way, that it had been so used for upwards of thirty years, & that deft. obstructed the public way, so that pltf. was obliged to go a circuitous way, & that deft. did considerable injury thereby to pltf.'s close; but the ct. refused to oblige deft. to plead on a given day, leaving it to the ordinary course as to time of pleading.—CHOOKE v. MURRAY (1861), 13 Ir. Jur. 391.—IR.

*p. Acts complained of alleged to be user of easement—Whether good defence.*—Pltf., in the first paragraph of the summons & plaint, complained that he was possessed of certain lands adjoining the river D., & was entitled to have the said river flow by & away

**Sect. 5.—Pleading and evidence: Sub-sects. 1 & 2.**  
**Part IV. Sect. 1.]**

fact to be determined according to the circumstances of each case.

Ptfs., who had rebuilt their premises, claimed a right to ancient lights in respect of portions of three windows in the new building which coincided with portions of three windows in the old building. A great part of the coincident area had been, in the case of two of the windows, boarded up, & in the case of the third window, covered with shelving, for more than a year before action brought; but the shelving allowed a substantial amount of light to pass through into the building:—**Held:** as to the two first windows, there had been such a discontinuance of user as to prevent the acquisition of any right by ptfs.; *secus* as to the third.

In the circumstances of the case the ct. made a declaration of ptfs.' right *in lieu* of granting an injunction, deft. undertaking to submit the plans of his proposed building to ptfs.

(4) Non-user which would not be sufficient to establish an abandonment of a right acquired may be enough to prevent the acquisition of that right under the Act. . . . I do not think that the user or non-user of the light can be entirely determined by simply considering whether an obstacle interposed to the light is fixed or movable. . . . It was, however, contended that as regards the portions of the windows which were boarded up, sufficient evidence had been given to establish a title under a lost grant. . . . In the present case the action was tried without pleadings, as the result of an order made on motion. . . . Counsel for deft. took the objection that this course was not open to ptfs. I think, however, it was open to ptfs., subject only to deft. having an opportunity of adducing evidence for the purpose of rebutting the presumption which arises from twenty years' enjoyment (STIRLING, J.).—SMITH v. BAXTER, [1900] 2 Ch. 138; 69 L. J. Ch. 437; 82 L. T. 650; 48 W. R. 458; 44 Sol. Jo. 393.

**Annotations:**—As to (2) **Refd.** *Colls v. Home & Colonial Stores*, [1904] A. C. 179. As to (4) **Refd.** *Hyman v. Van Den Bergh*, [1908] 1 Ch. 167.

**467. Allegation of lost grant.—What particulars pleaded.]—**Ptfs. in an action claimed in respect of N. Wood, & alleged that defts. had trespassed & broken down certain fences & caused damage. Defts. justified on the ground of the existence of certain rights of way which they claimed by common law & statutory prescription. They also claimed that by a deed, now lost, the owners in fee simple of N. Wood granted the rights of way to their predecessors in title, & also

pleaded a similar lost grant with the concurrence of the freeholders & copyholders of the manor:—**Held:** defts. were not bound to state the dates & parties of the lost grants, but they must state whether they were made before a release in 1775, or between that date & the passing of 18 Geo. 3, c. 15, or subsequently to that Act.—PALMER v. GUADAGNI, [1906] 2 Ch. 494; 75 L. J. Ch. 721; 95 L. T. 258.

**In whom prescription laid.]—**See Sect. 3, sub-sect. 2, *ante*.

**SUB-SECT. 2.—EVIDENCE.**

**468. Plea of lost grant.—Evidence that presumed grantor was not seised in fee.]—**In an action of trespass *quare clausum fregit*, deft. pleaded that A. was seised in fee, & being so seised, granted a right of way by non-existing grant. Pltf. replied, traversing the grant:—**Held:** on these pleadings, it was not competent for pltf. to give evidence to show that A. was not seised in fee, for the purpose of rebutting the presumption of the grant.—COWLISHAW v. CHESLYN (1830), 1 Cr. & J. 48.

**Annotations:**—**Consd.** *Morris v. Dimes* (1834), 3 Nev. & M. K. B. 671; *Cooke v. Blake* (1847), 1 Exch. 220. **Refd.** *Blewett v. Tregonning* (1835), 3 Ad. & El. 554. **Mentd.** *Bonzl v. Stewart* (1842), 4 Man. & G. 295; *Wills v. Murray* (1850), 4 Exch. 843; *R. v. Deady* (1853), 1 M. & B. 829; *Phelps v. Prew* (1854), 18 Jur. 245; *Chollet v. Hoffman* (1857), 7 E. & B. 686.

**469. Plea of user under Prescription Act, 1832 (c. 71)—Evidence of prior user.]—**To support a plea, framed on sect. 2 of above Act, of a right of way enjoyed for forty years, evidence may be given of user more than forty years back.—LAWSON v. LANGLEY (1836), 4 Ad. & El. 890; 6 L. J. K. B. 271; 111 E. R. 1018.

**Annotations:**—**Apprvd.** *Hollins v. Verney* (1884), 13 Q. B. D. 304. **Refd.** *Flight v. Thomas* (1841), 8 Cl. & Fin. 231.

**470. — Evidence of prior user under lease.]—**CLAY v. THACKRAH, No. 424, *ante*.

**471. — Evidence of user in each year.]—**LOWE v. CARPENTER, No. 428, *ante*.

**472. — Evidence of actual user.]—***Semble:* the person who asserts that an alleged twenty years' enjoyment of light has been interrupted during that period is bound, under sect. 4 of above Act to prove that some notice, other than that which arises from the mere existence of a physical obstruction, was given to the person interrupted by the person by whose authority the interruption was made.

A pltf. who alleges a twenty years' enjoyment of light must prove affirmatively a *prima facie* case of enjoyment. But, when he has done this,

**PART III. SECT. 5, SUB-SECT. 2.**

**a. Plea of thirty years user by predecessor in title.—No corroborating evidence.—Insufficient.]—**Pltf. claimed a right of way over land of deft. from a meadow lying in the rear of deft.'s land to the highway. He testified on the trial that G., the previous owner of his lot of land, enjoyed an easement for thirty years, adversely to the party from whom deft. derived title, but he produced no deed & did not show that the easement, if such there was, had been conveyed to him. He also claimed under a deed of the meadow, from the exors. of G. in 1861; but as there was no evidence, except that of pltf. himself, of a continuous user by G. for twenty years, & the evidence taken altogether negatived such a user:—**Held:** neither G. nor his exors. could convey any right of way to pltf., & the verdict for deft. must be sustained.—TUPPER v. CAMPBELL (1877), 2 R. & C. 68.—CAN.

**r. Refusal to produce title deeds in support of claim.—Presumed as evidence negating right claimed.]—**Ptfs. were owners of an hotel, & deft. of certain adjacent property. The two properties had at one time been united, & at that time the manager of hotel on behalf of the owner used to obtain water for the purposes of the hotel from a certain spring by means of a road which ran over land which subsequently became deft.'s. There was another but smaller & much less convenient path from the hotel to the spring. Ptfs. became owners of their portion of the property in 1886, & deft. of his portion in 1888. Ptfs. continued to use the above-mentioned road through deft.'s property for the purpose of getting water from the hotel until 1889, when deft. refused to permit them any longer to use the road. Ptfs. accordingly sued deft. for a declaration of their right of way over the said road, but refused to put in

from the said lands, & that deft. penned back & obstructed the same, whereby the water overflowed & flooded the lands, etc. In the second paragraph he complained that he was possessed of certain lands & entitled to the herbage thereof, & that deft. wrongfully & injuriously caused a great quantity of water to flow in upon the lands & flooded them, whereby, etc. Dft. pleaded to both paragraphs that, at the time, etc., he was possessed of a mill near the river D., near which pltf.'s lands were situated; that for twenty years before action the occupiers of the mill enjoyed, as of right, the right of keeping a weir across the river, & of penning back the water for the purpose of working the mill, & that the alleged grievances were a user of that right:—**Held:** this defence was bad as a defence to the second paragraph of the summons & plaint.—O'BRIEN v. ENRIGHT (1867), 1 R. 1 C. L. 718.—IR.

deft. may displace the *prima facie* case, either by proving the existence of an obstruction at the commencement of the twenty years or a statutory interruption of the enjoyment at some time during the twenty years, or by showing by other evidence that pltf.'s evidence of enjoyment cannot be relied upon. In either way deft. will discharge the *onus* which is cast on him.—*SEDDON v. BANK OF BOLTON* (1882), 19 Ch. D. 462; 51 L. J. Ch. 542; 46 L. T. 225; 30 W. R. 362.

**473. Traverse of plea of user under Prescription Act, 1832 (c. 71)—Evidence of parol agreement for payment in respect of user.**—*TICKLE v. BROWN*, No. 407, *ante*.

**474. — Evidence of unity of possession.**—*ONLEY v. GARDINER*, No. 419, *ante*.

**475. Evidence of lateral obstruction of light.**—(1) It is not to be laid down as a general rule that, where a building injuriously affecting ancient lights has been completed before the bill is filed, the ct. is unable to give damages unless the injury is such as would justify a mandatory injunction.

(2) The fact that the height of a building above an ancient light is not greater than its distance is not conclusive evidence that the light is not injuriously affected, but is *prima facie* evidence of there being no such interference with the light as the ct. will restrain, & requires to be rebutted by special evidence of injury.

(3) Prescription Act, 1832 (c. 71), has not altered the nature of the right to light or the principle on which the remedy for an obstruction of light is to be determined; it has merely substituted a statutory title for the fiction of a presumed grant.

(4) The extent of the right of an owner of ancient lights is to prevent his neighbour from building so as to obstruct the access of sufficient light & air to such an extent as to render the

house substantially less comfortable & enjoyable—that is to say, that he is “entitled to sufficient light, according to the ordinary notions of mankind, for the comfortable use & enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use & occupation of the house, if it were a warehouse, a shop, or other place of business (*JAMES, L.J.*). ”

(5) A greater amount of evidence is needed to prove a material injury to light by lateral or oblique obstruction than is necessary in a case of direct obstruction (*LORD SELBORNE, C.*).

(6) The nature of the case, which would have to be made for an injunction by the reason of the obstruction of air is *toto ceto* different from the case which has to be made for an injunction in respect of light. It is only in very rare & special cases, involving danger to health, or at least something very nearly approaching it, that the ct. would be justified in interfering on the ground of diminution of air (*LORD SELBORNE, C.*).—*CITY OF LONDON BREWERY CO. v. TENNANT* (1873), 9 Ch. App. 212; 43 L. J. Ch. 457; 20 L. T. 755; 38 J. P. 468; 22 W. R. 172, L. C. & L. J.

**Annotations:**—*As to* (1) *Folld.* *Stanley of Alderley v. Shrewsbury* (1875), L. R. 19 Eq. 616. *As to* (2) *Dist.* *Benjamin v. Storr* (1874), 43 L. J. C. P. 162. *Consd.* *Hackett v. Balss* (1875), L. R. 20 Eq. 494; *Theed v. Debenham* (1876), 2 Ch. D. 165; *Ecol. Comrs. for England v. King* (1880), 14 Ch. D. 213. *Folld.* *Warren v. Brown*, [1900] 2 Q. B. 722. *Apprvd.* *Colls v. Home & Colonial Stores*, [1904] A. C. 179. *As to* (1) *Consd.* *Theed v. Debenham* (1876), 2 Ch. D. 165. *Folld.* *Warren v. Brown*, [1900] 2 Q. B. 722. *Apprvd.* *Colls v. Home & Colonial Stores*, [1904] A. C. 179. *Refd.* *Jolly v. King*, [1907] A. C. 1. *As to* (6) *Folld.* *Perkins v. Slater* (1876), 35 L. T. 356. *Refd.* *Bryant v. Lefever* (1879), 1 C. P. D. 172; *Harris v. De Pinna* (1886), 33 Ch. D. 238; *Chastey v. Ackland*, [1895] 2 Ch. 389.

**476. Allegation of obstruction of user: Evidence of notice of obstruction.**—*SEDDON v. BANK OF BOLTON*, No. 472, *ante*.

## Part IV.—Transfer and Assignment of Easements.

### SECT. 1.—IN GENERAL.

**477. How conveyed—By lease—Without express grant.**—By bargain & sale of land with a way to it, no way passes; for the bargain & sale conveys a use only; & there cannot be a use of what does not exist; but if a way be appurtenant to land, by a lease of the land the way passes to

the lessee without any express grant.—*BEAUDELEY v. BROOK* (1607), Cro. Jac. 189; 79 E. R. 165.

**Annotation:**—*Refd.* *Pinnington v. Galland* (1853), 22 L. T. O. S. 41.

**478. — By word “appurtenances.”**—*WHALLEY v. TOMPSON*, No. 546, *post*.

**479. — By parol demise.**—To a declaration in trespass for false imprisonment deft. pleaded

evidence the deed under which they became owners of the hotel property:—*Held*: pltfs. were not entitled to any right of way over the land in question. Owing to the non-production by pltfs. of their title-deeds, it must be presumed as against them that they evidence afforded thereby would be unfavourable to their claim, & no right of way in favour of pltfs. could be shown to arise otherwise, either as an easement of necessity or as an easement, the intention to grant which might be inferred.—*WUTZLER v. SHARPE* (1892), 1 L. R. 16 All. 270.—*IND.*

**a. Evidence of acquiescence in interruption of user—Value compared to evidence of usage.**—In a question of a right of way evidence of an interruption acquiesced in, is of infinitely more weight than evidence of usage.—*LEGGE v. CROKER* (1811), 1 Ball & B. 514.—*IR.*

**t. Plea of twenty years user—Prima facie evidence of right claimed.**—User for upwards of twenty years, although not proved to be adverse to deft. or those under whom he claims,

is *prima facie* evidence of a right of way.—*MCULLAGH v. WILSON* (1838), 1 Jebb. & S. 120.—*IR.*

**a. Conclusiveness of certificate of title—As against unregistered easements.**—*Seemle*: the provisions of Land Transfer Act, 1915, s. 53, that a certificate of title shall not be conclusive as to the omission of any easement created in or existing upon any land must be read subject to sects. 197 & 198 of the Act, for protecting a *bona fide* purchaser against unregistered interests.—*CHURCH v. SNOOWILL*, [1917] N. Z. L. R. 252.—*N.Z.*

### PART IV. SECT. 1.

**478 i. How conveyed—By word “appurtenances.”**—Two adjoining hereditaments, A. & B., belonging to the same owner, were the subject of an absolute order for sale in the Land Judge's Ct. Over B. there was a formed road constructed by the owner & used, but not as a way of necessity, for the purposes of A. B. was dismissed out of ct., & A. “with the appurtenances,” was subsequently con-

veyed by the Land Judge to a purchaser:—*Held*: a right of way over the formed road passed to the purchaser.—*HEAD v. MEARA*, [1912] 1 L. R. 262.—*IR.*

**b. — General words—Whether undefined ways will pass.**—A way must be a defined way in order to pass by the general words “all ways used & enjoyed,” when the way is not an existing easement or way of necessity.—*ROGERS v. DUNCAN* (1890), 18 S. C. R. 710; Cam. Cas. 352.—*CAN.*

**c. — — — — —**—The owner of two adjoining closes, each of which consisted of a dwelling-house & yard, having demised them both to a tenant, the latter, for the convenience of his sub-tenants, divided an ash-pit & privy, situate on one of the yards, & permitted one portion thereof to be used by the occupants of the adjoining close. The latter was afterwards conveyed by the owner, who had previously obtained possession of both closes, to pltf. with “all buildings, privileges, easements, & appurtenances whatsoever to the premises belonging,

**Sect. 1.—In general. Sect. 2. Parts V. & VI. Sect. 1.]**

a justification that pltf. had broken & entered his yard in the night time, & committed a breach of the peace therein. Replication that pltf. had a right of way over the yard as servant to R. & B. who were lawfully possessed of a warehouse & premises with the appurtenances, by reason whereof they & their servants had all times a right of way over the yard. That deft. had obstructed the right of way by erecting gates, & that pltf. had done the acts alleged to be a breach of the peace in removing the obstruction as lawfully he might:—*Held*: it was not necessary to

show a grant of the right of way, by deed, if the jury were of opinion that the right of way was intended to be demised with the warehouse & premises, which were held by parol demise, as appurtenant thereto, & as a mode of enjoying the same.—*CHUCK v. BENNETT* (1845), 6 L. T. O. S. 238.

**480.** ———.]—*SKULL v. GLENISTER*, No. 706, *post*.

**SECT. 2.—UNDER CONVEYANCING ACT, 1881.**

*See* Conveyancing Act, 1881 (c. 41), s. 6.

*See* Part III., Sect. 1, sub-sect. 6, *c.*, *ante*.

## Part V.—Preservation and Repair of Easements.

**481. Right to enter & repair—Conduit.]**—The law gives power to him who has a conduit in the land of another to enter into the land & mend it when occasion requires it.—*ANON.* (1469), Y. B. 9 Ed. 4, fo. 34, pl. 10.

*Annotations:—Consol.* *Pomfret v. Ricroft* (1669), 2 Keb. 569; *Hodgson v. Field* (1806), 7 East, 613. *Refd.* *Baten's Case* (1610), 9 Co. Rep. 53 b; *Liford's Case* (1614), 11 Co. Rep. 46 b; *James v. Hayward* (1630), W. Jo. 221; *Patrick v. Colerick* (1838), 2 Jur. 377; *Goodhart v. Hyett* (1883), 53 L. J. Ch. 219; *Cope v. Sharpe*, [1910] 1 K. B. 168. *Mentd.* *Strata Mercolla's Case* (1591), 9 Co. Rep. 24 a; *Holford v. Platt* (1618), Cro. Jac. 464; *Simpson v. Jackson* (1622), Cro. Jac. 640; *Langham v. Bewett* (1627), Cro. Car. 68; *Newport v. Fieldmay* (1633), Cro. Car. 307.

**482. — Pump.]**—If a lease be made of a house & piece of land, except the land on which a pump stands, with the use of the pump, the lessee may repair the pump, but no action of covenant lies against the lessor for not repairing it.

Where I grant a way over my land I shall not be bound to repair it, but if I voluntarily stop it up an action lies against me for the misfeasance; but for the bare nonfeasance, viz. in not repairing it no action at all lies. . . . In this case pltf. himself being the lessee might have repaired the pump: for although neither the soil itself nor the pump be granted to him, yet by the grant of the use of the pump the law has given to him this liberty; for when the use of a thing is granted, everything is granted by which the grantee may have &

enjoy such use. As if a man gives me a licence to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter & dig the land to mend the pipes, though the soil belongs to another & not to me (*TWYSDEN, J.*).—*POMFRET v. RICROFT* (1669), 1 Wms. Saund. 321; 2 Keb. 543, 569; 1 Sid. 429; 1 Vent. 26, 44; 85 E. R. 451.

*Annotations:—Consol.* *Hinchliffe v. Kinnoul* (1838), 5 Bing. N. C. 1; *Colebeck v. Girdlers Co.* (1876), 1 Q. B. 11, 234; *Goodhart v. Hyett* (1883), 25 Ch. D. 182; *Buckley v. Buckley*, [1898] 2 Q. B. 608. *Expld.* *Pwllbach Colliery Co. v. Woodman*, [1915] A. C. 634. *Refd.* *Hodgson v. Field* (1806), 7 East, 613; *Blakesley v. Whieldon* (1841), 1 Haro. 176; *Winch v. Thames Conservators* (1872), L. R. 7 C. P. 458; *Serff v. Acton L. B.* (1886), 31 Ch. D. 679; *Jones v. Pritchard*, [1908] 1 Ch. 630. *Mentd.* *Rhodes v. Bullard* (1806), 7 East, 116; *Seddon v. Senate* (1810), 13 East, 63; *Bullard v. Harrison* (1815), 4 M. & S. 387; *Holmes v. Gorling* (1824), 9 Moore, C. P. 166; *Doe d. Douglas v. Lock* (1835), 2 Ad. & El. 705; *Harris v. Ryding* (1839), 5 M. & W. 60; *Ricketts v. East & West India Docks, etc. Ry.* (1852), 12 C. B. 160; *Pimlington v. Galland* (1853), 9 Exch. 1; *M. S. & L. Ry. v. Wallis* (1854), 14 C. B. 213; *Gayford v. Moffatt* (1868), 4 Ch. App. 133; *Carstairs v. Taylor* (1871), L. R. 6 Exch. 217; *Ross v. Fedden* (1872), 26 L. T. 966; *Hoare v. Metropolitan Board of Works* (1874), L. R. 9 Q. B. 296; *London Corp'n. v. Riggs* (1880), 13 Ch. D. 798; *Titchmarsh v. Royston Water Co.* (1899), 81 L. T. 673; *Schwann v. Cotton*, [1916] 2 Ch. 120.

**483. — Watercourse.]**—The owners of a house had had for many years a supply of water by pipes passing through the adjoining land under circumstances which in the view of the ct. created

occupied therewith, or reputed to belong, or be appurtenant thereto": &c., by the same deed, the grantee covenanted to suffer the tenants of the adjoining close to pass over the premises thereby granted, at intervals, in order to clean their part of the ash-pit & privy, described in the covenants as "adjoining those belonging to the premises hereby granted, & used therewith as part parcel, & member thereof".—*Held*: the use of the portion of the ash-pit & privy, which, previously to the severance of ownership, had been enjoyed by the occupants of the premises granted to pltf., passed to him under the deed.—*GEORGEHAN v. FEGAN* (1872), 1 L. R. 6 C. L. 139.—*IR.*

**d. — Registration of title.]**—A person claiming rights of way over land under Real Property Act, 1861, must prove a transfer of such rights from the registered proprietor of the servient tenement, & such transfer must be registered on the certificate of title of the transferor, & *semble*: of the transferee also.—*FORMBY v. ADRI-LAIDE CORPN.* (1880), 14 S. A. L. R. 144.—*AUS.*

**e. — By registered transfer.]**—As a praedial servitude partakes of the nature of real property, it can only be

conveyed by transfer duly registered in the Registry of Deeds. An unregistered agreement granting a right of servitude is not sufficient to constitute a servitude binding upon & running with the land.—*JUBB v. FOURIE* (1881), 2 E. D. C. 41.—*S. AF.*

**f. Unregistered servitude—Whether effective against purchaser with knowledge.]**—An unregistered servitude is effective against a purchaser with knowledge.—*HANSEN & SCHRADER v. COLONIAL GOVERNMENT* (1903), 20 S. C. 446.—*S. AF.*

**g. Transfer of servitude to another tenement—Consent of servient owner—Necessity for.]**—The owner of a tenement, in favour of which a duly registered praedial servitude exists, cannot transfer the benefit of the servitude to another tenement belonging to him without the consent of the owner of the servient tenement.—*LOUW v. DE VILLIERS* (1893), 10 S. C. 324.—*S. AF.*

**h. Whether easement transferable apart from dominant tenement.]**—The mtgee. in possession of land under Transfer of Land Act having buildings in which an easement of access of air had been gained over land of an adjoining owner covenanted "as mtgee. in possession" with the adjoining

owner & with one of two trustees of a creditor's deed of assignment by the mtgor. to release the easement for value & the adjoining owner covenanted to grant to the mtgee. a licence for access of air terminable by notice. The deed was expressed to bind all persons deriving title under the adjoining owner, the mtgee. or trustee. A caveat was lodged by the adjoining owner. The mtgee. in fact at the time of the deed had been in adverse possession of the dominant tenement for more than fifteen years. The mtgor. still appeared on the register as registered proprietor of the dominant tenement, though he had died long before & his will had been proved. The easement had been acquired after the expiration of fifteen years. After the date of the deed the mtgee. transferred to a purchaser an estate & interest of the mtgor. in the land & the purchaser obtained a certificate to the dominant tenement free from incumbrances:—*Held*: Transfer of Land Act, 1915 (s. 145) read with the definition of "land" in sect. 4, does not authorise a sale by the mtgee. of an easement appurtenant to the land mortgaged in gross, without a sale of the dominant tenement.—*TUCKETT v. BRICE*, [1917] V. L. R. 36.—*AUS.*

an easement. The owner of part of the adjoining land proceeded to build a house over part of the line of pipes:—*Held*: the owners of the house had a right to go on the adjoining land & repair the pipes when necessary, & that by building the house their means of access to the pipes would be materially interfered with & rendered more expensive; & an injunction was granted to restrain the building of the house.

The right to have the pipes there as an easement upon the land, part of which deft. claims, carries with it the necessary right to enter on the land in order to do what is necessary to preserve the right as it exists (NORTH, J.).—GOODHART v. HYETT (1883), 25 Ch. D. 182; 53 L. J. Ch. 219; 50 L. T. 95; 48 J. P. 293; 32 W. R. 165.

*Annotation*:—*Mentd.* Schwann v. Cotton & Hayles (1916) 85 L. J. Ch. 689.

484. — — — — —.]—JONES v. PRITCHARD, No. 220, *ante*.

485. — — — — — Sewer.]—In 1802 T. conveyed to the predecessors of plffs. as the sanitary authority under the Public Health Act, 1875 (c. 55), a piece of land for sewage disposal works, & granted to them the right to lay & construct specified sewers, through land belonging to the vendor, “& from time to time to repair, maintain, renew & improve the same,” reinstating the ground. The local board laid through the land an iron effluent outfall sewer, five feet underground. Under an agreement, dated June 14, 1910, C., who, in 1897, had purchased land through which the sewer had been laid from persons deriving title under T.’s will, subject to the easement for & right of access to the sewer, granted to defts. the right & liberty

to deposit refuse on the land. Defts. had deposited refuse on the land, including portions under which plffs.’ sewer was constructed, their pipe being covered in Aug. 1911. In Oct. 1912, a leakage in the outfall pipe was discovered near defts.’ refuse bank. In Jan. 1911, defts. covenanted not to deposit specified materials, & to prevent those already deposited from being a nuisance, but no suggestion was then made that the deposits were injurious to the sewer. There was evidence that under substituted arrangements plffs. would shortly discontinue their use of the outfall sewer.

Defts. were willing to submit to an injunction restraining them from depositing refuse on the land, but plffs. asked that defts. be also restrained from permitting refuse from remaining on the land so as to prevent their free access for the purpose of repairing & maintaining the sewer. Defts. pleaded laches, acquiescence, & delay on the part of plffs.:—*Held*: plffs. were not bound in exercising their right of access to the sewer to take the land in the condition in which it was at the time at which they wished to exercise such right. Defts., by increasing the depth of soil above the pipe, had increased the obligation on plffs. in exercising their right under the grant in the deed of 1802. The acts of defts. gave rise to a good cause of action.—THURROCK GRAYS & TILBURY JOINT SEWERAGE BOARD v. GOLDSMITH (E. J. & W.), LTD. (1914), 70 J. P. 17.

**Repair of ways.**]—*See* Part VII., Sect. 6, sub-sect. 3, D. (b), *post*.

**Repair of water rights.**]—*See* Part IX., Sect. 2, sub-sect. 6, *post*.

## Part VI.—Extinguishment of Easements.

### SECT. 1. —IN GENERAL.

486. By enfranchisement.—Of dominant tenement.]—EMSON v. WILLIAMSON (1598), 1 Roll. Abr. 933.

*Annotation*:—*Consd.* Derry v. Sanders, [1919] 1 K. B. 223.

487. — — — — — Of servient tenement.]—Pltf. & deft. owned adjoining land. Pltf.’s land had been copyhold of the manor of L. for a customary estate of inheritance, but in 1807 it was enfranchised, not under the Copyhold Acts, but at common law, the deed of enfranchisement containing no reservation of any right of way. Deft.’s land, which was part of the demesne land of the same manor of L., was held by deft. & his predecessors as tenants from year to year till 1914, when the freehold was purchased by deft. For eighty years deft. & his predecessors had used a way, which was not a way of necessity, over pltf.’s land. In an action for trespass brought by pltf. against deft. for using this way, deft. claimed that he had acquired, by the eighty years’ user, a right to the way:—*Held*: (1) in view of the rule that a legal origin must be presumed if such an origin is possible, the length of user of the

way by deft. & his predecessors was sufficient to found a presumption that a custom existed in the manor of L. whereby a right of way could be acquired over land within the manor as appurtenant to other land within the manor; but (2) even if such a right existed, it was extinguished upon the enfranchisement of pltf.’s land without any reservation of the right of way being contained in the deed of enfranchisement.—DERRY v. SANDERS, [1919] 1 K. B. 223; 88 L. J. K. B. 410; 120 L. T. 191; 35 T. L. R. 105; 63 Sol. Jo. 115, C. A.

488. Lapse of object for which easement granted.]—NATIONAL GUARANTEED MANURE CO. v. DONALD, No. 398, *ante*.

489. — — — — —.]—ACTON LOCAL BOARD v. NORTH & SOUTH WESTERN JUNCTION RY. CO. (1893), 37 Sol. Jo. 357.

490. — — — — —.]—A railway was made through the land of R., & pursuant to an award a level crossing was provided under the Railways (Clauses Act, 1845 (c. 20), s. 68, as an accommodation work, & by the conveyance to the co. a right of way over it was reserved to R. & his successors in title, &

### PART VI. SECT. 1.

488 i. Lapse of object for which easement granted.]—A., the owner of a saw-mill to which a piling place was attached, conveyed the mill with “the privileges & appurtenances” thereto belonging; the purchaser ceased to use the piling place, as such, & built upon it:—*Held*: no title to the soil of the piling place passed by the deed, but only an easement as appurtenant to the mill, which ceased when the purchaser built upon the

land.—DOE d. HILL v. TODD (1851), 2 All. 261.—CAN.

488 ii. — — — — —.]—When land is divided up into small building plots a state of things is created & contemplated which substantially puts an end to the natural servitudes previously existing as regards the water falling on the land & flowing from higher to lower levels. The erection of dwelling-houses & other necessary structures on such plots necessarily alters the natural arrangement of the soil to

such extent that the owner of an upper plot can no longer claim to allow all the water falling on it to flow on to a lower plot unless he acquires the *servitudo stillicidii recipiendi*.—BISHOP v. HUMPHRIES (1919), W. L. D. 13.—S. A.F.

k. Right of way.—Merger into public highway.—Closing of highway.]—In an action for obstructing a right of way, deft. pleaded that the close over which the supposed way passed was a public way, which had been shut up

**Sect. 1.—In general. Sect. 2: Sub-sects. 1 & 2, A.]** the co. covenanted to maintain it. Afterwards R. sold & conveyed his land on one side of the railway to P., not mentioning the crossing & not giving P. any right of way over the land sold. Afterwards the land retained by R. was sold to G., who insisted on his right to use the crossing:—**Held:** (1) after the conveyance to P. there was no right to use the crossing, & the co. were at liberty to stop it; (2) the right to the crossing was finally abandoned by the conveyance to P., & would not be revived if the lands on the two sides of the railway should again become invested in the same person.—**MIDLAND RY. CO. v. GRIFFITHS**, [1895] 2 Ch. 827; 64 L. J. Ch. 826; 73 L. T. 270; 44 W. R. 133; 12 R. 513, C. A.

**Annotations:**—As to (1) **Consol. S. E. Ry. v. Cooper** (1923), 21 L. G. R. 439. As to (2) **Consol. S. E. Ry. v. Cooper** (1923), 21 L. G. R. 439. **Reid. Long v. Gowllett**, [1923] 2 Ch. 177.

**491. Abandonment at will of dominant owner.]**—**MASON v. SHIREWSBURY & HEREFORD RY. CO.**, No. 28, *ante*.

**Easements of necessity.]—See No. 631, post.**

**By release.]—See Sect. 2, post.**

**By unity of seisin.]—See Sect. 3, post.**

**By statute.]—See Sect. 4, post.**

## SECT. 2.—BY RELEASE.

**SUB-SECT. 1.—BY WHOM RELEASE MAY BE MADE.**

**492. Tenant for life—Settled Land Acts, 1882 (c. 38), ss. 3, 21.]—**The B. Settled Estate & the M. Settled Estate adjoined one another, & each had appurtenant to some part of it a right of way or easement over some part of the other. It was to the advantage of the respective owners of the estates, for the purpose of developing the same,

by order of the municipal council:—**Held:** the plea was bad, *pltf.'s* private right of way not being necessarily extinguished by the closing of the public road.—**JOHNSON v. BOYLE** (1853), 11 U. C. R. 101.—**CAN.**

**l. —.]—**Where land was used as a way in the early settlement of the country, but a regular public highway was afterwards substituted for it, & from that time, being fifty years before action brought, the old way was disused:—**Held:** an abandonment of the ancient right of way, if any, & the owner of the soil over which the way passed held it exempt from the public right whatever the extent of it may have been that had previously burdened it.—**LEARY v. SAUNDERS** (1860), 1 Old. 17.—**CAN.**

**m. —.]—**A person who purchases lots according to a plan, abutting upon streets laid out thereon, acquiesces, as against the person who laid out the plot & sold him the land, a private right to use those streets, subject to the right of the public to make them highways, in which case the private right becomes extinguished.—**SKLITZKY v. CRANSTON** (1892), 22 O. R. 590.—**CAN.**

**n. —**Alteration of locality of way.—Changing the locality of a way, from time to time, by the agreement of the respective owners, does not destroy the right of way, nor can the grant of a certain specific line for the road put an end to the right, in case a purchaser should buy without notice of the grant.—**DIXON v. CROSS** (1884), 4 O. R. 465.—**CAN.**

**o. Compulsory purchase by railway company.]—**When land is taken by a railway co. under their compulsory powers it is taken absolutely & free

of all servitudes, unless it be otherwise provided in the special Act.

A railway co. by their private Act obtained compulsory powers to acquire land, & were taken bound to satisfy every claim competent to the town-council of a burgh for the "loss of all rights of servitude of which they shall be deprived by the construction of the co.'s works." Some years after the execution of the works the burgh contended that this clause by implication saved its servitude of way over a strip of ground in front of the station, which had been taken by the co. & converted by them into a garden, in respect that no works had been constructed to deprive the burgh of its right:—**Held:** the servitude had been extinguished.—**OBAN TOWN COUNCIL v. CALLANDER & OBAN RY. CO.** (1892), 19 R. (Ct. of Sess.) 912; 20 Sc. L. R. 818.—**SCOT.**

**p. Severance in title of dominant tenement.]—**Land for a highway, laid out in 1857, was granted by M. to deft. township corpn., & the right to a cattle-pass under the highways, to be made & maintained & repaired by deft. corpn., was reserved to M.:—**Held:** (1) the easement, including the obligation to maintain & repair, passed by M.'s will with the land which remained to M., the dominant tenement, & was not destroyed by the severance in title, by the will, of the north & south halves of the dominant tenement.—**FREEMAN v. CAMDEN TOWNSHIP** (1918), 41 O. L. R. 179; 13 O. W. N. 221.—**CAN.**

**q. Sale for taxes—Servient tenement.—**Necessity for notice to servient owner.—Deft. contended that an easement or right of way enjoyed by *pltf.* over ten feet of land sold for taxes was

that these appurtenant rights of way should be released so that each estate might be no longer incumbered with any easement in favour of the other. The question arose whether under above Acts a tenant for life of a settled estate could by way of sale or exchange release an easement which was appurtenant to such estate, or could out of capital money purchase the discharge or release of a right of way or similar right to which the settled estate was subject:—**Held:** whether or not the proposed scheme for exchange of the easements could properly be carried out, the better course would be that cross sales of the easements should be effected, that course being within the powers conferred by the above Acts.—**Re BROTHERTON, BROTHERTON v. BROTHERTON, Re MARKHAM'S SETTLEMENT** (1908), 77 L. J. Ch. 373; 98 L. T. 547, C. A.

**Annotation:**—**Reid. Re Westminster's S. E., Westminster v. Shaftesbury**, [1921] 1 Ch. 585.

**SUB-SECT. 2.—WHAT AMOUNTS TO A RELEASE.**

### A. In General.

**493. General rule.—**Intention of dominant owner.—(1) Though twenty years' user, in the absence of an express grant, is necessary for the acquisition of an easement, cesser of the use for a less time may suffice, in the absence of an express release, to show the abandonment of the easement. It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, & the intention which either one or the other indicates, which are material for the consideration of the jury; & the period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him. What period

extinguished by the sale in 1893, as being included in the word "privilege" used in Consolidated Assessment Act, 1892 (s. 137), then in force:—**Scoble:** the law of Ontario does not provide for the taxation of easements, & the title to an easement cannot be extinguished by the sale for taxes of the servient tenement, without notice to the person who uses it & without opportunity for him to exonerate the land by the payment of taxes.—**ESSEY v. BELL** (1909), 18 O. L. R. 76; 13 O. W. R. 395.—**CAN.**

**r. —**Dominant tenement.—Land over which defts. claimed a right of way was sold for taxes in 1901 & conveyed to the purchaser in 1902:—**Held:** the taxes assessed against the land became a charge upon that land & every interest in it, including any right of way to which defts. might have been entitled, & the sale & conveyance of the land for taxes extinguished that right.—**REACH (A. J.) CO. v. CHORLAND** (1919), 43 O. L. R. 209; 45 D. L. R. 140.—**CAN.**

### PART VI. SECT. 2, SUB-SECT. 1.

**s. Mortgage.]—**The mortgage, as such having in effect the legal estate in the dominant tenement, can validly release an easement subject to any liability for breach of duty.—**TUCKETT v. BRICE**, [1917] V. L. R. 36.—**AUS.**

### PART VI. SECT. 2, SUB-SECT. 2.—A

**t. Agreement for conveyance including easement.]—**The City of T. offered land for sale, according to a plan showing one block of 5 lots, each about 200 feet in depth, running from east to west, bounded north & south by a lane, & east by a lane running along the whole depth of the



of time, therefore, is insufficient in a particular case must depend on all the facts of it.

(2) On an indictment for obstructing a public footway, deft. set up a private horse & carriage way over the particular ground, in answer to which prosecutor set up acts of public user inconsistent with the private way claimed, & insisted that it had been thereby determined. The judge told the jury that no interruption of less than twenty years would destroy the private right:—*Held*: a misdirection, whether laid down as a rule of law or as a conclusive presumption of fact.

(3) In support of a claim to a carriage & horse way over a public footway to certain premises, a deft. indicted for obstructing the footway gave in evidence, after objection, two leases which purported to show that those under whom he claimed either were lords of the soil of the *locus in quo*, & as such grantors of an easement upon it for a term to the occupier of another tenement, or, being possessed of a right of way appurtenant to the other tenement, had granted it with that tenement to a lessee:—*Held*: they were not admissible to prove the right of way in question.—*R. v. (Horsley)* (1848), 12 Q. B. 515; 12 L. T. O. S. 371; 13 J. P. 136; 12 Jur. 822; 3 Cox, C. C. 262; 116 E. R. 960.

*Annotations*:—*As to* (1) *Appld.* *Crossley v. Lightowler* (1867), 2 Ch. App. 478. *Refd.* *Scrutton v. Stone* (1893), 9 T. L. L. 478; *Harris v. Flower* (1904), 90 L. T. 669. *Generally, Mntd.* *R. v. Cricklade* (1849), 12 L. T. O. S. 348; *R. v. Russell* (1854), 3 E. & B. 942; *R. v. Johnson* (1860), 6 Jur. N. S. 533.

494. ———.]—(1) Where a prescriptive right to foul a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of other people. The fact that the stream is fouled by others is not a defence to a suit to restrain the fouling by one.

(2) The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right, without some evidence of an intention to abandon it; but where dye-works had not been used for more than twenty years, & had been allowed to go to ruin:—*Held*: any right of fouling a stream attached to them was lost.

(3) The owner of land on the banks of a river can maintain a suit to restrain the fouling of the water of the river, without showing that the fouling is actually injurious to him. C., wishing to prevent the water of a river from being fouled by some dye-works, purchased from the owners of the dye-works a piece of land on the banks of the river, without communicating to them his object:—*Held*: in the absence of any express reservation by the owners of the dye-works of the right of fouling, C. could maintain a suit to restrain it.

(4) A mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long-continued suspension may render

it necessary for the person claiming the right to show that some indication was given during the period that he ceased to use the right of his intention to preserve it. The question of abandonment of a right is one of intention to be decided upon the facts of each particular case (*LORD CHELMSFORD, C.*).—*CROSSLEY & SONS, LTD. v. LIGHTOWLER* (1867), 2 Ch. App. 478; 36 L. J. Ch. 584; 10 L. T. 438; 15 W. R. 801, L. C.

*Annotations*:—*As to* (1) *Refd.* *Hulley v. Silversprings Bleaching & Dyeing Co.* (1921), 126 L. T. 499. *As to* (2) *Appld.* *Cook v. Bath Corp'n.* (1868), L. R. 6 Eq. 177. *Refd.* *Glover v. Coleman* (1874), 14 L. J. C. P. 66; *Mouson v. Boehm* (1884), 26 Ch. D. 398; *Scott v. Pape* (1886), 31 Ch. D. 554. *As to* (3) *Refd.* *Wheeldon v. Burrows* (1879), 12 Ch. D. 31; *Russell v. Watts* (1883), 25 Ch. D. 559; *A.-G. v. Conduit Colliery Co.*, [1895] 1 Q. B. 301; *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557; *Jones v. Manswst U. C.*, [1911] 1 Ch. 393. *As to* (4) *Foldd.* *James v. Stevenson*, [1893] A. C. 162. *Generally, Mntd.* *Blair & Sumner v. Deakin, Eden & Thwaites v. Deakin* (1887), 57 L. T. 522; *Rushmer v. Polsue & Alder*, [1906] 1 Ch. 234.

495. ———.]—In an action by resps. to assert a right of way which had been granted by applt.'s predecessor by deed in 1830 over his land, & along the boundary which divided land retained by him from land conveyed to resps.' predecessor, applt. pleaded that it had been abandoned:—*Held*: (1) abandonment being a question of intention, non-user by resps., coupled with user by applt. for farm purposes, of portions of land, subject to the easement, when the easement was not required, could not prove an abandonment of the entire right, & were inconclusive to prove an abandonment of portions thereof; (2) the omission in applt.'s & resps.' certificates of title to their respective lands under the Transfer of Land Act to record the easement, did not bar resps.' claim or relieve the servient tenement of its liability.

There can be no question of the abandonment of the entire right of way because an important part of it has been & is used by plffs. without disturbance. . . . It does not appear that the occupants of plffs.' land have ever had any occasion to use the northern part of the way or the southern part except once, & then they did so use it & to have required gates to be inserted in the wooden fence when the way was not wanted for use would have been an unreasonable act, the omission of which cannot be construed as the expression of an intention to abandon the right of way (*per CUR.*).—*JAMES v. STEVENSON*, [1893] A. C. 162; 62 L. J. P. C. 51; 68 L. T. 539; 1 R. 324, H. L.

*Annotation*:—*As to* (1) *Refd.* *Harris v. Flower* (1904), 90 L. T. 669.

496. *Acquiescence in expenditure by owner of servient tenement.*]—*LIGGINS v. INGE*, No. 119, ante.

497. ———.]—To an action for obstructing the light & air from entering plff.'s dwelling-house, for raising buildings above the level of the house,

*sistent with easement.*]—*Servitudes* are lost by persons entitled to the same lying by & allowing the owner of the servient tenement to do anything inconsistent with that servitude.—*EDMEADES v. SCHERKERS* (1881), 1 S. C. 334.—*S. AP.*

c. *Acquiescence—What amounts to.*]—In a suit for the removal of a building which defts. had erected & which was an obstruction to plffs.' right to use a courtyard adjoining their residences; the land on which the building stood did not belong to either party, but all the inhabitants of the mohalla had from time immemorial exercised a right of way over it to & from their houses. On a part of the same land there had formerly

block & connecting the other two lanes. South of this block was a similar block of smaller lots, running north & south. The lane at the east of the first lot was a continuation, after crossing the long lane between the blocks, of lot 10 in the second block. The advertisement of sale stated that "lanes run in rear of the several lots." M. purchased the first block, & C. lot 10 in the second. Before registry of the plan, M. applied to the city council to have the lane at the east of the block closed up & included in his lease, which was granted. C. then objected to taking a lease of his lot with the lane closed, but afterwards accepted a lease which described the land as leased according to the plan exhibited at the sale & plan 352, which showed the lane closed.

He brought an action against the city & M. to have the lane reopened:—*Held*: C. having accepted a lease after the lane was closed, in which reference was made to plan 352, he was bound by its terms & had no claim to a right of way over land thereby shown to be included in the lease to M.—*CAREY v. TORONTO CITY* (1887), 14 S. C. R. 172.—*CAN.*

a. *Acquiescence with full knowledge.*]—Where a bridge & a wharf had been built & openly enjoyed for over sixty years on public property:—*Held*: deft., who had full knowledge of the facts, was estopped of any right of way.—*CAVEHILL v. ROBILLARD* (1878), 2 S. C. R. 575.—*CAN.*

b. *Acquiescence in acts incon-*

*Sect. 2.—By release: Sub-sect. 2, A. & B.]*

& thereby preventing the smoke from being carried off from it by the chimneys of such house, & for pulling down certain adjoining buildings of deft. by which the house of pltf. was deprived of the support to which it was entitled, deft. pleaded for a defence upon equitable grounds that the grievances complained of were occasioned by deft. pulling down a messuage of his & erecting another messuage in lieu of it, & deft. so pulled down the one messuage & erected the other, & expended thereby large sums of money, with the knowledge, acquiescence & consent of pltf., & on the faith that pltf. so knew of, & acquiesced in, & consented to deft. so pulling down the one messuage & erecting the other, & so spending such sums of money. Deft. being under terms not to rely on such plea as amounting to a common law plea of leave & licence, pltf. replied thereto, upon equitable grounds, that pltf. acquiesced & consented as in that plea mentioned upon the faith of false representations made to him by deft., viz. that the grievances complained of would not result from the pulling down of the one & erecting the other messuage, & expending of the money as in the plea mentioned:—*Held*: the plea was good as an equitable defence, but that the same was well answered by the replication.—*DAVIES v. MARSHALL* (1861), 10 C. B. N. S. 697; 31 L. J. C. P. 61; 4 L. T. 581; 7 Jur. N. S. 1247; 9 W. R. 866; 142 E. R. 627.

*Annotations*:—*Reid*. *Jones v. Tapling* (1861), 11 C. B. N. S. 283; *Allen v. Seckham* (1879), 11 Ch. D. 790; *Osborne v. Bradley*, [1903] 2 Ch. 446.

**498.** —.]—To an action by B. against W. for damages for the obstruction of his light & air by the heightening of a party wall between his premises & those of W., W., pleaded by way of equitable plea, an alleged agreement on the part of B. to allow the wall to be raised on the terms of his not being called upon by W. to contribute to the expense, according to the Metropolitan Building Act, under which notice of the contemplated alteration had been given, & of his having a better skylight put up for him by W.

On bill filed by W. for specific performance of the alleged agreement, & motion made to restrain the action:—*Held*: inasmuch as this was a case in which a ct. of law could not give relief in respect of the agreement, the equitable plea did not preclude W. from coming into equity; & W. was entitled to the injunction upon certain terms.—*WATERLOW v. BACON* (1866), L. R. 2 Eq. 514; 35 L. J. Ch. 643; 14 L. T. 724; 12 Jur. N. S. 614; 14 W. R. 855.

**499.** *Agreement for conveyance excluding easement—Subsequent conveyance purporting to convey easements.*—An agreement to grant A. a lease, in a form set out in a schedule, of property in the City, as soon as the house then in course of erection by A. on the property should be completed, contained a proviso that nothing therein contained should give A. a right to any easement which did not belong to the premises agreed to be demised as they then existed, nor to any right of light & air derived from over the houses opposite, which belonged to the lessors. The lease subsequently granted was of the land, together with

the house erected thereon, & all lights, easements, & appurtenances thereto belonging, in accordance with the scheduled form:—*Held*: the grant by the lease of lights & easements was controlled by the antecedent agreement, which was to be read as part of the lease; & A. was not entitled to restrain the lessees of the opposite houses from building so as to obstruct the access of light & air to his premises from over such houses.—*SALAMAN v. GLOVER* (1875), L. R. 20 Eq. 444; 44 L. J. Ch. 551; 32 L. T. 792; 23 W. R. 722.

**500.** *Agreement for conveyance reserving easement—Subsequent conveyance of easements.*—By an agreement in 1870 between the vendor & a railway co. by their secretary, the vendor agreed to sell & the co. to purchase a piece of land, with a provision that the vendor should have a right of access to other lands belonging to him by & over any of the slopes which the promoters might arrange in their intended works. In 1871 the vendor executed a conveyance of the land to the co. without the reservation of any easement. The land was needed for raising a road over the railway, which road was raised accordingly, the slope of the approach of the road being separated from the vendor's neighbouring lands by a 1 fence only. Recently the urban authority of the district had agreed with the co. to repair & maintain the road & slopes, & had raised the level of the road, steepened the slope, & built retaining walls at the foot of the slope, cutting off the access to the slope from the adjoining lands of the vendor. The successors in title of the vendor claimed an injunction. There was no claim for rectification of the conveyance or specific performance of the agreement:—*Held*: whatever right of access was reserved to the vendor under the agreement of 1870, it was abandoned on the execution of the conveyance.—*TEEBAY v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.* (1883), 24 Ch. D. 572; 52 L. J. Ch. 613; 48 L. T. 808; 31 W. R. 739.

**501.** *Release by mortgagor of dominant tenement—Effect of reconveyance by mortgagee.*—The owner of two adjoining plots of land conveyed the western plot with a house thereon to his wife in fee simple together with a right of way over the eastern plot. The wife then conveyed the western plot & house by way of mtge. in fee simple together with the right of way over the eastern plot. Subsequently, while the mtge. was subsisting, the husband who still remained the owner of the eastern plot, by deed, dated May 25, 1907, conveyed that plot to pltf. in fee simple for value & the wife joined in the deed for the purpose of releasing the eastern plot from the right of way. The deed contained a recital that under & by virtue of a certain indenture of conveyance Ann Williams or all was entitled to a right of way at all times & for all purposes for Ann Williams, her heirs & assigns, owners & occupiers of the house on the western plot over & across the eastern plot, & that the deed had been agreed that she should join in it, & thereby convey the purpose of releasing the land & the deed in its operative part stated that she thereby released the piece of land & hereditaments vested to her by the conveyance from the right of way reserved.

stood a thatched building used as a "sitting place" by the residents of the mohalla:—*Held*: (1) the right which was alleged to have been obstructed was not a public right of way, but a right which was confined to the people dwelling in the mohalla & going to & from the houses in the mohalla; & the suit being brought in

respect of an interference with a private easement was maintainable without proof of special damage; (2) there was no principle of acquiescence involved in the case, inasmuch as there was no evidence that pltf. had given their actual consent to the building, & the only evidence of their acquiescence could be that they did not immediately

protest, & defts. neighbours had a right to which they were bound.—*AB KHAN v. MUHAMMAD YUSUF* (1887), 1 L. R. 9 All. 334.—*IND.*—*Release by one binds all.*—*d. Grants tenements*—



indenture. The mtge. was not referred to in this deed, nor had pltf. notice of it. The wife died, leaving all her property to her husband & appointing him exor. of her will, & later the husband died, having appointed R. his exor. Subsequently R. paid off the mtge., & the mtgees. conveyed the western plot & the house thereon to him. R. thereupon conveyed the western plot & the house for value to deft. together with the right of way over the eastern plot. Deft. had no notice of the release of the right of way. Deft. claimed to exercise the right of way:—*Held*: the right of way was released by the deed of May 25, 1907, except as regards the rights of the mtgees., & upon the reconveyance by the mtgees. their right to take possession of the mtged. premises & to exercise the right of way determined & the right of way became absolutely released & extinguished; & deft. was not entitled to the right of way claimed.—*POULTON v. MOORE*, [1915] 1 K. B. 400; 84 L. J. K. B. 462; 112 L. T. 202, C. A.

### B. Non-User—Abandonment.

**502. Effect of voluntary suspension of user.**—Defts. having erected, on their own premises, a permanent obstruction to a navigable drain leading from a river through deft.'s premises to pltf.'s close:—*Held*: an action lay for pltf., notwithstanding the portion of the drain which passed through pltf.'s close had for sixteen years been completely choked up with mud.

The right of pltf. to this way is injured, if there is an obstruction in its nature permanent. If acquiesced in for twenty years it would become evidence of a renunciation & abandonment of the right of way. That is the ground upon which a reversioner is allowed to bring his action for an obstruction, apparently permanent, to lights & other easements which belong to the premises (*TINDAL, C.J.*).

The voluntary suspension by pltf. of his exercise & enjoyment of a right can form no justification to defts. for preventing him from the possibility of enjoying it (*TINDAL, C.J.*).—*BOWER v. HILL* (1835), 1 Bing. N. C. 549; 1 Hodg. 45; 1 Scott, 526; 1 L. J. C. P. 153; 131 E. R. 1229; *subsequent proceedings*, 2 Bing. N. C. 339.

*Annotations*:—*Consd.* Metropolitan Assn. v. Petch (1858), 5 C. B. N. S. 504; Harrop v. Hirst (1868), L. R. 4 Exch. 43. *Refd.* Hale v. Oldroyd (1845), 14 M. & W. 789; Goodhart v. Hyett (1883), 25 Ch. D. 182. *Mentd.* Jacob v. Knight (1863), 8 L. T. 412.

**503.** —.—]—*CROSSLEY & SONS, LTD. v. LIGHTOWLER*, No. 494, *ante*.

**504. Non-user alone as presumption of abandonment—Non-user for ten years.**—A right to use the water thus acquired by occupancy in right of the

field must have passed to pltf. & could not be lost by mere non-user from 1819 to 1829; & the total or partial abstraction of the water may be an injury to such a right in point of law, though no actual damage is found to have been sustained in that respect (*DENMAN, C.J.*).—*MASON v. HILL* (1833), 5 B. & Ad. 1; 2 Nev. & M. K. B. 747; 1 L. J. K. B. 118; 110 E. R. 602.

*Annotations*:—*Refd.* Bower v. Hill (1835), 1 Scott, 526. *Mentd.* Cocker v. Cowper (1834), 5 Tyr. 103; Dodd v. Holme (1834), 1 Ad. & El. 493; Arkwright v. Gell (1839), 5 M. & W. 203; Acton v. Blundell (1843), 12 M. & W. 324; Wood v. Wand (1849), 3 Exch. 748; Embrey v. Owen (1851), 6 Exch. 353; Dickinson v. Grand Junction Canal Co. (1852), 7 Exch. 282; Sampson v. Hoddinott (1857), 1 C. B. N. S. 590; Chasemore v. Richards (1859), 7 H. L. Cas. 350; Gavod v. Lovering (1865), 19 C. B. N. S. 732; Wilts & Berks Canal Navigation Co. v. Swindon Waterworks Co. (1873), 9 Ch. App. 453, n.; Holker v. Porritt (1875), L. R. 10 Exch. 59; Orr Ewing v. Colquhoun (1877), 2 App. Cas. 839; Ormerod v. Todmorden Mill Co. (1883), 11 Q. B. D. 155.

**505. — Non-user for twenty years.**—An immemorial right of way is not lost by non-user for upwards of twenty years, the user having been discontinued merely by reason of the party's having had a more convenient way.

The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment. The non-user, therefore, must be the consequence of something which is adverse to the user (*ALDERSON, B.*).—*WARD v. WARD* (1852), 7 Exch. 838; 21 L. J. Ex. 334; 155 E. R. 1189.

*Annotations*:—*Consd.* Cook v. Bath Corpn. (1868), L. R. 6 Eq. 177. *Distd.* Swan v. Sinclair, [1924] 1 Ch. 254. *Refd.* Cooper v. Hubbuck (1862), 12 C. B. N. S. 456; Jones v. Tapling (1863), 9 Jur. N. S. 462; Crossley v. Lightowler (1866), L. R. 3 Eq. 279; Scrutton v. Stone (1893), 9 T. L. R. 478.

**506. — — — — —]**—(1) A nuisance was of long standing, the exercise of which, however, had been interrupted for a space of twenty years:—*Held*: where there had been a cesser of the right for this period such nuisance might be complained of by bill.

Where there has been a cesser of a right of this kind the party asserting it is bound to show that it had, at least, been exercised in the first & last year of the period of twenty years in order to preserve it from being lost. This, however, defts. have failed to do, & therefore have not established as of right this easement or privilege of sending foul smoke over their neighbours' lands (*WOOD, V.-C.*).—*ROBERTS v. CLARKE* (1868), 18 L. T. 49.

**507. — — — — —]**—*Abandonment question of fact.*—*CROSSLEY & SONS, LTD. v. LIGHTOWLER*, No. 491, *ante*.

**508. Non-user must amount to abandonment.**—*TAPLING v. JONES*, No. 841, *post*.

Three grantors, & each of them, by deed, granted, etc., to the pltf., three several plots of ground, "all & singular . . . ways, paths & passages":—*Held*: the release in the deed was a release by each grantor of his rights of way over the plots conveyed by his co-grantors.—*BURKE v. BLAKE* (1861), 13 L. C. L. R. 390.—*IR.*

### PART VI. SECT. 2, SUB-SECT. 2.—B.

**508 i. Non-user must amount to abandonment.**—The actual user of an easement by prescription under Limitation Act, R. S. O. 1914 (c. 75), ss. 35 & 36, must during the whole statutory period be such as to carry to the mind of a reasonable person in possession of the servient tenement the facts that a continuous right to enjoyment is being asserted & ought to be resisted if denied; but where the doctrine of

lost grant applied, non-user not amounting to abandonment does not destroy it.—*WATSON v. JACKSON* (1914), 30 O. L. R. 517; 31 O. L. R. 481; 19 D. L. R. 733; 6 O. W. N. 509.—*CAN.*

**508 ii. — — — — —]**—Pltf. claimed a prescriptive right to the flow of the surface drainage water from the land of deft. on to his land:—*Held*: such an easement can be acquired only where the water flows in a definite channel. In a suit for interrupting the flow of water from the land of deft. to the land of pltf. it appeared that eight years before suit deft. had diverted the water, & that it had been diverted ever since:—*Held*: the right, if acquired, would not necessarily be lost by the interruption, but if pltf. acquiesced during that time in the interruption it might be some evidence of an abandonment of the right.—*KENA*

*MAHOMED v. BOHATOO SIRCAR* (1863), Marsh. 508.—*IND.*

**508 iii. — — — — —]**—An easement can be extinguished by the dominant owner releasing it expressly or impliedly to the servient owner, & if expressly released it would amount to an alienation. Mere non-user is not an implied release of an easement.—*KRISTODHON MITTER v. NANDARANI DASSEE* (1908), 1 L. L. R. 35 Calc. 889; 12 C. W. N. 969.—*IND.*

**508 iv. — — — — —]**—In an action for an interdict restraining deft., the owner of land over which pltf. had a duly registered right of road, from placing a fence across the road, the evidence showed that deft. had for two or three years made a garden in the strip of land set apart for the road, but the strip of land was fenced off from the rest of deft.'s property, & there was no

**Sect. 2.—By release: Sub-sect. 2, B.]**

**509.** —[The owner of a house, having a back door leading into a lane, & through which he had a right of way to a street, about the year 1830 bricked up the doorway, but left the jambs standing. In 1864, the then owner re-opened the doorway, & restored it to its former position. In a suit to restrain the obstruction of the right of way:—*Held*: the bricking up of the doorway did not amount to an abandonment of the easement, & an injunction was granted.—*COOK v. BATH CORPN.* (1868), L. R. 6 Eq. 177; 18 L. T. 123; 32 J. P. 741.

*Annotations*:—*Mentd.* A.-G. v. Lonsdale (1868), L. R. 7 Eq. 377; Pudey Coal Gas Co. v. Bradford Corpn. (1873), 42 L. J. Ch. 293; Vernon v. St. James, Westminster Vestry (1880), 16 Ch. D. 449.

**510. Circumstances as presumption of abandonment—No intention manifested to resume user.**—If an ancient window has been completely shut up with brick & mortar above twenty years, it loses its privilege.—*LAWRENCE v. OREE* (1814), 3 Camp. 514, N. P.

**511.** —[—]—(1) The right to light is acquired by enjoyment, & may be lost by a discontinuance of the enjoyment, unless the party who ceases to enjoy at the same time does some act to show an intention of resuming the enjoyment within a reasonable time. Where in case by a reversioner for obstructing lights, it appeared that pltf.'s messuage was an ancient house, & that adjoining to it there had formerly been a building, in which there was an ancient window, next the lands of deft., & that the former owner of pltf.'s premises, about seventeen years before, had pulled down this building, & erected on its site another with a blank wall, next adjoining the premises of deft.; & this latter, about three years before the commencement of the action, erected a building next the blank wall of pltf., who then opened a window in that wall in the same place where the ancient window had been in the old building:—*Held*: he could not maintain any action against deft. for obstructing the new window; because, by erecting the blank wall, he not only ceased to enjoy the light, but had evinced an intention never to resume the enjoyment.

(2) Although a right of common, except as to common appendant, or a right of way being a privilege of something positive to be done or used in the soil of another man's land, may be the subject of legal grants, yet light & air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction & non-interruption of them more properly arises by a covenant which the law would imply not to interrupt the free use of the light & air (*LITTLEDALE, J.*).—*MOORE v. RAWSON* (1824), 3 B. & C. 332; 5 Dow. & Ry. K. B. 234; 3 L. J. O. S. K. B. 32; 107 E. R. 756.

*Annotations*:—*As to* (1) *Consd.* Stokoe v. Singers (1857), 8 E. & B. 31; Jones v. Tapling (1861), 11 C. B. N. S. 283. *Apd.* Crossley v. Lightowler (1867), 2 Ch. App. 478; *Cook v. Bath Corpn.* (1868), L. R. 6 Eq. 177. *Distd.* Cooper v. Straker (1888), 40 Ch. D. 21. *Consd.* Mid. Ry. v. Gribble, (1895) 2 Ch. 827; over since the great case of *Moore v. Rawson* with regard to ancient lights the law as to abandonment of easements has been perfectly well

settled (*LINDLEY, L.J.*): *Young v. Star Omnibus Co.* (1902), 86 L. T. 41. *Refd.* *Garritt v. Sharp* (1835), 4 Nev. & M. K. B. 834; *R. v. Chorley* (1848), 12 Q. B. 515; *Scrutton v. Stone* (1893), 9 T. L. R. 478; *A.-G. v. Reynolds*, [1911] 2 K. B. 888. *As to* (2) *Consd.* *Dalton v. Angus* (1881), 6 App. Cas. 740. *Refd.* *Rowbotham v. Wilson* (1857), 8 E. & B. 123; *Stokoe v. Singers* (1857), 8 E. & B. 31; *Webb v. Bird* (1862), 13 C. B. N. S. 841; *Hall v. Lichfield Brewery Co.* (1880), 49 L. J. Ch. 655; *Wheaton v. Maple*, [1893] 3 Ch. 48; *Chasley v. Ackland*, [1895] 2 Ch. 389. *Generally, Mentd.* *Wood v. Copper Miners' Co.* (1854), 14 C. B. 428; *Jacomb v. Knight* (1863), 8 L. T. 412; *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

**512. — Disuse prejudicial to dominant tenement.**—The long enjoyment of a right of way by A. to his house or close, over the land of B., which is a prejudice to the land, may most reasonably be accounted for, by supposing a grant of such right by the owner of the land; & if such a right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient & prejudicial to the owner of the house or close, may most reasonably be accounted for, by supposing a release of the right. In the first class of cases, therefore, a grant of the right, & in the latter, a release of it, is presumed (*ABBOTT, C.J.*).—*DOE d. PUTLAND v. HILDER* (1819), 2 B. & Ald. 782; 106 E. R. 551.

*Annotations*:—*Mentd.* *Aspinall v. Kempson* (circa 1820), cited in 15 C. B. 555; *Townsend v. Champenown* (1827), 1 Y. & J. 538; *Doe d. Hammond v. Cooke* (1829), 6 Bing. 174; *Doe d. Blacknell v. Ploymann* (1831), 2 B. & Ad. 573; *Gairard v. Tuck* (1849), 8 C. B. 231; *Cottrell v. Hughes* (1855), 15 C. B. 532; *Muggleton v. Barnett* (1857), 2 H. & N. 653.

**513. — Expense incurred by servient owner in belief of abandonment.**—Pltf. was owner of a house in which there were ancient windows. Pltf.'s predecessor blocked them up; & they continued blocked up for nearly twenty years. Deft. purchased the adjoining land, & proposed to build upon it. Pltf., by way of asserting the right to the light, reopened his ancient windows. Deft. obstructed them. On the trial of an action for this obstruction, the judge directed the jury that, if the right had once been acquired, it continued unless lost; & he directed them, if they thought the right had once been acquired, to find for pltf., unless they thought his predecessor had, in blocking up the windows, manifested an intention of permanently abandoning his right to the light, or unless they thought that the lights had been kept so closed as to lead deft. to alter his position in the reasonable belief that the lights had been permanently abandoned. Pltf. having had a verdict:—*Held*: deft. had no ground to complain of this as a misdirection. *Qu.*: whether the manifestation of an intention to abandon the lights communicated to the owner of the land would destroy the right, until the owner of the land altered his position in reliance thereon.—*STOKOE v. SINGERS* (1857), 8 E. & B. 31; 26 L. J. Q. B. 257; 29 L. T. O. S. 263; 3 Jur. N. S. 1258; 5 W. R. 756; 120 E. R. 12.

*Annotations*:—*Consd.* *Jones v. Tapling* (1862), 12 C. B. N. S. 826; *Crossley v. Lightowler* (1866), L. R. 3 Eq. 279. *Distd.* *Young v. Star Omnibus Co.* (1902), 86 L. T. 41. *Refd.* *Cook v. Bath Corpn.* (1868), L. R. 6 Eq. 177; *Eccl. Comrs. for England v. Kino* (1880), 14 Ch. D. 213; *Scott v. Pape* (1886), 31 Ch. D. 554.

**514. — User of less convenient way.**—*DARLING v. CLUE*, No. 338, *ante*.

evidence that the owner of pltf.'s property knew of the trespass:—*Held*: the work done on the strip of land was not of so permanent or substantial a nature as to justify the inference that pltf. had relinquished his right of road; & consequently, the servitude had not been lost by reason of the owner of the dominant tenement having permitted acts inconsistent with the servitude.—

*BRAUN v. POWRIE* (1903), 20 S. C. 476. —S. AF.

**c. Circumstances as presumption of abandonment—Acquiescence in acts of servient owner.**—Abandonment of an easement may be shown not only from acts done by the owner of the dominant tenement indicating an intention to abandon, but also from acquiescence

in acts done by the owner of the servient tenement. Where, therefore, the owner of the property over which a right of way existed built, with the knowledge of the owner of the property for the benefit of which the right of way had been reserved, & after some years pulled down the ice-house, & with the same knowledge built a stable on the same site, & a row of shops

**515. — Acquiescence in obstruction of way.]**

—In 1871, houses & shops in Essex Road, Islington, were put up for sale at auction in eleven lots. One of the conditions was that a strip of land fifteen feet in width running the entire length of the lots & being the rear portions of the back gardens of the houses should be formed into a roadway, & that the lots were sold subject to & with the benefit of a right of way from the back garden of each house along the proposed roadway into Church Road, which bounded the side of lot 1, on the south-west, & that the respective purchasers should as soon as possible remove the garden fences & form the roadway. In each of the original conveyances to the purchasers of lots 1, 2, & 3 that condition was recited; & lot 1 was conveyed subject to the right of way of the owners of the other lots, & lots 2 & 3 were each conveyed with the benefit of & subject to the right of way in the condition mentioned; & in each of the conveyances the obligation was cast upon the purchaser to contribute towards the expense of forming the road. In the subsequent title deeds relating to pltf.'s & deft.'s properties the existence of the right of way was expressly mentioned. In 1873, the purchaser of lot 1 granted a lease thereof to pltf.'s father for fifty years, which expired on June 24, 1922, subject to the right of way, & the lessee covenanted to keep the site of the roadway in good repair & to contribute towards keeping it in repair & erecting & maintaining gates at the entrance of the roadway into Church Road. On July 25, 1904, that lease was assigned to pltf. subject to the right of way of the owners of the other lots. In 1911, pltf. purchased & had conveyed to him in fee simple lots 2 & 3, subject to & with the benefit of the right of way. It appeared that at the time of the sale in 1871 the several lots were divided from one another by fences of some kind which extended across the 15 feet strip, & that a brick wall separated lot 1, including the end of the strip, from Church Road. It also appeared that from 1871 to 1922 the roadway was physically incapable of being used as such, owing to its site never having been formed into a road & having been allowed to remain obstructed by the dividing fences, & further that, with the tacit acquiescence of the owners for the time being of the several lots, the condition of the site of the proposed roadway had never been altered throughout that period, & that pltf. himself did nothing from 1911 to 1922 to assert his rights. In 1883 pltf.'s father, by levelling up part of the site of lot 1, caused a sheer drop of 6 feet to occur in the strip between that lot & the adjoining lot 2. About the year 1919, pltf., in anticipation of the expiration of his lease in June, 1922, entertained a scheme of building a garage on the site of lots 2 & 3 & to use the strip as a roadway from the same into Church Road, & with that object in view he pulled down part of the wall which had, since 1871, separated the end of the strip from Church Road & erected gates there. Shortly after the expiration of the lease, deft., who was entitled to the freehold of lot 1, challenged pltf.'s right by erecting a wall across the site of the roadway between lot 1 & lot 2.

Pltf., accordingly, commenced this action, in which he sought a declaration that he was entitled, as the owner of lots 2 & 3, to a general right of way along the site of the proposed roadway at the rear, & forming part of lot 1, into Church Road, & for an injunction:—*Held*: although the mere non-user of the right of way was not conclusive evidence of its abandonment, yet having regard to the facts above stated & the conduct of pltf. & his predecessors in title there was sufficient evidence of the abandonment of the right of way in question.—*SWAN v. SINCLAIR*, [1924] 1 Ch. 254; 93 L. J. Ch. 155; 130 L. T. 530; 88 J. P. 80; 40 T. L. R. 222; 68 Sol. Jo. 321, C. A.

—**Alteration of dominant tenement.]—***See* Sub-sect. 2, D., *post*.

**516. Circumstances explaining non-user—Agreement with servient owner.]—***PAYNE v. SHEDDEN*, No. 523, *post*.

**517. — — — — —.]—**(1) L., 30 years ago, being in the enjoyment of a prescriptive right of way over S.'s land, agreed with the then owner & occupier of the servient tenement to substitute a new way over part of the land, & for more than 20 years had used the substituted way:—*Held*: the mere non-user of the original way was no evidence of an abandonment thereof.

(2) I do not think that this ct. means to lay it down that there can be an abandonment of a prescriptive easement like this without a deed, or evidence from which the jury can presume a release of it (*WILLES, J.*).—*LOVELL v. SMITH* (1857), 3 C. B. N. S. 120; 22 J. P. 787; 140 E. R. 685.

**518. — — — — — More convenient mode of exercising right.]—***WARD v. WARD*, No. 505, *ante*.

**519. — — — — — User prohibited by order of magistrates.]—***HARRIS v. FLOWER*, No. 702, *post*.

**520. Effect of partial non-user.]—***JAMES v. STEVENSON*, No. 495, *ante*.

**521. — — — — —.]—**B. & T. were owners of adjoining lands, B. having a private right of way over T.'s land. In 1801, when B. was selling his land to X., pltf.'s predecessor, it was agreed that B. should have the use of a new private road which T. had lately made on his land instead of the old way. That agreement was embodied in the conveyance made by B. to X., to which T. was for this purpose a party. B. thereby released his old right of way to T., who granted the new way to X. in these words, "to & from every or any part of the pieces or parcels of land hereinbefore described," thus giving to X. a right to come out upon the new road at any point at which he could get access to it. The new road did not exactly skirt the boundary of that part of X.'s land now held by pltf., there being at that part an intervening strip of T.'s land varying in width. X. made a gateway opening out of that part of his land now held by pltf., & a track from it to the new road over the intervening strip, & that gateway & track had been used from pltf.'s land ever since. Pltf.'s land had for some years been fenced in along the intervening strip, in which the gateway was the only opening. Neither pltf. nor any of his predecessors had occasion to open out any other gate or to make any other track into the road.

over another part of the right of way:—*Held*: the owner of the dominant tenement could not then have the right of way opened.—*BELL v. GOLDING* (1886), 23 A. R. 485.—*CAN.*

**f. — — — — —.]—**Where a way is substituted for a pre-existing one with the consent of the party entitled & non-user of the original easement is accompanied by acts which warrant the ct.

or a jury in inferring an intention to release it, the right of resumption becomes forfeited, nor is it necessary in such a case that the non-user should extend over twenty years or any other defined period.—*MULVILLE v. FALLON* (1872), 6 I. R. Eq. 458.—*IR.*

**g. — — — — — Destruction of building.]—**Where the house, the right of ease-

ment to which was claimed, was not & had not been in existence for several years, nor was the intention shown of rebuilding it within a reasonable time:—*Held*: the right of easement which is acquired by prescription & enjoyment, & continues so long as the person enjoying it continues the enjoyment & shows an intention to continue it, had thus been lost by discontinuance;

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Deft., who represented T., apprehending, however, that an attempt might be made to open out another gate, erected posts & rails along the intervening strip in such a manner as to prevent exit from pltf.'s land at any but the accustomed place:—*Held*: (1) in the absence of anything in the original grant expressly limiting the grantee to one line of access, or to access only at the points, if any, where his land actually adjoined the new way, & of anything to show that the right as claimed was unreasonable, or destructive of the object of the grant, no obligation to elect one particular line of access could be implied; (2) there had been no manifestation of intention to abandon the easement.—*COOKE v. INGRAM* (1893), 68 L. T. 671; 3 R. 607.

*Annotations*:—*As to* (1) *Distd. Met. Ry. v. G. W. Ry. & London Corpn.* (1900), 82 L. T. 451. *Consd. Pettey v. Parsons*, [1914] 2 Ch. 653.

**522.** —[Pltfs., as owners of certain lands, had a right of way over a strip of land 10 ft. wide on adjoining property in the occupation of defts. Some years before action brought, pltfs. erected a summer-house which projected over the strip of land to the extent of 2 ft. 4 in. Before action brought, defts. erected & eight months prior to the date of the writ they completed the erection of a stable on the strip of land which obstructed pltfs.' right of way. Pltfs. brought an action (1) for a declaration that they were entitled to the right of way; (2) an order requiring defts. to remove the buildings in question; (3) for an injunction to restrain defts., their servants & agents, from obstructing pltfs. & their tenants, in the exercise of such right of way. Defts. pleaded extinguishment or abandonment before action brought:—*Held*: (1) on the facts, pltfs. had proved their title to & had not abandoned or extinguished their right of way; (2) partial abandonment, by the erection of a summer-house projecting across a portion of the strip of land was not, in the circumstances, sufficient evidence of abandonment; pltfs. were entitled to an injunction & 40s. damages, but owing to the fact that defts.' obstructing building had been completed eight months before action, an order for its removal could not be made.—*YOUNG (TRUSTEES OF YOUNG, DECEASED) v. STAR OMNIBUS CO., LTD.* (1902), 86 L. T. 41.

**C. Alteration of User.**

**523. By agreement.**—[A plea of twenty years' user of a right of way, under Prescription Act, 1832 (c. 71), is not defeated by proof of an agreed alteration of the line of way, nor by a temporary non-user under an agreement of the parties.—*PAYNE v. SHEDDEN* (1834), 1 Mood. & R. 382, N. P. *Annotations*:—*Reid. Parker v. Mitchell* (1840), 11 Ad. & El. 783; *Carr v. Foster* (1842), 3 Q. B. 581; *Roberts & Lowell v. James* (1903), 89 L. T. 282.

**524. Substantial alteration.**—[Pltf. had a barn, in the side of which, adjoining deft.'s premises, were apertures, by which, chiefly, the barn was

lighted. Pltf. converted the barn into a malt-house, & cut windows where the apertures had been in the barn. Deft. erected on his own ground a fence before the windows, which obstructed the access of light. In an action on the case for such obstruction, evidence was offered at the trial to show that the mode of enjoying the light had been essentially altered by pltf. himself, in a manner prejudicial to deft. The judge did not receive the evidence, but directed the jury, if they thought that deft. had left pltf. less light than he enjoyed before the present windows were made, to give damages for such diminution:—*Held*: evidence of the above description was receivable, & it might have appeared from such evidence that pltf. had altogether lost his right to the easement in question.

A party may so alter the mode in which he has been permitted to enjoy this kind of easement as to lose the right altogether (*LORD DENMAN, C.J.*).—*GARRITT v. SHARP* (1835), 3 Ad. & El. 325; 1 Har. & W. 220; 4 Nev. & M. K. B. 834; 111 E. R. 437.

*Annotations*:—*Consd. Jones v. Tapling* (1861), 11 C. B. N. S. 283. *Distd. Bailey v. Holborn & Finsbury*, [1914] 1 Ch. 598. *Reid. Binckes v. Pash* (1862), 31 L. J. C. P. 121.

**525. Slight alteration.**—(1) In an action for the obstruction of a watercourse, it appeared that pltf. had three years ago slightly altered the course of the stream, at a point between its exit from deft.'s land, where the obstruction took place, & its entrance upon his own land; & that more than twenty years ago the stream had for some time ceased to flow to pltf.'s land, & had resumed its ancient course only nineteen years before the commencement of the action:—*Held*: pltf.'s right was not thereby destroyed.

(2) It is further objected that the right claim has been lost by desuetude, the water having many years since discontinued to flow in its accustomed channel, & having only recommenced flowing nineteen years ago. That interruption, however, may have been occasioned by the excessive dryness of seasons or from some other cause over which pltf. had no control. But it would be too much to hold that his right is therefore gone; otherwise, I am at a loss to see why the intervention of a single dry season might not deprive a party of a right of this description, however long the course of enjoyment might be (*TINDAL, C.J.*).—*HALL v. SWIFT* (1838), 4 Bing. N. C. 381; 1 Arn. 157; 6 Scott, 167; 7 L. J. C. P. 209; 132 E. R. 834.

*Annotations*:—*As to* (1) *Reid. Carr v. Foster* (1842), 3 Q. B. 581; *Binckes v. Pash* (1862), 31 L. J. C. P. 121; *Harvey v. Walters* (1873), L. R. 8 C. P. 162. *As to* (2) *Consd. Hollins v. Verney* (1884), 13 Q. B. D. 304. *Reid. Presland v. Blingham* (1889), 60 L. T. 433.

**526. What is sufficient alteration.—Question for jury.**—[In an action by resps. for damages in respect of a nuisance committed by applts. & for an injunction, it was alleged that applts., who had a prescriptive right to load, unload, & store coals on their wharf in such manner as to spread their coal dust over resps.' wharf, had within twenty years so extended the site of their operations &

& by the destruction of the tenement the servitude had been extinguished, & pltf. had no right to maintain the suit for the right of easement.—*TEKA RAM v. DOORGA PERSHAD* (1866), 1 Agra, 196.—*IND.*

**h. Interruption.**—[*Held*: Ontario Act, R. S. O. 1877, c. 108, reducing the period of limitation to ten years, does not apply to the interruption of an easement, such as a right to a way *in alieno solo*, in this case a lane, which deft. had occupied & obstructed for

ten years, but which pltf. had used prior to such obstruction.—*MYKEL v. DOYLE* (1880), 45 U. C. R. 65.—*CAN.*

**PART VI. SECT. 2, SUB-SECT. 2.—C.**

**525. Slight alteration.**—[The termini *a quo* & *ad quem* of a way over deft.'s land, used & enjoyed as of right by pltf. & his predecessors in title for upwards of twenty years before the commencement of the action, had not varied during that period, except at two points, where, about fourteen years

before action, one of pltf.'s predecessors slightly altered the line of the way for the purpose of going round muddy spots, & the user of the original line at these two points was abandoned for the substituted one. These deviations were short as compared with the length of the way:—*Held*: they did not operate to do away with pltf.'s right to claim the way between the termini, that way having been substantially used during the whole period.—*WARREN v. VAN NORMAN* (1898), 29 O. R. 508.—*CAN.*

altered the structure of their works & the conduct of their business as to produce injurious effects not covered by any prescriptive right. The question submitted was whether applts.' works taken as a whole had by their extension been rendered more injurious than before to resps.' works taken as a whole. The jury found that there had been no increase in inconvenience & discomfort to resps., & a verdict was entered for applts. On motion before the full ct. judgment was given for resps., on the ground that the change in the incidence of the dust produced by the extension & alteration of site & works so altered the nature of the easement as to constitute a new wrong:—*Held*: on appeal, the question whether by this extension & alteration there had been a variation in the kind of servitude imposed on resps. substantial enough to cause a new & appreciable wrong was a question of fact which had not been submitted to the jury, & there must be a new trial.—*ROYAL MAIL STEAM PACKET CO. v. GEORGE & BRANDAY*, [1900] A. C. 480; 69 L. J. P. C. 107; 82 L. T. 530, P. C.

*Annotation*:—*Refd.* *Pwllbach Colliery Co. v. Woodman*, [1915] A. C. 634.

**527. Right to pollute—Alteration lessening pollution.**—In 1832 applts. came into possession of a certain factory, & then commenced the business of fellmongers & manufacturers of sheepskin rugs, which they carried on down to 1852, & during this period the refuse of the fellmongery & sheepskin factory was discharged into a certain stream, which was an arterial drainage within the jurisdiction of resps. In 1852 the business of tanners was added, & the refuse from the tanyard was in addition to the other refuse, discharged into the stream. In 1878 applts. altered their premises, & began the manufacture of leather boards, & the washings from such new factory, which were different in character from those before discharged, were from & after 1878 poured into the stream; no refuse of tannery or fellmongery was then poured in, but only the washings of the dyes used to colour the leather boards. Such washings were not so foul in degree as the washings from the factory before 1878. Applts. were summoned by resps. for causing or permitting these washings of the leather board manufactory to flow into the stream, & were convicted & fined. Resps. contended that the pouring into the stream the refuse of the fellmongery & sheepskin manufactory from 1832, & the refuse of the tannery from 1852, did not confer the right to pour into the stream the refuse & washings from the leather board manufactory opened in 1878, either under the Prescription Act, 1832 (c. 71), or at common law. Applts. contended that they had proved a legal prescriptive right to cause such washings to flow into the stream:—*Held*: the conviction was right, as applts. had not, at the passing of the Land Drainage Act, 1861 (c. 133), the right to pour into the stream the refuse & washings of their leather board manufactory, & the fact that they had poured other refuse & washings into the stream since 1832 did not give them such right, although those washings were less foul than those formerly poured into the stream.—(*CLARKE v. SOMERSETSHIRE DRAINAGE COMRS.* (1888), 57 L. J. M. C. 90; 59 L. T. 670; 36 W. R. 890; 4 T. L. R. 539; 52 J. P. Jo. 308, D. C.

#### D. Alteration of Dominant Tenement.

##### (a) Easements other than Light.

**528. Rendering user of dominant tenement impossible—Water.**—*LIGGINS v. INGE*, No. 119, ante.

**529.** ————]—If an ancient ditch has at one end anciently opened into a stream, & the owner of a mill on the stream has kept the opening at the end of the ditch closed for twenty years & more, without interruption, that would give the mill-owner such a right to keep it closed, that the owner of the land adjoining the ditch would not be justified in re-opening the communication, although it might appear that the communication between the ditch & the stream was ancient.

If the owner of a water mill worked by a ground-shot wheel at a low head of water, alter the wheel to a breast-shot wheel, which requires a high head of water, & after that, for twenty years & more, discontinue the use of the breast-shot wheel, & resume the use of the ground-shot wheel, his discontinuance will cause the mill-owner to lose his right to the higher head of water.—*DREWETT v. SHEARD* (1830), 7 C. & P. 465.

**530. Burden on servient tenement not increased—Water.**—(1) A person having two ancient fulling mills, to which was annexed by prescription a right to a watercourse, pulled them down, & erected two mills to grind corn:—*Held*: the prescription remained.

(2) If plff., in an action on the case for disturbing his watercourse, prescribe to have the watercourse to his mills generally, it is sufficient.—*LUTTRELL'S CASE* (1601), 4 Co. Rep. 81 b; 70 E. R. 1063.

*Annotations*:—*As to* (1) *Refd.* *Renshaw v. Bean* (1852), 18 Q. B. 112; *Hutchinson v. Copestake* (1861), 8 Jur. N. S. 54; *Colls v. Home & Colonial Stores*, [1904] A. C. 179; *White v. Grand Hotel, Eastbourne*, [1913] 1 Ch. 113. *As to* (2) *Refd.* *Dowglas v. Kendall* (1610), 1 Bulst. 93. *Generally, Consd.* *Allan v. Gomme* (1840), 11 Ad. & El. 759; *Aynsley v. Glover* (1874), L. J. 18 Eq. 544. *Refd.* *Shury v. Pigot* (1626), 3 Bulst. 339; *Wilson v. Townend* (1860), 1 Drow. & Sm. 324; *A.-G. v. Reynolds*, [1911] 2 K. B. 888. *Mentd.* *Brown & Tucker's Case* (1610), 4 Leon. 211; *R. v. Sorel* (1613), Cro. Jac. 324; *Burton v. Browne* (1622), Palm. 319; *Harrison v. Itooke* (1625), Palm. 420; *Rowden v. Malster* (1626), Cro. Car. 42; *Popham v. Woolcott* (1666), 1 Sid. 291; *Colchester Corp'n. v. Seaber* (1766), 3 Burr. 1866; *Hill v. Cock* (1872), 26 L. T. 185; *Warren v. Brown*, [1900] 2 Q. B. 722.

**531.** ————]—Prescription to have a watercourse to an ancient mill is not destroyed by pulling down the old & building a new mill on the same stream.—*PALMIS v. HERBLETHWAITE* (1688), 2 Show. 249; *Skin*. 64; 89 E. R. 921; *sub nom.* *HERBLETHWAITE v. PALMES*, 3 Mod. Rep. 48; *sub nom.* *HERBLETHWAITE v. PALMS*, Carth. 84; *Holt*, K. B. 5; *sub nom.* *NULMES v. HOBLETHWAYTE*, 3 Lev. 133; *sub nom.* *KEBLETHWAIT v. PALMES*, Comb. 9.

*Annotation*:—*Refd.* *Mason v. Hill* (1833), 5 B. & Ad. 1.

**532.** ————]—The occupier of a mill may maintain an action for forcing back water & injuring his mill, although he has not enjoyed it precisely in the same state for 20 years; & therefore it was holden to be no defence to such an action that the occupier had, within a few years, erected in his mill a wheel of different dimensions, but requiring less water than the old one, although the declaration stated plff. to be possessed of a mill, without alleging it to be an ancient mill.—*SAUNDERS v. NEWMAN* (1818), 1 B. & Ald. 258; 106 E. R. 95.

*Annotations*:—*Refd.* *Mason v. Hill* (1833), 5 B. & Ad. 1; *Fréchette v. Compagnie Manufacturière de St. Hyacinthe* (1883), 9 App. Cas. 170; *A.-G. v. Reynolds*, [1911] 2 K. B. 888.

**533.** ————]—In case for the diversion of water, plff. alleged in his declaration a reversionary interest in three closes of land, to wit, three ponds filled with water, one pond being upon each of the closes, & a right to the flow of the water into the closes, for supplying the ponds in the

*Sect. 2.—By release: Sub-sect. 2, D. (a) & (b); sub-sect. 3. Sect. 3: Sub-sect. 1.]*

closes with water for the watering of cattle. Deft. traversed the right to the flow of the water as alleged.

It appeared in evidence at the trial, that pltf. had enjoyed an immemorial right to the flow of this water into an ancient pond in one of his closes, but that, above thirty years ago, he made a new pond in each of the three closes, & turned the water so as to supply them, & thenceforth disused the old pond, which was gradually filled with rubbish & overgrown with grass. Pltf.'s right in respect of the three ponds having been defeated by proof of an outstanding life estate, under Prescription Act, 1832 (c. 71), s. 7:—*Held*: he was entitled, under this declaration, to recover in respect of his right to the flow of water to the old pond.—*HALE v. OLDROYD* (1845), 14 M. & W. 789; 15 L. J. Ex. 4; 153 E. R. 694.

*Annotation:—Refd. Crossley v. Lightowler* (1866), L. R. 3 Eq. 279.

534. — *Projecting eaves.*] — *HARVEY v. WALTERS*, No. 1287, *post*.

535. — *Light.*] — *BARNES v. LOACH*, No. 204, *ante*.

536. *Burden on servient tenement increased—Whether former easement extinguished—Eaves-dropping.*]—(1) An easement is suspended as long as the same person having a term of years in the land *a qua* & a fee simple in the land *in qua*, is in possession of both, but it revives on a cessation of the unity of possession, though the change of possession be not accompanied with an alienation of the whole of either of the estates.

(2) An user of the subject of an easement for twenty years will create a right, though interrupted by intervals of suspension by such an unity of possession, such intervals being excluded from the computation.

(3) When it is sought to establish a right to an easement by user, & it appears that the user has varied, it is for the jury to say, whether the user has been commensurate with the right claimed.

(4) Though a party, having an easement of eavesdropping from a thatch resting on a wall, increases the height of the wall, & the projection of the thatch, he may maintain an action against a neighbour who does an act which not only prevents the enjoyment of the extended easement, but which would also interrupt it if existing within its proper limits.—*THOMAS v. THOMAS* (1835), 2 Cr. M. & R. 34; 1 Gale, 61; 5 Tyr. 804; 4 L. J. Ex. 179; 150 E. R. 15.

*Annotations:—As to (2) Refd. Harvey v. Walters* (1873), L. R. 8 C. P. 162. *Generally, Refd. Tapling v. Jones* (1865), 11 H. L. Cas. 291.

537. — *Water.*]—An Act of Parliament empowered a co. to make & maintain a canal, & provided that it should be lawful for owners of lands within the distance of twenty yards from the canal to make a communication by pipes, etc., between the water therein & any steam-engine, & to draw from the canal such quantities of water as should be sufficient to supply the engine with cold water for the sole purpose of condensing the steam, & for working any such engine as aforesaid, & for no other use or purpose; & there was a proviso that if any dispute should arise between the co. & any person who should be desirous of taking water out of the canal for the purposes of any such engine, or who should be in the use of taking

the same, such dispute should be finally settled by the comrs. appointed under the powers of the Act. In an action on the case the declaration alleged that defts., owners of a steam-engine, who had laid down a pipe communicating with the canal, used the water which had been drawn off by means of the pipes for other purposes than for condensing the steam, & more than was necessary for condensing:—*Held*: (1) the special power of the commissioners did not take away the right of action; (2) the action would lie though no specific damage was alleged.—*KING v. ROCHDALE CANAL CO.* (1851), 14 Q. B. 136; 18 L. T. O. S. 5; 1 Jur. 896; 117 E. R. 55, Ex. Ch.; *affg. S. C. sub nom. ROCHDALE CANAL CO. v. KING* (1849), 14 Q. B. 122; *subsequent proceedings, sub nom. ROCHDALE CANAL CO. v. KING* (1851), 2 Sim. N. S. 78; (1853), 10 Beav. 630.

*Annotations:—As to (1) Consd. National Manure Co. v. Donald* (1859), 28 L. J. Ex. 185. *Refd. Rochdale Canal Co. v. Manchester Ship Canal Co.* (1901), 85 L. T. 585. *Generally, Refd. Rochdale Canal Co. v. King* (1851), 2 Sim. N. S. 78; *Rochdale Canal Co. v. Radcliffe* (1852), 18 Q. B. 287; *Rochdale Canal Co. v. King* (1853), 16 Beav. 630. *Mentd. Coc v. Wise* (1866), L. R. 1 Q. B. 711.

538. — *Way.*]—*MILNER'S SAFE CO., LTD. v. GREAT NORTHERN & CITY RY. CO.*, No. 288, *ante*.

539. — — — — —.]—*GRAND HOTEL, EAST-BOURNE, LTD. v. WHITE*, No. 738, *post*.

540. *Alteration of substance of dominant tenement—Way.*]—*ALLAN v. GOMME*, No. 735, *post*.

*Ways.*]—*See Part VII., Sect. 6, sub-sect. 3, C., post.*

*Watercourses.*]—*See Part VIII., Sect. 2, sub-sect. 5, post.*

(b) *Light.*

*See Part VIII., Sect. 5, sub-sect. 2, post.*

#### SUB-SECT. 3.—FORM OF RELEASE.

*See CONTRACT*, Vol. XII., p. 501, Nos. 4098 *et seq.*

541. *By parol.*]—In the case of a right of way over the lands of other persons, being an easement belonging to lands, if the owner chooses to say I have no right of way over those lands, that is disclaiming that right of way; & though the previous title might be shown, a subsequent release of the right might be presumed (*LORD REDESDALE*).—*NORBURY v. MEADE* (1821), 3 Bli. 211; 4 E. R. 582, H. L.

*Annotations:—Mentd. Williams v. Bacon* (1823), 1 Sim. & St. 415; *Bacon v. Williams* (1827), 3 Russ. 525; *Cherry v. Legh* (1827), 1 Bli. N. S. 306; *Fairfax v. Holdsworth* (1830), You. 79; *Hughes v. Davies* (1832), 5 Sim. 331; *Bayley v. Drever* (1834), 3 Nev. & M. K. B. 885; *Andrews v. Drever* (1835), 9 Bli. N. S. 471; *Chapman v. Gatecombe* (1836), 2 Bing. N. C. 516; *Waterford v. Knight* (1844), 11 Cl. & Fin. 653; *South Staffordshire Ry. v. Hall* (1851), 7 Ry. & Can. Cas. 983; *Esdale v. Payne* (No. 2) (1885), 53 L. T. 21.

*See, also*, Nos. 119, 497, *ante*.

542. *By deed.*]—*LOVELL v. SMITH*, No. 517, *ante*.

#### SECT. 3.—BY UNITY OF SEISIN.

##### SUB-SECT. 1.—IN GENERAL.

543. *Unity of seisin extinguishes easements—Way.*]—*ANON.* (1347), Jenk. 20; 145 E. R. 15.

*Annotation:—Refd. James v. Plant* (1836), 4 Ad. & El. 749.

#### PART VI. SECT. 3, SUB-SECT. 1.

k. *Unity of seisin extinguishes easements.*]—Unity of ownership extinguishes all pre-existing easements,

such as private right of way over one part of the land for the accommodation of another part.—*MCQUELLAN v. POWASSAN LUMBER CO.* (1908), 12

O. W. R. 473; 17 O. L. L. 32.—*CAN.* 1. —.—One piece of land cannot be said to be burdened by an easement in favour of another when both



544. ———.]—*HEIGATE v. WILLIAMS* (1006), Noy, 119; 74 E. R. 1083.

545. ———.]—*BROWN v. KIDNEY* (1735), Barnes, 155; 94 E. R. 853.

546. ———.]—One being seised in fee of the adjoining closes A. & B. over the former of which a way had immemorially been used to the latter, devises to B. with the "appurtenances":—*Held*: the devisee cannot under the word "appurtenances" claim a right of way over A. to B., as no new right of way is thereby created, & the old one was extinguished by the unity of seisin in the devisor.

There can be no doubt that the word "appurtenances" may convey an existing right of way. But from the moment that the possession of two closes is united in one person all subordinate rights & easements are extinguished (*EYRE, L.J.*).—*WHALLEY v. TOMPSON* (1799), 1 Bos. & P. 371; 126 E. R. 959.

*Annotations*:—*Reid*. *Doldge v. Carpenter* (1817), 6 M. & S. 47; *Plant v. James* (1833), 5 B. & Ad. 791; *Baring v. Abington*, [1892] 2 Ch. 374; *Schwann v. Cotton & Hayles* (1916), 85 L. J. Ch. 689.

547. ———.]—*MORRIS v. EDGINGTON*, No. 49, *ante*.

548. ———.]—*DYNEVOR (LORD) v. TENNANT*, No. 111, *ante*.

549. **Unity of possession without unity of seisin—Suspension of easement—Water.**—If land, with a run of water upon it, be sold, the water passes with the land, & the vendee, having used the water, though for less than twenty years, gains a title to it by appropriation, & may maintain an action for obstructing it.

An unity of possession merely suspends; there must be an unity of ownership to destroy a prescriptive right (*BAYLEY, B.*).—*CANHAM v. FRISK* (1831), 2 Cr. & J. 126; 2 Tyr. 155; 1 L. J. Ex. 61; 149 E. R. 53.

550. ———.]—*THOMAS v. THOMAS*, No. 536, *ante*.

belong absolutely to the same owner, & if the title to different parcels comes to be vested in the same owner, there is an extinguishment of any easements which may previously have existed.—*ATRILL v. PLATT* (1883), 10 S. C. 11. 425.—*CAN.*

m. ———.]—*Revivor.*—A right of way which had existed for many years in connection with marsh land was extinguished by unity of seisin in deft. who became owner by purchase of the servient tenement. Deft. almost immediately mortgaged the marsh land, & in the mtgo. described the way in the same terms in which it had been described in previous conveyances. Later, he released to the mtgoes. his equity of redemption, & the mtgoes. sold to pltf. including the right of way as described in the mtgo. In an action by pltf. for obstruction of the right of way:—*Held*: the effect of the mtgo. & release was to revive the way as it had previously existed.—*BRIGHTMAN v. HAZEL* (1921), 54 N. S. R. 81.—*CAN.*

550 i. **Unity of possession without unity of seisin—Suspension of easement.**—In order to acquire a right of way of enjoyment for twenty years it must be proved that the claimant has enjoyed it for the full period required, as of right, & if there has been unity of possession for all or any part of that time, the claimant will not have enjoyed as of right the easement, but the soil itself. A defence on this ground to a claim of right of way is sufficiently put in issue by a plea that the claimant is not entitled to such right of way as alleged.—*SMITH v. McDONALD* (1878), 3 R. & C. 283.—*CAN.*

550 ii. ———.]—A testator dying

in 1874 devised adjoining lots of land, 4 & 5, to his two sons respectively. House No. 9 stood mainly on lot 4, but also partly on lot 5, & house No. 13 stood on the remainder of lot 5, there being a passage way between the two houses, used in common by the occupants of both for the purpose of getting in wood & coal & getting out ashes. Applt., the owner of lot 4, had, as was admitted, by virtue of a conveyance from the devisee of lot 4 & by Stat. Limitations, acquired title to the portion of lot 5 on which house No. 9 stood. The passage in question was used by the occupants of house No. 9 from the time of the death of the testator until 1895, but during the period from Mar. to June, 1894, the owner of No. 13 was also the tenant of No. 9.—*Held*: the unity of possession during that period interrupted the running of the statute, & applt. had not acquired a right of way as an easement by prescription.—*Re COCKBURN* (1896), 27 O. R. 450.—*Re CAN.*

550 iii. ———.]—In a suit to restrain deft. from obstructing the access of light & air through certain windows of pltf.'s house, it appeared that both the tenements had formerly constituted the joint property of a Hindu family, & that in 1835 a partition took place among the various members composing it, by which the tenement in the occupation of pltf. became separated from that occupied by deft.; & that the latter property was, in 1860, purchased by pltf. jointly with one G., but under the purchase pltf. took sole possession thereof; that in 1867, however, he relinquished it in favour

551. **Unity of seisin for different estates—Suspension of easement—Way.**—*JAMES v. PLANT*, No. 50, *ante*.

552. ———.]—A right merely dependent on ownership cannot be reserved over the entirety after partition.

One entitled to a right of way over a strip of land, independently of the ownership thereof, purchased the strip of land:—*Held*: during ownership, his right of way over land was suspended, but would revive on his ceasing to be owner.—*CHARLESWORTH v. GARTSDEN* (1863), 3 New Rep. 54, L. J.J.

553. ———.]—**Light.**—Sect. 3 of Prescription Act, 1832 (c. 71), limiting twenty years as the period for acquiring an indefeasible right to the access & use of light, is retrospective, so that such an easement may be acquired by virtue of enjoyment prior to the passing of the Act.

(2) An union of the ownership of dominant & servient tenements for different estates does not extinguish an easement of this description, but merely suspends it so long as the union of ownership continues, & upon a severance of the ownership the easement revives.

(3) Where a right to an easement of this description is acquired against the owner of a leasehold interest in the servient tenement, it is acquired also against the owner of the reversion.

(4) A tenant from year to year may file a bill for an injunction to protect an easement of this description, but the injunction will be limited to the period of the continuance of pltf.'s tenancy.—*SIMPER v. FOLEY* (1862), 2 John. & H. 555; 5 L. T. 669; 70 E. R. 1179.

*Annotations*:—*As to* (2) *Consd.* *Hyman v. Van den Bergh*, [1908] 1 Ch. 167; *Richardson v. Graham*, [1908] 1 K. B. 39. *Generally, Mendl.* *Colls v. Home & Colonial Stores*, [1901] A. C. 179.

554. **Unity of possession without unity of title—Easement acquired by prescription at common law.**—*AYNSLEY v. GROVEIT*, No. 389, *ante*.

of G. in pursuance of an award, wherein it was found pltf. had no right or title thereto; & that in 1870 it was purchased by deft. who, in 1871 & 1872, erected the obstructions complained of by pltf.:—*Held*: though, in the interval between 1860 & 1867, pltf. had not such an estate in the servient tenement as to constitute unity of title in him to the two tenements, & thereby extinguish all easements between them, yet the unity of possession in the pltf. during that period excluded the operation of sect. 27 of Act IX of 1871, as the enjoyment during that time was not "of right".—*MONROODUN DRY v. BISHONATH DRY* (1875), 15 B. L. R. 361.—*IND.*

550 iv. ———.]—A lease, dated June, 1848, & made in pursuance of an agreement of 1802, demised certain premises, "with the rights, members, & appurtenances thereunto belonging or in anywise appertaining." Evidence was given of the enjoyment of a right of way, by the occupiers of the demised premises, over the premises of the lessor, under whom defts. claimed, for more than forty years before action brought; & that the right of way in question was essential to the enjoyment of the demised premises:—*Held*: there was no unity of possession of the dominant & servient tenements in the lessor, upon the grant of the lease of 1848, sufficient to extinguish the right of way.—*KAVANAGH v. COAL MINING CO. OF IRELAND* (1861), 14 L. C. L. R. 82.—*IR.*

n. ———.]—*Revivor.*—Where an easement has been extinguished by unity of possession of the dominant & servient tenements a reference to it as

*Sect. 3.—By unity of seisin: Sub-sects. 1 & 2.*  
*Sect. 4. Part VII. Sect. 1.]*

**555. Unity of seisin without unity of possession—Easement not extinguished.**—If acquired under Prescription Act, 1832 (c. 71), s. 3.]—Unity of seisin for an estate in fee will not cause an easement of ancient light to be extinguished where there is no unity of possession & enjoyment.

A tenement which had enjoyed the access & use of light over an adjoining tenement for a period of twenty years without interruption was leased for a term of years to plffs. Subsequently & during the continuance of this term the freeholder conveyed the tenement in fee to the freeholder of the servient tenement:—*Held*: the easement acquired by the tenement under the above sect. was not thereby extinguished.—*RICHARDSON v. GRAHAM*, [1908] 1 K. B. 39; 77 L. J. K. B. 27; 98 L. T. 360, C. A.

**Extinguishment of quasi duty to fence.**—*See* BOUNDARIES, Vol. VII., p. 292, Nos. 188-190.

#### SUB-SECT. 2.—WHAT EASEMENTS EXTINGUISHED.

**556. Easements of necessity—Way.**—*SHURY v. PIGGOT* (1626), 3 Bulst. 339; 81 E. R. 280; *sub nom. SURY v. PIGOTT*, Palm. 444; Poph. 166; Benl. 188; *sub nom. SURREY v. PIGOTT*, Lat. 153; Noy, 84; *sub nom. SHEWRY v. PIGOTT*, W. Jo. 145.

*Annotations*:—*Consd.* *Drake v. Wiglesworth* (1753), Willcs. 654; *Pheysey v. Vicary* (1847), 16 M. & W. 484. *Refd.* *Palmer v. Fleissler* (1664), 1 Keb. 553; *Brown v. Best* (1747), 1 Wils. 174; *Wood v. Waud* (1849), 3 Exch. 748; *Pyer v. Carter* (1857), 1 H. & N. 916; *Suffield v. Brown* (1864), 4 De G. J. & Sm. 185; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Bradford Corp'n. v. Ferrand*, [1902] 2 Ch. 660. *Mentd.* *Harlow v. Brodnox* (1673), 3 Keb. 151; *Dickinson v. Grand Junction Canal Co.* (1852), 7 Exch. 282; *Rawstron v. Taylor* (1855), 11 Exch. 369; *Chasemore v. Richards* (1859), 7 H. L. Cas. 349.

**557.** ———.]—*PACKER v. WELLSTEAD* (1658), 2 Sid. 111; 82 E. R. 1284.

*Annotations*:—*Consd.* *Pearson v. Spencer* (1861), 1 B. & S. 571. *Refd.* *Holmes v. Goring* (1824), 2 Bing. 76; *Bolton v. Bolton* (1879), 11 Ch. D. 968.

**558.** ———.]—A way of necessity exists after unity of possession of the close to which, & the close over which, & after a subsequent severance. If a person purchases close A., with a way of necessity thereto over close B., a stranger's land, & afterwards purchases close B., & then purchases close C., adjoining to close A., & through which he may enter close A., & then sells close B. without reservation of any way, & then sells close A. & C.; the purchaser of close A. shall nevertheless have the ancient way of necessity to close A., over close B.—*BUCKBY v. COLES* (1814), 5 Taunt. 311; 128 E. R. 709.

*Annotations*:—*Consd.* *Holmes v. Goring* (1824), 2 Bing. 76; *Richardson v. Graham*, [1908] 1 K. B. 39.

**559.** ———.]—**Gutter to carry off water.**—*HOLTBYE v. BRAY* (1607), 2 Keb. 291; 84 E. R. 181.

a boundary in a deed of conveyance of the dominant tenement by the person entitled to both tenements, may sufficiently indicate an intention to revive the easement, so as to give the purchaser a right to it.—*CURRY v. DAVIS* (1883), 9 V. L. R. 390.—**AUS.**

o. ——— Where claim is by lost

*grant.*—Unity of possession, which would defeat a defence under Limitations Act, might not defeat a claim as upon a lost grant.—*ROBINSON v. WILSON* (1919), 45 O. L. R. 296; 48 D. L. R. 437; 16 O. W. N. 54.—**CAN.**

p. *Ecc vested in term.*—Easement not extinguished during term.—The fact

**560.** ———.]—*PIEYSEY v. VICARY*, No. 286, *ante*.

**561. Natural easements—Flowing water.**—*SHURY v. PIGGOT* (1626), 3 Bulst. 339; 81 E. R. 280; *sub nom. SHEWRY v. PIGOTT*, W. Jo. 145; *sub nom. SURY v. PIGOTT*, Benl. 188; Palm. 444; Poph. 166; *sub nom. SURREY v. PIGOTT*, Lat. 153; Noy, 84.

*Annotations*:—*Refd.* *Palmer v. Fleissler* (1663), 1 Keb. 553; *Drake v. Wiglesworth* (1752), Willcs. 654; *Pyer v. Carter* (1857), 1 H. & N. 916; *Suffield v. Brown* (1864), 4 De G. J. & Sm. 185. *Mentd.* *Harlow v. Brodnox* (1673), 3 Keb. 151; *Brown v. Best* (1747), 1 Wils. 174; *Pheysey v. Vicary* (1847), 16 M. & W. 484; *Wood v. Waud* (1849), 3 Exch. 748; *Dickinson v. Grand Junction Canal Co.* (1852), 7 Exch. 282; *Rawstron v. Taylor* (1855), 11 Exch. 369; *Chasemore v. Richards* (1859), 7 H. L. Cas. 350; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Bradford Corp'n. v. Ferrand*, [1902] 2 Ch. 655.

**562.** ———.]—A prescriptive right to the use of water flowing through certain closes, for the purpose of supplying a water mill, is not extinguished by unity of possession of the mill & such closes.—*HOLLAND v. DEAKIN* (1828), 7 L. J. O. S. K. B. 145.

**Water generally.**—*See* Part IX., *post*.

#### SECT. 4.—BY STATUTE.

**563. Light—Fire Prevention (Metropolis) Act, 1774 (c. 78).**—Above Act has not destroyed the right to lateral windows which existed before that Act. The owner of windows in an edifice carried up above a party wall contrary to the provisions of above Act may nevertheless recover against the owner of the adjoining land who contributed to the wall, for darkening the lights.—*TITTEYTON v. CONYERS* (1813), 5 Taunt. 405; 1 Marsh. 140; 128 E. R. 770.

*Annotation*:—*Consd.* *Re Metropolitan Building Act, 1855, Ex p. McBryde* (1876), 35 L. T. 543.

**564.** ———.]—**Metropolitan Building Act, 1855 (c. 122).**—Above Act does not authorise the raising of a structure by a building owner so as to obstruct ancient lights in the adjoining premises.—*CROFTS v. HILDANE* (1867), L. R. 2 Q. B. 194; 8 B. & S. 194; 36 L. J. Q. B. 85; 16 L. T. 116; 31 J. P. 358; 15 W. R. 444.

*Annotation*:—*Consd.* *Re Metropolitan Building Act, 1855, Ex p. McBryde* (1876), 35 L. T. 543.

**565. Support of building by building—Service of party wall notice—London Building Act, 1894 (c. cxxiii).**—*SELBY v. WHITTHREAD & CO.*, No. 395, *ante*.

**Under Inclosure Acts.**—*See* COMMONS, Vol. XI., pp. 80-82, Nos. 1005-1009, 1015-1018.

**Under compulsory powers.**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 106, Nos. 30-36; p. 118, Nos. 117-123; pp. 136-138, Nos. 226-241, 247, 251; p. 144, Nos. 282-287; p. 149, No. 323; p. 172, Nos. 494-497; p. 283, No. 2118; p. 293, Nos. 2215-2217, 2220, 2222.

that the fee in the soil over which a right of way for a term has been granted, afterwards becomes vested in the grantee of the way, does not operate as a merger of the right of way during the term.—*MCARTHY v. CUNNINGHAM* (1877), 3 V. L. R. 59.—**AUS.**



## Part VII.—Rights of Way.

## SECT. 1.—IN GENERAL.

**566. How arising—By grant—Prescription—Necessity.**—(1) A way cannot be claimed from one part of a man's ground to another.

(2) A stranger may have a way over another's soil three manner of ways, viz. for necessity, by grant, & by prescription (*per cur.*).

(3) The grantee of land shall have all the ways, easements, etc., which the grantor had.

(4) The grant of a house is also a grant of a way to it. By the grant of a house to which there is a way of necessity, without more, the grantee shall have the way as well as if it were specially mentioned in the grant (*per cur.*).—**STAPLE v. HEYDON** (1703), 6 Mod. Rep. 1; 2 Ld. Raym. 922; 3 Salk. 121; 87 E. R. 768.

*Annotations*.—As to (2) **Refd.** *Holmes v. Goring* (1821), 9 Moore, C. P. 166; *Pinnington v. Galland* (1853), 9 Exch. 1; *Wheldon v. Burrows* (1879), 12 Ch. D. 31. *Generally, Mentd.* *Broadbent v. Wilks* (1742), Willes, 360; *R. v. Phillips* (1757), 1 Burr. 292; *Rishton v. Nisbit, Nisbit v. Rishton* (1839), 2 Per. & Dav. 706; *Gwynne v. Burnell* (1840), 6 Bing. N. C. 453.

**567.** ————]—An easement, by implied grant, of communication with a dwelling-house, through land not conveyed therewith, cannot be claimed in virtue of anything short of absolute necessity for the user.

Pltf. claims to have a right of way from the grantor. A right of way can only pass by prescription, grant, or necessity. There is no question here of grant or prescription, & there is no preservation in the deed; & therefore it was argued upon the third point, to the effect that the law implies a right of way of necessity under the circumstances of the case. The question is, whether the domestic uses for which this way may be used makes it a way of necessity. I think that it would be most dangerous to hold that they do. Where a man has used his premises in a certain way for some time, & it can be brought home to the knowledge of the purchaser, the conveyance can be supposed to be made with an intention of reservation, on the part of the grantor, & the land passes subject to such a user. But here there are no such facts (**WILDE, B.**).—**DODD v. BURCHELL** (1862), 1 H. & C. 113; 31 L. J. Ex. 364; 8 Jur. N. S. 1180; 158 E. R. 822.

*Annotation*.—**Refd.** *Hall v. Lumd* (1863), 1 H. & C. 676.

—]—*See Sects. 2, 3, 4, post.*

**568. Course must be constant.**—**ALBAN v. BROUNSALE** (1609), Yelv. 163; 80 E. R. 109.

**569. Where way may exist—Not over part of dominant tenement.**—**STAPLE v. HEYDON**, No. 566, *ante*.

**570.** ————]—**PINCHIN v. LONDON & BLACKWALL RY. CO.**, No. 12, *ante*.

**571.** ————]—**Over structure erected under statutory power—Pier.**—Pltfs., the Improvement Comrs. of the river T., acquired certain lands & constructed a pier under statutory powers, the work being done at intervals between 1854 & 1891. The public were in the habit of using the pier as a promenade & for various purposes of pleasure & recreation, & pltfs. alleged that they never desired nor intended to prevent the public from so using

it as a matter of favour. Finding, however, that a claim as of right was being set up, pltfs., in Dec. 1897, placed barriers across the landward end of the pier, & ordered the pier to be closed for 24 hours. Thereupon the mayor & other officers of the adjoining borough of S., being refused admission broke down the barriers & also certain permanent gates across the pier. Pltfs. now sued them for the trespass. At the same time an action was brought against the comrs. in the name of the A.-G. alleging that the said pier & the several parts thereof had been from time to time dedicated to the use of & accepted by the public as a common & public highway, & had been & were used by the public for the purposes of boating, bathing, fishing, embarking, disembarking, recreation, & other lawful purposes, with power to stray on & off the sands at the side of the pier, & alleging in the alternative, a lost grant to the mayor, aldermen, & burgesses of S., for the benefit of themselves & the inhabitants of S., & claiming a declaration that the public & the inhabitants of S. were entitled to exercise such right of way & such other rights:—**Held**: (1) a right of way could exist over a structure erected under statutory powers; & (2) an owner might dedicate his land for purposes of recreation; but (3) a licence to stray on & off a right of way required such a case to prove it, that it could practically never be proved; & (4) the plea of a lost grant could not be maintained; (5) the various obstructions, erected from time to time by pltfs. with the object of saving their rights had been a sufficient assertion of their rights; (6) pltfs. must be presumed to have dedicated a simple right of way within certain assigned limits.—**TYNE IMPROVEMENT COMRS. v. IMRIE, A.-G. v. TYNE IMPROVEMENT COMRS.** (1899), 81 L. T. 174.

**572. Ownership of soil of way—Apportionment between two owners—Ad medium filum viae.**—The presumption which prevails in the case of a public highway, that the soil *usque ad medium filum viae* belongs to the owner of the adjacent land, prevails also in the case of a private way; provided there be no other evidence of ownership to rebut such presumption.—**HOLMES v. BELLINGHAM** (1859), 7 C. B. N. S. 329; 29 L. J. C. P. 132; 33 L. T. O. S. 239; 23 J. P. 503; 6 Jur. N. S. 534; 141 E. R. 843.

*Annotations*.—**Expld. & Apprvd.** *Smith v. Howden* (1863), 14 C. B. N. S. 398. **Refd.** *Frost v. Richardson* (1910), 103 L. T. 22.

**573.** ————]—A. was possessed of a close the only way to which was along a green lane between two other closes, one of which belonged to A. & the other to B. In the absence of any direct evidence of ownership, the jury were told that they might presume the soil of the lane to belong in moieties to the owners of the adjoining closes, & that, in respect of the close at the end of the land, A. had a mere easement:—**Held**: a proper direction.—**SMITH v. HOWDEN** (1863), 14 C. B. N. S. 398; 2 New Rep. 30; 143 E. R. 500.

**574.** ————]—**Acts of ownership—Must be consistent with exercise of right.**—On a covenant by

## PART VII. SECT. 1.

**566 I. How arising—By grant—Prescription—Necessity.**—A right of way may be created either by grant or custom, or necessity, & it is necessary for a party seeking to establish such right to prove its existence, & that

it is ancient & has been exercised without interruption.—**SAVAIGHAPA VIRBASAPA v. BANYANAPA BASAPA** (1873), 10 Bom. 399.—**IND.**

*g. May exist though not registered.*—There may be rights of way under the Real Property Act, 1861, though such

rights of way do not appear on the register or certificate of title.—**LEAN v. MAURICE** (1871), 8 S. A. L. R. 119.—**AUS.**

*r. Must be definite—Mere proof of right to pass over land not sufficient.*—In a suit for declaration of a right of

**Sect. 1.—In general. Sect. 2: Sub-sect. 1.]**

lessee that there shall be no communication or way across the demised land to a certain other place; *qu.*: whether the mere opening of doors in a wall is a breach, without any user of the communication; but a user across the demised land may be a breach, even although the doors have been opened by a third party.

(1) It is not necessary to show any acts of commission on the part of deft.; if there was a breach of the covenant he is responsible (BYLES, J.).

(2) Though there is a right of way the soil remains in the owner, who may deal with it in any way not inconsistent with the right of way acquired (BYLES, J.).—BOUGNIS v. EDWARDS (1860), 2 F. & F. 111.

**575. ——— Claim of possessory title by grantees.]—**(1) In order to acquire a title to land under Real Property Limitation Act, 1833 (c. 27), it is necessary to prove discontinuance of possession by the true owner or dispossession of the true owner.

(2) When dispossession has to be inferred from equivocal acts, the intention with which the acts are done is all important.

(3) Pltfs., having a right of way for agricultural purposes over a strip of grass land belonging to defts. leading from a public highway to pltfs.' field, put up gates at each end of the strip, which they kept locked, & grazed the grass & clipped the hedges of the strip:—*Held*: these acts, being compatible with the intention of protecting & exercising the right of way rather than that of excluding the true owner, were insufficient to establish pltfs.' title to the strip of land under above Act.—LITLEDALE v. LIVERPOOL COLLEGE, [1900] 1 Ch. 19; 69 L. J. Ch. 87; 81 L. T. 564; 48 W. R. 177; 16 T. L. R. 44, C. A.

*Annotations:—As to (1) Conad. Philpot v. Bath* (1905), 21 T. L. R. 634. *As to (2) Refd. Craven v. Pridmore* (1901), 17 T. L. R. 399.

—*J.—Sec, generally, HIGHWAYS.*

**576. Relation to public ways—Public & private ways distinguished.]—**AUSTIN'S CASE (1672), 1 Vent. 189; 86 E. R. 128.

*See, also, No. 677, post.*

**577. ——— Same way may be public & private.]—**In 1838, the occupier of a field called the Hall Close, took down the old fence & added to the field a strip of land adjoining a public road. In an action for a trespass committed upon the strip of land about a year after it had been taken in, the declaration described the *locus in quo* as the Hall Close:—*Held*: it was properly described.

There may be both an occupation way & a public highway over the same road, for it does not, on becoming a highway, cease to be an occupation way (DENMAN, C.J.).—BROWNLOW v. TOMLINSON (1840), 1 Man. & G. 484; 8 Dowl. 827; 1 Scott, N. R. 426; 133 E. R. 423.

**578. ———.]—**A public bridle road & footway, fifteen feet wide, had been set out by an award which provided that the same should also be used as a private carriage & drift way by the owners of certain adjoining allotments. Pltfs., owners of these allotments, placed a bar across eleven feet of the width of the way in order to preserve their exclusive right to the use of the way as a carriage & drift way, & brought an action for injunction against the surveyor of highways

who had removed the barrier for the purpose of repairing the way:—*Held*: the public had the right to the use of the whole length & breadth of the way as a bridle road & footway.—PULLIN v. DEFFEL (1891), 64 L. T. 134.

**579. ——— Extinction of public right—Private right not affected—Compulsory acquisition.]—**WOOD v. STOURBRIDGE RY. CO., No. 591, *post*.

**580. ———.]—**Pltfs. had been entitled from 1855 to a carriage way to property of theirs over a railway by a level crossing. By an Act of Parliament obtained by the co. in 1875, reciting that it was expedient that the rights of way in respect of certain footways which crossed the railway on the level should be extinguished, it was enacted that all rights of way in, over or affecting the footways numbered 2, 4, 5, 6, & 7 on the deposited plans, should be extinguished. No provision for compensation was made. The roadway in question was numbered 5 on the deposited plans, & was thereon marked "roadway & footway," the others being marked simply "footway":—*Held*: upon the true construction of the Act, it did not interfere with private rights of way, but only with public rights of footway, & an injunction restraining the railway co. from obstructing the way had been rightly granted.—WELLS v. LONDON, TILBURY & SOUTHEAST RY. CO. (1877), 5 Ch. D. 126; 37 L. T. 302; 41 J. P. 452; 25 W. R. 325, C. A.

**581. When claimed as public way—Where doctrine of dedication inapplicable—Established by grant or prescription.]—**(1) In the Channel Islands, where the doctrine of dedication to the public is unknown title to a right of way must be made out by the public as by a private individual, by either grant or prescription. In an action by applt. to have it determined that the public had no right of way over his property:—*Held*: a registered minute of a resolution of the Seigneur & resident tenants of the Island of Sark, where it was situated, which did not duly record a completed transaction of grant, being rather a note of an unaccepted offer, was neither in form nor effect sufficient to create a title in the public.

(2) A grant must be matter of record.—GOWFRAY v. SARK ISLAND (CONSTABLES), [1902] A. C. 534; 71 L. J. P. C. 116; 87 L. T. 3; 18 T. L. R. 671, P. C.

*See, generally, HIGHWAYS.*

**Right to enter on land to lay sewers.]—***See* SEWERS & DRAINS.

**As ancillary to water rights.]—***See* Part IX., Sect. 2, sub-sect. 7, *post*.

**Navigable ways.]—***See* SHIPPING; WATERS & WATERCOURSES.

**Rights of way relating to mines.]—***See* MINES.

**Church ways.]—***See* HIGHWAYS.

**SECT. 2.—EXISTING BY EXPRESS GRANT.****SUB-SECT. 1.—IN GENERAL.**

*See, generally, Part III., Sect. 1, ante.*

**582. Who may grant right of way—Commissioners of partition.]—**Comrs. of partition may award a right of way over the lands of one party to the lands of another party interested in the

way pltf. must prove the particular line over which he claims the right. Mere proof of a right to pass over land without proving the particular route is not sufficient.—BAIHANATH SUGRACHARJI v. DAIDONATH SEAL (1869),

3 B. L. R. App. 118.—IND.

**PART VII. SECT. 2, SUB-SECT. 1.**

**a. Who may grant right of way—Joint tenant—Duration of right.]—**A

grant of a right of way by one joint tenant over land held jointly with another is good & valid against the grantor during his lifetime.—MANSFIELD v. MANSFIELD (1890), 16 V. L. R. 569.—AUS.

partition.—*LISTER v. LISTER* (1839), 3 Y. & C. Ex. 540; 160 E. R. 816.

**583. — Tenant for life—Of settled estates.]—***SUTHERLAND (DOWAGER DUCHESS) v. SUTHERLAND (DUKE)*, No. 99, *ante*.

**584. Reservation out of grant—Operating as re-grant.]—**Case by a reversioner against a railway co., for entering & making a railway on his land. (1) Plea, that, before the reversion of pltf. the dean & chapter of Durham were seised in fee, & by indenture between them & pltf. demised to pltf. the lands in question for a term, "excepting & reserving the mines under the same, with power to dig, & carry away the mines, with free ingress, egress, & regress, way-leave & passage to & from the same, or to or from any other mines, lands, & grounds, on foot & on horseback, & with carts & all manner of carriages, & also all necessary & convenient passages, & powers whatsoever, for the purposes aforesaid, & particularly of laying, making, & granting waggon ways in & over the last-mentioned premises, or any part thereof." The plea then justified the making the railway by depts. as the servants of the dean & chapter, & by their authority. Replication, admitting the seisin in fee of the dean & chapter, & the demise to pltf., & that he had no other title except under such demise, *de injuria*, etc., on which issue was joined.

(2) On the trial, it appeared that the railway co. had made a double line of railway on pltf.'s land, under a deed executed by the dean & chapter, authorising the co. to make such a railway for the conveyance of passengers, coals, goods, wares & merchandise. The railway was constructed for the purpose of conveying general goods & passengers as well as coals, but had not been actually so used, & the railway was not more than was necessary for the carriage of the coals likely to be sent along it from the part of the county with which it communicated:—*Held*: if the railway was such a railway as the co., at the time when it was made, might lawfully make for the purposes for which, when made, they might lawfully use it, the pltf., as reversioner, had no ground of complaint by reason of the intention of the co. to use it also for other purposes for which they had no right to use it.

(3) The proper question for the jury was, not whether the railway was made for other purposes as well as for the carriage of coals & minerals, but whether, at the time when the road was made, it had become necessary or expedient for the co. to make a road for the purpose of getting the excepted mines, & if so, whether the road actually made was a proper road for that purpose, assuming that it would be used for no other object. (4) The only right reserved to the dean & chapter under the above clause in the indenture of demise by them to pltf. was that of making & granting the right of making ways over the demised lands for the purpose of getting the excepted woods, mines & minerals. (5) The right possessed by the dean & chapter under the clause as lessors, was not the subject of an exception, as it was no parcel of the thing granted; nor of a reservation, as it did not issue out of the thing granted; but it was an easement newly created by way of grant from the lessee. It was to be presumed that the deed was executed by both parties, lessee as well as lessors.

(6) A right of way cannot in strictness be made the subject either of exception or reservation. It is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, & the latter to a reservation. A right of way reserved to a lessor is, in

strictness of law, an easement newly created by way of grant from the grantee or lessee.—*DURHAM & SUNDERLAND RY. CO. v. WALKER* (1842), 2 Q. B. 940; 3 Ry. & Can. Cas. 36; 2 Gal. & Dav. 326; 114 E. R. 304; *sub nom.* *WALLIS v. HARRISON*, *DURHAM & SUNDERLAND RY. CO. v. WALKER*, 11 L. J. Ex. 440, Ex. Ch.

*Annotations*:—*As to* (4) *Consd.* *Hamilton v. Graham* (1871), L. R. 2 Sc. & Div. 166. *Refd.* *Midgely v. Richardson* (1845), 14 M. & W. 595. *As to* (6) *Refd.* *Hamilton v. Graham* (1871), L. R. 2 Sc. & Div. 166. *Generally, Mentd.* *Wallis v. Harrison* (1842), 3 Ry. & Can. Cas. 63, n.; *Bowes v. Ravensworth* (1855), 15 C. B. 512.

**585. — Must be specific.]—**Trespass for breaking & entering a close called the Hencroft. Plea, that C. being owner in fee of the said close granted to H., by indenture, a way over the said close for the occupiers of a certain dye-house, & that deft. being in the occupation of the dye-house committed the said trespasses. Pltf. cravedoyer of the indenture, & set it out in his replication. By the indenture C. granted, bargained, etc. to H. all those newly erected buildings standing & being partly on the said close called the Hencroft, & partly on B., together with all & singular out-houses, edifices, buildings, roads, ways, etc., & appurtenances with the said premises usually held, occupied, or enjoyed; the said C. reserving to himself exclusively the said Hencroft, with the rights, privileges, & appurtenances within & to the same belonging:—*Held*: (1) the plea was bad in omitting to aver that the way had been usually held, occupied, or enjoyed with the Hencroft. (2) No right of way was granted by C. over the Hencroft.—*TATTON v. HAMMERSLEY* (1849), 3 Exch. 279; 18 L. J. Ex. 162; 12 L. T. O. S. 354; 154 E. R. 848.

**586. — Indefinite as to time of operation.]—**In 1889 deft. conveyed to pltf.'s predecessors in title a strip of land for a tramway, the deed containing a reservation by the vendors of the right to cross the line at two points to be selected by them, & a covenant by the purchasers to "make & provide" crossings at the point selected by the vendor on notice being given. In 1892 defts. gave notice of one point selected, & from that date crossed the line there from time to time, but no crossing was ever constructed. In 1910 pltf. obstructed the crossing, sought to restrain deft. from using it:—*Held*: the reservation was void as breaking the rule against perpetuities, but that the covenant contained an implied personal obligation not to interfere with deft.'s crossing, which obligation became fixed & attached to the land as soon as the point was selected, & pltf. had notice thereof, & was bound thereby.—*SHAPE v. DURRANT* (1911), 55 Sol. Jo. 423; *affd.*, [1911] W. N. 158, C. A.

**587. Grantor cannot derogate from grant—Right of way by demise—Effect of subsequent demise.]—**In case for obstructing a right of way, pltf. proved an interrupted user for seventeen years. Deft. claimed a right to the soil under a subsequent demise, containing a covenant that the lessee should contribute a rateable proportion of the expense of repairing the fences, paths, ways, etc., used in common with the occupiers of other premises, near or adjoining thereto, belonging to the lessor. It appeared that the passage over which pltf. claimed a right of way was the only one to which this covenant could apply:—*Held*: the right of way in pltf. was not inconsistent with the demise to deft.—*OAKLEY v. ADAMSON* (1831), 8 Bing. 356; 1 Moo. & S. 510; 131 E. R. 431.

**588. — — — — —.]—**Where pltf. derived title to the *locus in quo* under a lease from the owners, within the last twenty years, without any

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reservation of a right of way, & deft. had within that time occupied part of the *locus*, & taken adjoining premises by a subsequent lease from the original lessors:—*Held*: he could not set up a right of way over the land by user, or of necessity.

The lease to the *pltf.* was prior to the conveyance to deft. & the lessors could not derogate from their own grant (COCKBURN, C.J.).—WALTER v. WILLIAMS (1861), 2 F. & F. 423, N. P.

—*See, generally, Part III., Sect. 2, sub-sect. 1, C., ante.*

**Grant out of land compulsorily acquired.]—See** COMPULSORY PURCHASE OF LAND, Vol. XI., p. 121, No. 139.

**Who may enjoy—Limitation of user.]—See** Sect. 6, sub-sect. 3, B. (a), *post*.

#### SUB-SECT. 2.—FORM OF GRANT.

*See, generally, Part III., Sect. 1, sub-sect. 5, ante.*

#### SUB-SECT. 3.—RIGHT EXISTING IN FUTURO.

**589. Proposed or intended way—At date of grant—Way completed before deed executed.]—**A covenant for “the free use of the newly intended road whenever the same may be made” will not apply to a road which, when the parties contracted, was newly intended to be made, but was executed & complete before the sealing of the covenant.—CRISP v. PRICE (1814), 5 Taunt. 548; 128 E. R. 804.

**590. ——— Width of way narrowed.]—**Lease of a parcel of building ground described the premises as abutting on “an intended way of thirty feet wide,” which was not then set out. Lessee underlets the premises, & describes them as abutting on “an intended way,” without mentioning the width. The soil of the intended way, together with the adjacent land on the other side, is afterwards sold by the owner to another person, who narrows the intended way to the extent of three feet, by building a wall thereon:—*Held*: the tenant of a house built by the under-lessee was entitled only to a way of necessity & convenience, & such being left him, he could not maintain case for the alleged encroachment.

The declaration of an intention cannot be construed as an implied grant. Then does the under-lease carry the case any further? I apprehend not. That lease describes the premises in question with abutments, “together with all ways thereunto appertaining.” Now under these words the right of way in question would not pass, it being over the soil of the original lessor. I agree they would give a way *ex necessitate* as far as the convenient enjoyment of the premises demised are concerned, but no further (HOLROYD, J.).—HARDING v. WILSON (1823), 2 B. & C. 96; 3 Dow. & Ry. K. B. 287; 1 L. J. O. S. K. B. 238; 107 E. R. 319.

*Annotations.—Consd.* Espley v. Wilkes (1872), L. R. 7 Exch. 298; Bolton v. Bolton (1879), 11 Ch. D. 968; Furness Ry. v. Cumberland Co-op. Bldg. Soc. (1884), 52 L. T. 144. *Reid.* Clifford v. Hoare (1874), 30 L. T. 465.

**591. ———.]—**(1) P., the owner in fee of an estate called L. estate, having sunk a shaft for working coals thereunder, staked & set out a road across L. from a public highway on the west to the colliery, & to the east to another public highway. The road from the west to the colliery being formed, but the remainder to the east

being only staked out, P. in 1832 agreed with one A. for the sale to him of a piece of land which was described in the conveyance (not executed until Dec. 1, 1840) as being “bounded on the north by the road leading to the said P.’s colliery,” “together with the free use & enjoyment by A., his heirs, appointees, tenants, & assigns, of the above mentioned road leading to the said colliery at all times & on all occasions, he & they contributing a proportionate part of the expense of keeping such road in repair.” In 1846, A. conveyed this piece of land, together with the right of way, to *ptfs.*:—*Held*: the deed of 1840 conveyed to A. & his assigns the right to use the road across the L. estate to the east as well as to the west, though part of it was only staked out at the time of sale.

(2) In 1858 *ptfs.* purchased from B. a piece of land, abutting upon the land conveyed to A. by the deed of Dec. 1, 1840, which was described in the conveyance as “adjoining at one end thereof to a certain road or highway leading from C. to R.” At the time of this purchase, the only mode of access to this piece of land was by means of an opening at the west corner upon the road described in the conveyance. By an Act for the formation of the S. railway, a new road was directed to be made in lieu of a portion of the old road numbered 4 on the plan deposited under the standing orders, & that so much of the road numbered 22 thereon as should lie between the point at which such new road terminated & the point where the road numbered 4 met the road numbered 22, should cease to be used as a public highway, “without prejudice to the existing rights of the owners & occupiers of adjoining lands at all times thereafter to use the same for all purposes”:—*Held*: this reserved to *ptfs.* right of way to the whole of their premises over that part of the road numbered 22 which lay between the new road & the point where the road numbered 4 met it.—WOOD v. STOURBRIDGE RY. CO. (1864), 16 C. B. N. S. 222; 143 E. R. 1111.

**592. ———.]—**ESPLEY v. WILKES, No. 651, *post*.

**593. ——— Route to be selected—Effect of selection—Interest in land.]—**SHARPE v. DURRANT, No. 586, *ante*.

**594. Future interest in land—Way in respect of.]—**RYMER v. MCILROY, No. 105, *ante*.

**595. Way undefined—No user—Extinguishment of right.]—**METROPOLITAN RY. CO. v. GREAT WESTERN RY. CO. & LONDON CORPN., No. 599, *post*.

**596. Time indefinite—Rule against perpetuities.]—**SHARPE v. DURRANT, No. 586, *ante*.

#### SUB-SECT. 4.—UNDEFINED WAY.

**597. Choice of route by grantee—Grant by statute.]—**A canal Act empowered the proprietor of a mineral district, lying within a prescribed distance, to make roads & railways over the lands of other persons from his mines to the canal:—*Held*: not to restrict him to the shortest practicable route, but to empower him to adopt any more circuitous route, which, in his judgment, he might deem expedient, provided he joined the canal at a point within the distance prescribed by the Act.—RICHARDS v. RICHARDS (1859), John. 255; 23 J. P. 726; 70 E. R. 419.

**598. Choice of route in grantor—Estoppel by defining route.]—**By lease, dated in 1862, the S. E. Ry. co. demised to *pltf.*, for 21 years, the space under & within one of the arches supporting

C. station, together with a right of way for him, his servants, agents & customers, with or without carts & carriages, from the said arch into V. street. At the time of the lease, & for eight years after, the only way by which pltf. could get to V. street was by passing over an open space lying in front of pltf.'s arch & the adjoining arches, in a northerly direction, in front of two arches occupied by G., & then turning east into V. street. Pltf. used this way exclusively till 1880. In that year the co. made a way into V. street, a little to the south of pltf.'s arch; after this pltf.'s carts occasionally used this new way, but more generally continued to use the old one. In 1882 the co. put a fence across the open space barring the old way used by pltf., but they made gates in this fence & gave pltf. keys. Pltf. continued till 1888 to use the old way through the fence by means of these gates. The right of way granted was in no way defined in the lease or the plan thereon & had never been paved, set out, or otherwise defined on the land. In Dec. 1888, the co. put new locks on the gates, & claimed to prevent pltf. passing through, & to confine him to the way made in 1880:—*Held*: the right of way granted by the lease being undefined by the deed, the right to define the line it should take was vested in the co. as the grantor, but that the co. by their action in putting up the gates & giving pltf. keys, had defined the way & could not afterwards alter it, & that the injunction must be granted.—*DEACON v. SOUTH EASTERN RY. CO.* (1889), 61 L. T. 377.

**599. No user—Right extinguished.**—In 1862 the Corp'n. of the City of London, in pursuance of powers conferred on them by the Metropolitan Meat & Poultry Act, 1860 (c. xciii.), entered into an agreement with pltf. & deft. cos. by which the cos. agreed to construct a railway station for goods traffic only beneath the site of S. market.

In 1878 the corp'n., with the privy of deft. co., leased to pltf. co. the northern part of the land, on which the railway station had been built, for 100 years, together with a right of way from time to time & at all times over the southern part of the land, which was leased by the corp'n. to deft. co., through a circular road. The way was not definitely described, & it was never in fact used by pltf. co.:—*Held*: until pltf. co. used the demised premises as a goods station in accordance with the provisions of the Act of 1860, their right of way did not arise; & the claim to the right of way was so undefined & unlimited that it could not be maintained.—*METROPOLITAN RY. CO. v. GREAT WESTERN RY. CO. & LONDON CORPN.* (1901), 84 L. T. 333; 45 Sol. Jo. 238, C. A.

**600. Route to be selected—Effect of selection—On right to obstruct way.**—*SHARPE v. DURRANT*, No. 586, *ante*.

**Determination of way of necessity.**—*See* Sect. 3, sub-sect. 2, D., *post*.

**Prescriptive right to undefined tracks.**—*See* No. 665, *post*.

#### SUB-SECT. 5.—CONSTRUCTION OF GRANT.

*See, generally*, Part III., Sect. 1, sub-sect. 6, *ante*; & *DEEDS*, Vol. XVII., Part III., pp. 242–389.

#### PART VII. SECT. 2. SUB-SECT. 5.

**1. Sale of land in lots—Plan showing ways—Access to public roads.**—Where land had been subdivided into lots & such lots have been sold & transferred according to a general plan of subdivision in which the roads for the different lots are laid down, the owner of each lot may use all such

roads as are reasonably necessary for convenient access to, & egress from, the public roads of the district.—*OHLESON'S CAPE BREWERIES, LTD. v. WHITEHEAD* (1892), 9 S. C. 84.—*S. AF. a.* —[Where land has been subdivided into lots, & such lots have been sold & transferred, & in the general plans the subdivisions

& the different roads are laid down, the owner of each lot may use all such roads as may be reasonably necessary for convenient access to & egress from a public road.—*ROSS v. HITE'S EX-CUTOR* (1899), 16 S. C. 139.—*S. AF.*

**b. Division of property by sale.**—B., owning land in fee, conveyed part of it, on which were two houses, to

**601. Identification of way—Admissibility of evidence.**—In an action for obstructing a way granted by a lease from deft. to pltf., the judge will receive evidence of the state of the premises at the time of granting the lease, & will then put a construction on the lease as to the line along which the way granted is; but he will not receive evidence of the declarations or acts of the parties, either before or after the lease, as showing where the way is, or was intended to be; but if it be uncertain on the words of the grant which of two ways is intended, the judge will receive parol evidence to show which of the two the grantor meant to grant.

If a way granted by a lease cannot be used, by reason of its passing over the land of third persons, & there is no other way to the lessee's house, he is entitled to a way of necessity to the nearest public highway, by the shortest line, across the grantor's land. The grantee of a private way is the person to make it.

*Qu.*: whether a lessee of building ground is entitled to a way of necessity for carriages to go to the houses when built?

I do not say that a carriage way is a way of necessity to a house when built, though it may be while the house is building, as the materials would have to be carried (*PARKE, B.*).—*OSBORN v. WISE* (1837), 7 C. & P. 761, N. P.

*Annotation*:—*Reid. Pheysey v. Vicary* (1817), 16 M. & W. 484.

**602. Extent of user of way—Stipulated width.**—*CLIFFORD v. HOARE*, No. 783, *post*.

**603.** —[—].—*NICOL v. BEAUMONT*, No. 701, *post*.

**604.** —[—].—*STRICK (F. C.) & CO., LTD. v. CITY OFFICES CO., LTD.*, No. 700, *post*.

**605. Sale of land in lots—Plan showing ways.**—Upon a sale by auction of a large parcel of land, in sixty lots, the particulars & conditions of sale referred to a plan on which several roads were marked out so as to provide frontages for all the lots, but there was no intention that any lot was to have rights of way beyond the road adjoining it & directly leading into the public highway. In a suit by a purchaser of two lots for specific performance, the questions arose as to what rights of way he was entitled to have conveyed to him:—*Held*: the ct. could only act on the footing of the contract, & the purchaser could only claim a right of way over the road adjoining the lots, & directly thence into the public highway.—*RANDALL v. HALL* (1851), 4 De G. & Sm. 343; 64 E. R. 861.

**606. Division of property by devise—Access to well & pump.**—*POLDEN v. BASTARD*, No. 60, *ante*.

**607. Agreement to divide property—Common right of way.**—By an agreement for the distribution of an estate left to pltf., deft. & another, it was agreed that the freehold house & premises known as B. should forthwith be conveyed to pltf., & that the freehold house & premises known as S. should forthwith be conveyed to deft. These were adjoining houses, & the back of B. could only be approached by a private road at the side of & forming part of S., by which also the back of S. was approached. This way had in fact been used by the tenants of both houses since the houses

**Sect. 2.—Existing by express grant: Sub-sect. 5.**  
**Sect. 3: Sub-sects. 1 & 2, A. & B.]**

were built:—*Held*: pltf. was entitled to a conveyance of B. together with the ways, rights & appurtenances to the premises belonging & therefore a roadway over a portion of S. for the apparent use of B. would pass to pltf.—*NICHOLLS v. NICHOLLS* (1899), 81 L. T. 811.

*See, also*, No. 249, *ante*.

**Effect of general words.]—See Part III., Sect. 1, sub-sect. 6, B., *ante*.**

**Effect of Conveyancing Act, 1881.]—See Part III., Sect. 1, sub-sect. 6, C., *ante*.**

**Ways of necessity.]—See Sect. 3, sub-sect. 2, *post*.**

### SECT. 3.—ARISING BY IMPLICATION OF LAW.

#### SUB-SECT. 1.—IN GENERAL.

*See, generally*, Part III., Sect. 2, sub-sect. 1, A., *ante*.

#### SUB-SECT. 2.—WAYS OF NECESSITY.

##### A. In General.

**608. Nature of right—Necessity—Not convenience.]—DODD v. BURCHELL**, No. 567, *ante*.

**609. ———.]—LONDON CORPN. v. RIGGS**, No. 627, *post*.

deft., by deed, etc. A lane then existed over B.'s land, & was used as a means of access to the two houses. Pltf. claimed title under B. by a subsequent conveyance:—*Held*: the right to use the way passed by the deed to deft.—*ADAMS v. LOUGHMAN* (1876), 39 U. C. R. 247.—*CAN.*

#### PART VII. SECT. 3, SUB-SECT. 2.—A.

**608 i. Nature of right—Necessity—Not convenience.]—A way of necessity is founded on necessity, not on convenience, & the foundation of the right is the fact that the lands conveyed are physically inaccessible except by passing over other lands.**—*PITCHETT v. MELLOW* (1898), 29 O. R. 6.—*CAN.*

**608 ii. ———.]—HUDDLESTONE v. LOVE** (1901), 13 Man. L. R. 432.—*CAN.*

**608 iii. ———.]—The question whether grantees of land thereby acquire a right to use a pathway over other land of the grantor is one that must be determined by the necessity of the way claimed, & not by its convenience or its effect in enhancing the value of the land granted.**—*FULLERTON v. RANDALL* (1919), 52 N. S. R. 354; 44 D. L. R. 356.—*CAN.*

**608 iv. ———.]—In an suit for an injunction to restrain deft. from using a path on pltf.'s land:—*Held*: the use of the path was absolutely necessary to the enjoyment of deft.'s tenement, & there was an easement of necessity.**—*CHABU SURNOKAR v. DOKOURI CHUNDER THAKOOR* (1882), 1 L. R. 8 Calc. 956; 10 C. L. R. 577.—*IND.*

**608 v. ———.]—If A. has a means of access to his property without going over B.'s land, A. cannot claim a right of way over B.'s land on the ground that it is the most convenient means of access.**—*KRISHNAMARAZU v. MARRAJU* (1905), 1 L. R. 28 Mad. 495.—*IND.*

**608 vi. ———.]—An easement of necessity is an easement without which a property cannot be used at all, & not one merely necessary to**

the reasonable enjoyment of the property.—*SUKHDEI v. KEDAR NATH* (1911), 1 L. R. 33 All. 467.—*IND.*

**608 vii. ———.]—A lease demised certain premises, "with the rights, members, & appurtenances thereunto belonging or in anywise appertaining." Evidence was given of the enjoyment of a right of way, by the occupiers of the demised premises, over the premises of the lessor, under whom defts. claimed, for more than forty years before action brought; & that the right of way in question was essential to the enjoyment of the demised premises:—*Held*: the right of way being essential to the beneficial enjoyment of the demised premises, passed under the word appurtenances.**—*KAVANAUGH v. COAL MINING CO. OF IRELAND* (1861), 14 I. C. L. R. 82.—*IR.*

**608 viii. ———.]—As between a lessor & lessee, the proper question to be left to a jury, as to the right to a way of necessity, is whether the easement was, at the time of granting the lease, necessary for the fair & reasonable enjoyment of the demised premises.**—*GERAGHTY v. MCCANN* (1872), 1 I. R. 6 C. L. 411.—*IR.*

**608 ix. ———.]—In an action for a declaration of a right of road, the evidence showed that pltf. had access to & egress from his farm by another practicable but much more circuitous road:—*Held*: pltf. was not entitled to have it declared that the road was a road of necessity.**—*VAN SCHALKWIJK v. DU PLESSIS* (1900), 17 S. C. 454.—*S. AF.*

**611 i. What is a way of necessity—No other access to land.]—A way of necessity over lands of a grantor cannot be claimed where the grantee has any other way of access to his land.**

*Qu.*: whether a way of necessity can arise where the lands of the grantee are not land-locked by those of the grantor.—*MCLENNON v. CONNOR* (1907), 9 W. A. L. R. 141.—*AUS.*

**611 ii. ———.]—TURNBULL v. MERRIAM** (1856), 14 U. C. R. 265.—*CAN.*

**610. ——— Exception to rule against derogation from grant.]—LONDON CORPN. v. RIGGS**, No. 627, *post*.

**611. What is a way of necessity—No other access to land.]—CHICHESTER v. LETHBRIDGE**, No. 658, *post*.

**612. ———.]—OSBORN v. WISE**, No. 601, *ante*.

**613. ——— Carriage way.]—OSBORN v. WISE**, No. 601, *ante*.

**614. ——— Wrongful stoppage of existing way—Creation of new way.]—A., the owner of a close situate within a close belonging to B., had a prescriptive right of way through B.'s to his own; 24 years ago B. stopped up the old way, & made a new way which was used ever since, but lately B. stopped up the new way. In an action brought by B. against A. for going over the new way:—*Held*: A. could not justify using this way as a way of necessity, but he should either have gone the old way & thrown down the inclosure, or brought an action against B. for stopping up the old way. The new way was only a way by sufferance during the pleasure of both parties; & B. by stopping it up determined his pleasure.**—*REIGNOLDS v. EDWARDS* (1741), Willes, 282; 125 E. R. 1173.

*Annotation*:—*Refd.* Grand Surrey Canal Co. v. Hall (1840), 9 L. J. C. P. 329.

**615. ——— Land bounded by public highway.]—TITCHMARSH v. ROYSTON WATER CO., LTD.**, No. 188, *ante*.

**611 iii. ———.]—RATCHFORD v. KINNEAR** (1858), 2 Thom. 407.—*CAN.*

**611 iv. ———.]—The mere fact that a person will suffer considerable inconvenience if he be not allowed to use a certain road is not sufficient to constitute such road a way of necessity; but relief will be given if the only alternative route is practically impossible.**—*VAN SCHALKWIJK v. DU PLESSIS* (1900), 17 S. C. 454.—*S. AF.*

**611 v. ———.]—In an application in which appets. claimed as a way of necessity a road over resp.'s ground to enable them to have direct access from the respective dwellings to the nearest railway station, it appeared that appets. could obtain access to the station by another practicable but slightly more circuitous route, a road running along the portion of their land furthest away from their dwellings:—*Held*: the fact that the road claimed was a more convenient one did not entitle appets. to claim it as a way of necessity having regard to the other practicable road open to them.**—*CARTER v. DREMEYER* (1913), 34 N. L. R. 1.—*S. AF.*

**611 vi. ———.]—In a claim for a way of necessity the claimant must show that he has no reasonable sufficient access to the public road for himself & his servants to enable him, if he is a farmer, to carry on his farming operations. If he has an alternative route to the one claimed which runs over one or more intervening properties, although such route may be less convenient & involve a long journey, so long as the alternative route gives him reasonable access to a public road, he must be content, & cannot insist on a more direct approach over his neighbour's property.**—*LENTZ v. MULLIN*, [1921] E. D. L. 268.—*S. AF.*

**615 i. ——— Land bounded by public highway.]—There is no implied grant of a way of necessity over lands adjoining when the land granted is bounded by a public road, even though the said road may lead nowhere.**—*RIDDFORD v. FOREMAN* (1910), 29 N. Z. L. R. 781.—*N.Z.*



**616. When right implied.]**—GORDON v. OGILVIE, No. 206, *ante*.

**617. How pleaded.]**—A person who prescribes in a que estate for a private way, cannot justify going out of it on the adjoining land, because the way is impassable. A way of necessity cannot be pleaded generally, without showing the manner in which the land, over which the way is claimed, is charged with it.—BULLARD v. HARRISON (1815), 4 M. & S. 387; 105 E. R. 877.

*Annotation* :—*Mentid*. Russell v. Shenton (1842), 3 Q. B. 449.

#### B. When Right arises.

**618. General rule.—Title by grant.—Express or implied.]**—PROCTOR v. HODGSON, No. 293, *ante*.

**619. — Personal or statutory.]**—The parties have admitted, though upon what facts or what view of the law we do not know, that deft. has acquired a title in fee simple in possession, under the Statutes of Limitation, to the two plots of land. The one point argued before us has been whether, assuming the premises to have passed to deft. by virtue of Stat. Limitations, a right of

way over this approach inevitably came into existence over pltf.'s remaining land as a way of necessity & as distinct from any other way. There is nothing in Stat. Limitations to create ways of necessity. The statute does not expressly convey any title to the possessor. Its provisions are negative only. We cannot import into such negative provisions doctrines of implication that would naturally arise where title is created either by express grant or by statutory enactment. The doctrine of a way of necessity is only applied to a title by grant, personal or Parliamentary. Upon the hypotheses we are obliged to assume the title to the right of way can only be maintained if the statute gives it, which statute, however, does not apply to a right of way. It is not contended that the statutory enactment as to easements applies. We are therefore, unable to agree with the learned judge below (*per Cur.*)—WILKES v. GREENWAY (1890), 6 T. L. R. 449, C. A.

**620. Implied grant.]**—CLARK v. COGHE, No. 232, *ante*.

**616 i. When right implied.]**—Upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law; easements not continuous or apparent, but used from time to time only, will not. A right of way is not such a continuous easement as to pass by implication of law with a grant of the land; only a way of necessity will so pass.—HARRIS v. SMITH (1876), 40 U. C. R. 33.—CAN.

**616 ii. —.]**—C. conveyed to I. L. fifty acres of land & also a strip twenty feet wide, to the south, to give access from the fifty acres to the town line. I. L. mortgaged to C. the fifty acres, but not the twenty feet strip, & then conveyed the strip to N. Afterwards I. L. conveyed the fifty acres to his son, subject to C.'s mtgo., & on the same day gave him the occupation, under an agreement for sale, of the adjoining fifty acres to the west. The son mtgd. to pltf. the fifty acres conveyed to him. During the possession of I. L. & his son they got access from the east fifty acres to the side line through the west fifty acres owned by I. L. The agreement for sale of the west fifty acres to the son having been cancelled, & I. L. having refused to allow a tenant of his son of the east fifty acres access to the side line through the west fifty acres, pltf. brought this action against R., C., & N.:—*Held*: pltf. was entitled to a declaration of the existence of a way of necessity through the west fifty acres, which was given by way of implied grant when I. L. conveyed to his son.—LUPTON v. RANKIN (1889), 17 O. R. 599.—CAN.

**616 iii. —.]**—If at the time a landlord lays out a farm for letting there is a usual & manifest way of access from it to the high road through other lands of the landlord, & if he demises the farm with the appurtenances & all easements usually enjoyed with it, the way will pass, even under a parol demise from year to year, although the way was not a strictly legal way of necessity, but a way the use of which was essential to the convenient use of the farm.—CLANCY v. BYRNE (1877), 1. R. 11 C. L. 355.—IR.

**616 iv. —.]**—Where part of an estate was sold to a tenant as agent for the purchaser, & the only practicable means of access to such part was a strip of land which to all outward appearances was, & was believed by the vendor & such agent to be, a public road, & had always been used as the only road to the part of the land sold, & such strip of land turns out to be the property of the vendor, the road is in the nature of a continuous & apparent

quasi-easement, & the contract for sale would include in it by implication a contract to grant a right of way over the strip of land in question.—*DRIVER v. OTAGO & SOUTHLAND INVESTMENT CO.* (1903), 23 N. Z. L. R. 111.—N.Z.

**c. Necessity must be clearly proved.]**—LONDON & S. A. EXPLORATION CO. v. BULTFOUNTAIN MINING CO. (1890), 8 S. C. 55.—S. AF.

#### PART VII. SECT. 3, SUB-SECT. 2.—B.

**618 i. General rule.—Title by grant.—Express or implied.]**—If, at the time a landlord lays out a farm for letting, there is a usual & manifest way of access from it to the high road through other lands of the landlord, & if he demises the farm with the appurtenances & all easements, etc., usually enjoyed with it, the way will pass, even under a parol demise from year to year, although the way was not a strictly legal way of necessity, but a way the use of which was essential to the convenient use of the farm.—CLANCY v. BYRNE (1877), 1. R. 11 C. L. 355.—IR.

**618 ii. —.]**—A proprietor of a piece of land has no right to access thereto over the lands of his neighbour merely because he has no other means of access.—*MENZIES v. BREADALBANE* (No. 2) (1901), 4 F. (Ct. of Sess.) 59.—SCOT.

**620 i. Implied grant.]**—B. & W. becoming entitled in 1830, as tenants in common, to a hundred acres of land, made a partition thereof by agreement, whereby fifty acres were allotted to each in severalty. The fifty acres allotted to B. were land locked, & there was no way out to the highway, except over the fifty acres of W., over which accordingly B. was allowed by W. to pass at will. B.'s parcel subsequently became vested in pltf. under conveyances granting not only the land, but also all ways, etc., therewith used & enjoyed. The right of way had been used by pltf. & his predecessors in title for over thirty years:—*Held*: it was not necessary for him to show any express grant of the right of way by deft., or his predecessors in title.—*DIXON v. CROSS* (1884), 4 O. L. 465.—CAN.

**620 ii. —.]**—Pltf. was the owner of a farm about two-thirds of which was heavily wooded, & the rest cleared & cultivated. Deft. became the purchaser of the trees & timber upon the land under an agreement which provided, among other things, that the purchaser should have "full liberty to enter into & upon the lands for the purpose of removing the trees & timber

at such times & in such manner as he may think proper," but reserved to pltf. the full enjoyment of the land "save & in so far as may be necessary for the cutting & removing of the trees & timber." To have removed the timber through the wooded land at the time it was removed would have involved an expenditure which would have possibly amounted to a sacrifice of the greater portion of the timber:—*Held*: defts. had a right to remove the timber by the most direct & available route, provided they acted in good faith & not unreasonably, & the reservation in favour of pltf. did not minimise or modify deft.'s right, under the general grant of the trees, to remove the trees across the cleared land.—*STEPHENS v. GORDON* (1893), 22 S. C. R. 61.—CAN.

**620 iii. —.]**—K. owned lands over which he had for years utilised a roadway for convenient purposes. After his death deft. became owner of the middle portion, the parcels at either end passing to pltf., who continued to use the old roadway, as a winter road, for hauling fuel from his wood-lot to his residence, at the other end of the property. Though the three parcels fronted upon a public highway, this was the only practical means pltf. had for the hauling of his winter fuel, owing to a dangerous hill that prevented him getting it off the wood-lot to the highway. There was not any formed road across the lands, but merely a track upon the snow during the winter months, & the way was not used at any other season of the year:—*Held*: the circumstances in which the roadway had been used did not supply sufficient reason to infer that the way was an easement of necessity appurtenant or appendant to the lands formerly held in unity of possession, which would without special grant pass by implication, upon the severance of the tenements.—*KNOCK v. KNOCK* (1897), 27 S. C. R. 664.—CAN.

**620 iv. —.]**—In a suit for an injunction to restrain deft. from using a path on pltf.'s land:—*Held*: the use of the path, though not absolutely necessary to the enjoyment of deft.'s tenement, was necessary for its enjoyment in the state in which it was at the time of severance; & as the easement was apparent & continuous, there was a presumption that it passed with deft.'s tenement.—*CHARU BURNOKAR v. DOKOTRI CHUNDER THAKOOR* (1882), 1. L. R. 8 Cal. 956; 10 C. L. R. 577.—IND.

**620 v. —.]**—Where A. sold a portion of a property & there was an existing access to it through another portion

*Sect. 3.—Arising by implication of law: Sub-sect. 2, B., C. & D.]*

**621.** —[—]—*OLDFIELD'S CASE* (1608), Noy, 123; 74 E. R. 1087.

**622.** —[—]—(1) Where one as a trustee conveys land to another, to which there is no access but over the trustee's land, a right of way passes of necessity, as incidental to the grant.

(2) If the owner of two closes, having no way to one of them but over the other, part with the latter without reserving the way, it will be reserved to him by operation of law.—*HOWTON v. FREARSON* (1798), 8 Term Rep. 50; 101 E. R. 1261.

*Annotations:—As to (2) Refd. Holmes v. Goring* (1821), 9 Moore, C. P. 166; *Pinnington v. Galland* (1853), 1 C. L. R. 819.

—[—]—*See, generally, Part III., Sect. 2, sub-sect. 1, C., ante.*

**623. Implied reservation.**—[—]—*DUTTON v. TAYLER* (1700), 2 Lut. 1487; 125 E. R. 819.

*Annotations:—Consd. Howton v. Frearson* (1798), 8 Term Rep. 50. *Refd. Holmes v. Goring* (1821), 9 Moore, C. P. 166; *Pinnington v. Galland* (1853), 9 Exch. 1; *Proctor v. Hodgson* (1855), 10 Exch. 824; *Wheeldon v. Burrows* (1879), 12 Ch. D. 31.

**624.** —[—]—*HOWTON v. FREARSON*, No. 622, *ante.*

**625.** —[—]—*PINNINGTON v. GALLAND*, No. 165, *ante.*

**626.** —[—]—On the sale of land to a purchaser, who has notice that the adjoining land is to be laid out in building in a manner which will make a right of way over the purchased land necessary to the vendor, such right of way is reserved to the vendor by implication as a way of necessity.—*DAVIES v. SEAR* (1809), L. R. 7 Eq. 427; 38 L. J. Ch. 545; 20 L. T. 56; 17 W. R. 390.

*Annotations:—Consd. Wheeldon v. Burrows* (1879), 12 Ch. D. 31. *Refd. Allen v. Seckham* (1879), 11 Ch. D. 790.

**627. —Operating as re-grant.**—[—]Where the owner of a close surrounded by his own land grants the land & reserves the close, the implied right to a way of necessity to & from the close over the land operates by way of re-grant from the grantee of the land, & is limited by the necessity which created it. This re-grant, however, does not create a right to a way of necessity for all purposes for which the close may at any time be used, but only such a right of way as will enable the owner of the close to enjoy it as in the condition it happened to be at the time of the re-grant. For instance, if at the time of the re-grant the close was agricultural land, the owner of the close can only claim such a right of way as is suitable to the enjoyment of land in that condition; he cannot claim a right of way suitable to the user of the close as building land.

(2) *Semble*: the same rule applies if the grant is of the landlocked close with an implied grant of a way of necessity over the surrounding land.

(3) It seems to me to have been laid down in

very early times . . . that the right to a way of necessity is an exception to the ordinary rule that a man shall not derogate from his own grant (*JESSEL, M.R.*).—*LONDON CORPN. v. RIGGS* (1880), 13 Ch. D. 798; 49 L. J. Ch. 297; 42 L. T. 580; 44 J. P. 345; 28 W. R. 610.

*Annotations:—As to (1) Apud. Mid. Ry. v. Miles* (1886), 33 Ch. D. 632. *Refd. Serff v. Acton L. B.* (1886), 55 L. J. Ch. 569; *Taff Vale Ry. v. Cardiff Lty.*, [1917] 1 Ch. 299. *Generally, Refd. Brown v. Alabaster* (1887), 57 L. J. Ch. 255.

**628.** —[—]—A railway co., under the powers of a special Act & of Railways Clauses Act, 1845 (c. 20), bought a piece of land on part of which it made three railways, leaving the rest of the land within the triangle formed by the railways, except two small pieces on the west of its lines. The landowner from whom it bought owned the adjoining land on the east. This he afterwards sold, but acquired a right of way over it. He had also bought the two severed pieces on the west. The conveyances to the railway co. did not include the minerals under the land:—*Held*: (1) as under the special Act & under Railways Clauses Act, 1845 (c. 20), s. 80, the landowner when he sold the land was entitled to make passages under the railway from his land on the east, no right of way over the railway for the purpose of working the minerals would be implied, & he had not now such right of way; (2) being neither "owner, lessee, or occupier" of the land to the east, he had no right, under Railways Clauses Act (c. 20), s. 79, to work the minerals on the land within the triangle by means of passages under the railway; but he might work the minerals from the pieces of land on the west, & under s. 81 get compensation for extra expenses; (3) under Railways Clauses Act, 1845 (c. 20), s. 79, the owner of the minerals might, having lawfully made a communication with the land sold to the railway co., work the minerals by open workings, that being the usual mode of working such minerals in the district where the same were situate.

It seems clear on the authorities with regard to rights of necessity that where a grant is made with an exception or reservation in favour of the grantor, the so-called rights of necessity or implied rights which under that reservation pass to the grantor take effect by way of regrant by grantee to grantor & are limited by the necessity of the case (*STIRLING, J.*).—*MIDLAND RY. CO. v. MILES* (1886), 33 Ch. D. 632; 55 L. J. Ch. 745; 55 L. T. 428; 35 W. R. 76; 2 T. L. R. 775.

*Annotations:—As to (3) Apprvd. Itabon Brick & Terra Cotta Co. v. G. W. Ry.*, [1893] 1 Ch. 427. *Generally, Mendl. G. W. Ry. v. Blades*, [1901] 2 Ch. 624; *Howley Park Coal & Cannel Co. v. L. & N. W. Ry.*, [1913] A. C. 11.

—[—]—*See, generally, Part III., Sect. 2, sub-sect. 1, B., ante.*

**629. Not under title by escheat.**—[—]—*PROCTOR v. HODGSON*, No. 293, *ante.*

**630. Not under possessory title.—Acquired under**

which he reserved there was an implied grant of access through the reserved portion.—*WALTON BROTHERS v. GLASGOW (MAGISTRATES)* (1876), 3 Ll. (Cl. of Sess.) 1130; 15 Sc. L. R. 646.—*SCOT.*

**623. 1. Implied reservation.**—[—]A right way of necessity to land, surrounded by other lands, is created as well in the case where the grantor grants the reversion expectant on the determination of the outstanding leases in the surrounding lands, himself retaining a similar reversion in the lands surrounded, as when the grantor, being in actual possession, grants the surrounding lands themselves, retaining the lands surrounded; although at the time of such grant the tenant of the

land surrounded has another way of access thereto, to continue during his lease.—*NUGENT v. COOPER* (1853), 7 Ir. Jur. 112.—*IR.*

**d. Purchase of land adjoining purchaser's land.—Claim of way of necessity over vendor's land.**—[—]A person purchasing a plot adjoining his own land, & having access to the plot through his land cannot acquire a way of necessity over his vendor's land of which the plot formed a part. The fact that, if the plot had been sold to a third person, he would have acquired a way of necessity, does not effect the question.—*POONA CITY MUNICIPALITY v. VAMAN RAJARAM GHOLAP* (1894), 1 L. R. 19 Bom. 797.—*IND.*

**e. —[—]—**—[—]If a proprietor buys land adjacent to his own property the presumption is that he is to enter it from his own property.—*CULLENS v. CAMBUSARROON CO-OPERATIVE SOCIETY, LTD.* (1895), 23 R. (Cl. of Sess.) 209; 33 Sc. L. R. 164; 3 S. L. T. 168.—*SCOT.*

**f. Owner building on whole frontage.—(Claiming way of necessity to back of premises.)**—[—]An owner of land fronting a street who builds upon the whole of his frontage is not thereby entitled to a way of necessity over his neighbours' land in order to get to the back of his premises.—*ROSS' EXERCUTORS v. RITCHIE* (1898), 19 N. L. R. 103.—*S. AF.*



**Statute of Limitations.**—*WILKES v. GREENWAY*, No. 619, *ante*.

*C. Extent of Right.*

**631. General rule—Limited by necessity.**—A way of necessity is limited by the necessity which created it, & ceases, if at any subsequent period the party entitled to it can approach the place to which it led, by passing over his own land.—*HOLMES v. GORING* (1824), 2 Bing. 76; 9 Moore, C. P. 166; 2 L. J. O. S. C. P. 134; 130 E. R. 233.

*Annotations*:—*Dbtd.* Proctor v. Hodgson (1855), 10 Exch. 824. *Consd.* Pearson v. Spencer (1861), 1 B. & S. 571; *Barkshire v. Grubb* (1881), 18 Ch. D. 616. *Refd.* Deacon v. S. E. Ry. (1889), 61 L. T. 377.

**632.** ———.]—Where the owner of a farm severed it by will among his two sons & the moiety devised to one son was landlocked, except where it abutted on the moiety devised to the other, yet the will made no mention of any ways whatsoever:—*Held*: some way passed by implication under the will & the ct. would look at the previous occupation of testator's property, to see what way was meant by him to pass.

Under such circumstances, where the access to the landlocked premises, & to the farm buildings upon them, had been in testator's lifetime by one particular road across the moiety devised to the other son, & the enjoyment of the landlocked premises, in the state they were in when devised, was not complete without this particular road:—*Held*: this road passed under the will, & was not merely a way of necessity. *Semble*: if a way of necessity only had passed the way would have been limited by the necessity.—*PEARSON v. SPENCER* (1863), 3 B. & S. 761; 8 L. T. 166; 11 W. R. 471; 122 E. R. 285; *sub nom.* R. v. PEARSON, 1 New Rep. 373, Ex. (Ch).

*Annotations*:—*Consd.* Brown v. Alabaster (1887), 37 Ch. D. 490; *West Peckham Vicar & Churchwardens v. Geary* (1889), Trist. 189; *Phillips v. Low*, [1892] 1 Ch. 47; *Hansford v. Jago*, [1921] 1 Ch. 322. *Refd.* Dodd v. Burchell (1862), 1 H. & C. 113; *Bolton v. Bolton* (1879), 11 Ch. D. 968; *Brett v. Clowser* (1880), 5 C. P. D. 376; *Ford v. Met. & Met. Dist. Rys.* (1886), 17 Q. B. D. 12; *Deacon v. S. E. Ry.* (1889), 61 L. T. 377; *Nicholls v. Nicholls* (1899), 81 L. T. 811; *Milner's Safe Co. v. G. N. & City Ry.*, [1907] 1 Ch. 208; *Schwann v. Cotton*, [1916] 2 Ch. 459. *Meantd.* Polden v. Bastard (1863), 4 B. & S. 258.

**633.** ———.]—*LONDON CORPN. v. RIGGS*, No. 627, *ante*.

**634.** ———.]—*MIDLAND RY. CO. v. MILES*, No. 628, *ante*.

**635. Limited to necessity at time of grant.**—*BALLARD v. DYSON*, No. 690, *post*.

**PART VII. SECT. 3, SUB-SECT. 2.—C.**

**631 i. General rule—Limited by necessity.**—A right of way by necessity can be claimed no further than the actual necessity of the case demands.—*PEACOCK v. HODGES* (1876), Buch. 65.—*S. AF.*

**635 i. Limited to necessity at time of grant.**—Part of a farm was set apart as a family burial plot & parcel of the farm was conveyed to deft.'s predecessor in title, save & except about one-quarter of an acre of said lands used as a burying ground. One of the family erected on what he supposed to be the plot, a monument to two of his ancestors, & surrounded the supposed plot with a hedge:—*Held*: the implied way of necessity was limited to purposes for which the plot was expressed to be reserved.—*MAY v. BELSON* (1906), 10 O. L. L. 686; 6 O. W. R. 462.—*CAN.*

**635 ii.** ———.]—Pltf. was the owner of a farm of land which immediately adjoined an historical moat consisting of a circular close on which timber was growing, & which was completely surrounded by lands in the occupation of persons, some of whom were tenants

of E., & others of whom, including pltf., had purchased their holdings from him. The moat, which had never within living memory been used for ordinary agricultural purposes, but had been preserved as an object of antiquarian interest, was approached by a path leading to it from the county road over the lands purchased by pltf. Deft. purchased the fee simple of the moat from E. & subsequently proceeded to cut down the timber growing on the moat, & to remove it by the pass leading to the county road, claiming that he had a right so to use the pass as a way of necessity. In an action for an injunction brought by pltf. against deft.:—*Held*: deft.'s right to use the pass as a way of necessity was limited to such use as was suitable or necessary for the enjoyment of the moat in the condition in which it was at the date of the original severance of the lands; & deft. was accordingly not entitled to use the pass for the purposes of carting felled timber with horses & carts.—*MAQUIRE v. BROWNE*, [1921] 1 L. R. 148.—*IR.*

**635 iii.** ———.]—A piece of land was described in a disposition as being

**636.** ——— **No larger right acquired by extended user—Or licence of grantor.**—*GAYFORD v. MOFFATT*, No. 236, *ante*.

**637.** ——— **Carriage way—To house being built—To house when built.**—*OSBORN v. WISE*, No. 601, *ante*.

**638.** ——— **Agricultural land—Subsequent user for building.**—*LONDON CORPN. v. RIGGS*, No. 627, *ante*.

**639.** ——— **Subsequent user for sewage works—Purpose known to vendor.**—A local board, being authorised by a provisional order of the Local Govt. Board, confirmed by Act of Parliament, to take land for sewage works, gave notice to treat for land of which pltf. was tenant under a building agreement. The land had been agricultural land, to which the occupiers had had access by a path, called a warple-way, used only for agricultural purposes, but since the building operations had been commenced the path, which was the only mode of access to the land, & ran across land also held by pltf. under the building agreement, had been used for the cartage of bricks. The amount to be paid for the land taken & for compensation for damage was fixed by an umpire, & pltf. as "beneficial owner" assigned his interest to the board by a deed which contained a full recital of the circumstances under which the land was being acquired by the board. The board used the path for the cartage of materials for the sewage works:—*Held*: inasmuch as the land was being acquired for definite purposes, which purposes were known to pltf. at the times of the arbn. & of the conveyance, the extent to which the board was entitled under the conveyance to use the right of way was co-extensive with the purposes for which the land was acquired, & the board was entitled to use the right of way for all purposes connected with sewage works.—*SERFF v. ACTON LOCAL BOARD* (1886), 31 Ch. D. 679; 55 L. J. Ch. 569; 51 L. T. 379; 31 W. R. 563; 2 T. L. R. 281.

*D. Course of Way.*

**640. By whom determined—Grantee.**—*MORRIS v. EDINGTON*, No. 49, *ante*.

**641.** ——— **Grantor—Choice of alternative ways.**—A contract to sell land with the appurtenances does not pass a right to a way to the land sold which the vendor has used over adjoining land of his own. Where a grantee is entitled to a way of necessity over another tenement belonging to the grantor, & there are to the tenement granted more

bounded on one side by a roadway. This roadway was the private property of the disposer; it was fenced off from the subjects sold, & at the date of the sale access to these subjects was obtained by a small gate, which opened on to the private road close to its junction with a public road:—*Held*: the disponee was only entitled to a continuance of the existing access, & had otherwise no right to use the private road as an access to the subjects sold to him.—*LOUTFIT'S TRUSTEES v. HIGHLAND RY. CO.* (1892), 19 Ll. (Cl. of Sess.) 791; 29 Sc. L. Ll. 670.—*SCOT.*

**PART VII. SECT. 3, SUB-SECT. 2.—D.**

**g. By whom determined.**—Where the law implies a grant of a right of way of necessity, the right of selecting the same rests with the grantee, but it must be a reasonably direct course.—*SHARPE v. EMERY* (1860), 2 Legge, 1281.—*AUS.*

**h.** ———.]—Defts. were entitled by reason of a registered servitude to water their cattle at a dam situated on pltf.'s farm, but no route was fixed which the cattle should follow when

*Sect. 3.—Arising by implication of law: Sub-sect. 2, D., E. & F.; sub-sect. 3. Sect. 4: Sub-sect. 1.]*

ways than one, the grantee is entitled to one way only, which the grantor may select.—*BOLTON v. BOLTON* (1870), 11 Ch. D. 968; 48 L. J. Ch. 467; 43 J. P. 764; *sub nom.* *BOLTON v. LONDON SCHOOL BOARD*, 40 L. T. 582.

*Annotations:—Consd. Re Peck & London School Board's Contract*, [1893] 2 Ch. 315. *Follid. Re Walmsley & Shaw's Contract*, [1917] 1 Ch. 93. *Expld. Hansford v. Jago*, [1921] 1 Ch. 322. *Reid. Deacon v. S. E. Ry.* (1889), 61 L. T. 377. *Mentd. Schwann v. Cotton*, [1916] 2 Ch. 120.

**642. Shortest line — Across servient tenement.]**—*OSBOEN v. WISE*, No. 601, *ante*.

**643. Undefined tracks in wood.]**—*SCHWINGE v. DOWELL*, No. 605, *post*.

**Grant of undefined way.]**—*See Sect. 2, sub-sect. 4, ante*.

#### *E. Transfer of Right.*

**644. Without express words of grant.]**—*BEAUDELY v. BROOK*, No. 477, *ante*.

**645. —.]**—*STAPLE v. LLEYNON*, No. 506, *ante*.

**646. — Right of way incident to grant.]**—*PINNINGTON v. GALLAND*, No. 165, *ante*.

**647. —.]**—*WATTS v. KELSON*, No. 250, *ante*.

**648. Appurtenances.]**—*BOLTON v. BOLTON*, No. 641, *ante*.

#### *F. Extinguishment of Right.*

**Extinguishment of easements generally.]**—*See Part VI., ante*.

**Unity of possession.]**—*See Part VI., Sect. 3, ante*.

**649. Ceases of necessity—Subsequent access over soil of grantee.]**—*HOLMES v. GORING*, No. 631, *ante*.

#### SUB-SECT. 3.—BY ESTOPPEL.

**650. By description of parcels conveyed—"Abutting on the road"—Grantor's land intercepting access to road.]**—A. granted to B. land of unequal width, described as abutting on a road on his own soil. It abutted in the broadest part of the road, but in the narrowest part a narrow strip of the grantor's land intervened between the road & the premises granted:—*Held*: the grantor & those claiming from him were concluded from preventing the grantee to come out into the road over this slip of land.

proceeding to & from the dam:—*Held*: in the absence of any provision to the contrary, the selection of the route is left to the device of the owner of the dominant tenement, & when he has once exercised that choice he must abide by it, though it will be open to the owner of the servient tenement subsequently to point out a more convenient route, provided that the owner of the dominant tenement is not prejudiced in the exercise of the servitude.—*SMIT v. RUSSOUW* (1913), C. P. D. 847.—*S. AF.*

**k. — By agreement — Grantee — In default grantor.]**—A way of necessity does not give to the owner of the dominant tenement the right to cross any part of the servient tenement at pleasure, but is confined to a definite way to be determined by the agreement of the parties, or by the owner of the servient tenement, or of the dominant tenement in his default.—*DIXON v. CROSS* (1884), 4 O. L. 465.—*CAN.*

**l. Must be definite.]**—Defts. were entitled by reason of a registered servitude to water their cattle at a dam situate on pltf.'s farm, but no route

was fixed which the cattle should follow when proceeding to & from the dam. Defts. claimed that they were entitled to drive their stock, including sheep & goats, over any portion of the servient tenement, while pltf. claimed the right to restrict defts. to a defined & convenient route in enjoying their rights:—*Held*: as the grant in no way indicated the direction or route in which the stock should take nor the manner in which the servitude was to be exercised, & as by common law a real servitude must be exercised *civiltiter modo*, pltf. was entitled to confine defts. to a defined & definite route.—*SMIT v. RUSSOUW* (1913), C. P. D. 847.—*S. AF.*

#### PART VII. SECT. 3, SUB-SECT. 2.—F.

**m. Cesser of necessity — Subsequent access over soil of grantee.]**—Where there is an implied grant of a way of necessity to land, & other land is afterwards acquired by the grantee which gives him other access to the first-mentioned land, the way of necessity ceases, though the new way may not be as convenient as the previous one.—*SMITH v. CHRISTIE* (1904), 24 N. Z. L. R.

Supposing that [pltf.], which I do not believe, had in his mind the intent to reserve this land, he could not consistently with what appears upon the face of these deeds prevent deft. from opening his door into the street, because he has described deft.'s land in his lease as abutting on the street. If then he afterwards prohibits deft. from coming there, is it not a sufficient answer to say "You have told me in your lease 'this land abuts on the road,' you cannot now be allowed to say that the land on which it abuts is not the road." We are therefore of opinion that the verdict is right (*LORD MANSFIELD, C.J.*).—*ROBERTS v. KARR* (1809), 1 Taunt. 495; 127 E. R. 926; *previous proceedings* (1807), 1 Camp. 262, n.

*Annotations:—Consd. Espley v. Wilkes* (1872), L. R. 7 Exch. 298. *Apld. International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165. *Reid. Hooley v. Bailey Corp.* (1875), L. R. 19 Eq. 375; *Roe v. Siddons* (1888), 22 Q. B. D. 224; *Cooke v. Ingram* (1893), 68 L. T. 671; *Mellor v. Walmsley*, [1905] 2 Ch. 164. *Mentd. Lompriere v. Humphrey* (1835), 3 Ad. & El. 181; *Furness Ry. v. Cumberland Co-op. Bldg. Soc.* (1884), 52 L. T. 144; *Brockman v. Folkestone Corp.* (1911), 76 J. P. 99; *White v. Grand Hotel, Eastbourne* (1912), 107 L. T. 695.

**651. — "Bounded by newly-made streets"—Streets not in fact made.]**—By a lease, under which deft. claimed as assignee, S. demised "all that plot of land, bounded on the east & north by newly-made streets," & on the west & north by other premises of the lessor & his tenants, through which there was no way, "a plan whereof is indorsed on these presents." On the indorsed plan the site of the new streets was shown, & was marked as "new streets." The lease contained covenants by the lessee to build two houses on the land, & "to kerb the causeways adjoining the said land." S. afterwards granted to pltf. a lease of the land comprised in the site of one of the proposed new streets, which had, in fact, never been made into a street, & pltf. inclosed the land, so that deft. was unable to reach the east side of his premises. In an action against deft. for pulling down this obstruction:—*Held*: under deft.'s lease a right of way was granted along the site of the proposed new streets to his premises.

The question we have to determine is, whether a private way was granted by the lease together with the plan indorsed upon it. The house was built as contemplated by the lease, abutting on each of the two intended new streets; & it is obvious that, unless a grant was expressed or is to be implied in the lease, of a way of some kind along both the north front & the east front of the

561.—*N.Z.*

**n. Not by construction of less convenient public road.]**—The right to a way of necessity does not cease by the subsequent construction of a public road by which there is less convenient access to the land.—*GARDNER v. HORNE* (1848), 2 Thom. 278.—*CAN.*

#### PART VII. SECT. 3, SUB-SECT. 3.

**o. By description of parcels conveyed.]**—B. was seised of fifty acres of land. In his certificate, M. Street was shown running through his fifty acres down to the river. B. afterwards transferred to S. two pieces of the land, the boundaries of both being described by reference to M. Street. S. transferred one piece to P., who transferred to deft., & the other to L., the description in each case being by reference to M. Street. As in the original conveyance from B. Ptf., trustees of the will of L., prayed for a declaration that they were entitled to right of way over M. Street, & an injunction to restrain deft. from obstructing them:—*Held*: B. having in his transfer to S. described the land as bounded by M. Street would be estopped from denying

house to be built, it would be impossible for the lessee to bring materials for the building which he had covenanted to erect upon the land, or to go into or out of his house on the north side or the east side whenever it should be built. & as the land was bounded to the west by land leased to H., & on the south by land of the lessors from which there was no approach or access to the land leased, the house so covenanted to be erected, could not be built at all; & if, or when built, would be absolutely unapproachable & inaccessible. It must, therefore, have been intended by the parties that there should be either a public way, or a private way, or a way of necessity. Now the claim to a public way was properly given up at the trial. The existence of a public way being thus negatived, it was contended by counsel for plff. that all that could be inferred or deduced from the lease & the facts of the case was, that the lessee had acquired a way of necessity. But a way of necessity exists only where the land conveyed or demised is surrounded by other lands of the grantor, & cannot be approached but by a way over the grantor's land where no way exists, & which thus becomes a way of necessity. But here the lessor, by the grant, has expressly described the land demised as abutting upon strips of land of his own to the north & the east, which he himself in the lease describes as newly-made streets, & which are distinctly delineated upon the plan, & therein called "new streets." The lessor, therefore, is estopped from denying that there are streets which are in fact ways, & which ways run along the north & the east fronts of the houses to be built on the demised lands, including deft.'s house, & of which streets or ways the way claimed in the plea to this action is a part (KELLY, C.B.).—*ESPLEY v. WILKES* (1872), L. R. 7 Exch. 298; 41 L. J. Ex. 241; 26 L. T. 918.

*Annotations:—Consol. Furness Ry. v. Cumberland Co-op. Bldg. Soc.* (1884), 52 L. T. 141. *Refd. Bolton v. London School Board* (1879), 40 L. T. 582; *Roe v. Siddons* (1888), 22 Q. B. D. 221; *Cooke v. Ingram* (1893), 68 L. T. 671; *Mellor v. Walmesley*, [1905] 2 Ch. 164.

**652. — "Bounded by seashore" — Gradual accretion to land due to receding high-water mark.**—In a conveyance the land granted was described as "situate on the seashore." The exact dimensions of each side of the plot were then given as well as its area, & it was stated that the plot was bounded on the south by other land of the grantor, on the east & north respectively by specified roads, & "on the west by the seashore." Reference was then made to a plan indorsed on the deed. The plan showed the dimensions as stated in the description:—*Held*: the word "seashore" must be taken to mean the "foreshore" in its

strict legal sense, that is, the land situate between medium high & low water marks; & the land between the plot & the foreshore did not pass to the grantee, but the grantor was estopped from saying that the land to the west of the plot was anything but "seashore," & the grantee was entitled to free & unrestricted access to the sea from every part of his western frontage over every part of the land lying between that frontage & the sea.

In so far as the right of plffs. is based on estoppel, it seems to me that this right is supported by the judgment in *Roberts v. Karr*, No. 650, *ante*. This, I think, is sufficient to entitle plffs. to an injunction (VAUGHAN WILLIAMS, L.J.).

In my judgment, the grantor & defts. as his successors in title are precluded from setting up as against plffs. that the land to the west of the boundary shown in the plans on the conveyances is not "seashore" in the strict legal sense, so as to interfere with plffs.' access to the sea (STIRLING, L.J.).—*MELLOR v. WALMESLEY*, [1905] 2 Ch. 164; 74 L. J. Ch. 475; 93 L. T. 574; 53 W. R. 581; 21 T. L. R. 591; 49 Sol. Jo. 505, C. A.

*Annotations:—Mentid. Asheton-Smith v. Owen* (1905), 75 L. J. Ch. 181; *Mercer v. Danno*, [1905] 2 Ch. 538; *Re Djanbi (Sumatra) Rubber Estates* (1912), 107 L. T. 631; *Eastwood v. Asheton* (1913), 83 L. J. Ch. 263; *Nesbitt v. Mablethorpe U. D. C.*, [1918] 2 K. B. 1; *Watcham v. A.G. of East Africa Protectorate*, [1919] A. C. 533.

*See, generally, ESTOPPEL.*

#### SECT. 4.—CLAIMED BY PRESCRIPTION.

##### SUB-SECT. 1.—IN GENERAL.

*See, generally, Part III., Sect. 3, ante.*

**653. Way appurtenant to estate.**—LAWTON v. WARD, No. 35, *ante*.

**654. General & private way—Cannot be claimed together.**—CHICHESTER v. LETHBRIDGE, No. 658, *post*.

**655. To land previously common—Enclosed forty-eight years before action brought.**—A plea of way by prescription over A. to B. is not disproved by showing that 48 years ago B. was part of a common inclosed under an Act of Parliament, & allotted to the party under whom deft. justifies.

Plff. proved that B.'s close was, down to 1771, part of an open common, which was inclosed in that year under the provisions of an Act of Parliament, & that that close was allotted to B.'s ancestor. Deft. proved the user of the way by persons having a right of common over B.'s close for some years prior to the inclosure. It was objected, that as the close was a modern

the right of way; this estoppel did not exist merely as regards S., but endured for the benefit of all his successors in title, that plffs.' right of way was, therefore, as well established as if B. had granted it by deed, & they were entitled to the injunction for which they asked.—*LITTLE v. DARDIER* (1891), 12 N. S. W. Eq. 319.—*AUS.*

**p.**—Plff. & the two defts. purchased a field, divided the front portion into lots according to a certain plan, laying off two lots as proposed streets, connecting an existing street with the undivided rear portion of the land & furnishing the only access to that rear portion from any existing street. Deft., 1., purchased the undivided rear portion & two of the front lots, one on each side of one of the proposed streets, the said lots being described in the deed as bounded on the north & south respectively by the street in question.—*Held*: plff. was estopped as a grantor in the deed to

deft., 1., from denying that a right of way was granted over the land designated in the deed & on the plan under which the sales were made as proposed streets.—*PUGH v. PETERS* (1877), 2 L. & C. 139.—*CAN.*

**q.**—The owner of land sold it to G. reserving a right of way on its south side. G. sold by the same description, & with same reservation, to M., who, in turn, sold to the municipality of the county of B., bounding the land sold, on the south, by a lane or right of way, but without including the way. Subsequent conveyances at the end of the description contained the words "together with the easements & appurtenances to the same belonging," but none of them specifically conveyed the right of way.—*Held*: M., the owner of the fee in the land over which the right of way was claimed, was estopped from disputing the existence of the right of way, & the municipality, by their deed, acquired a perpetual

easement or right of way over the land which thereupon became appurtenant to the land conveyed, & which passed to the grantees under subsequent conveyances.—*MCLENNAN v. HUTCHINGS* (1917), 50 N. S. L. 359.—*HUT.*

**r. Former recovery.**—Deft. was charged with obstructing plff.'s right of way from his land over lot 14 to a highway, & back again from the highway over lot 14 to plff.'s land. To a plea denying plff.'s right to the way, plff. replied, by way of estoppel, a former recovery against deft. for obstructing a right of way then claimed by plff. from her land "over lot 14 to a highway, & back again from the highway over lot 14 to plff.'s land."—*Held*: replication good, for the issue was as to the existence of any right of way in plff. over lot 14, & that was determined by the former recovery.—*DEAN v. GRAY* (1879), 22 C. P. 202.—*CAN.*

*Sect. 4.—Claimed by prescription: Sub-sects. 1, 2 & 3, A. & B.; sub-sects. 4 & 5. Sects. 5 & 6: Sub-sects. 1 & 2.]*

inclosure, a right of way to it could not be claimed by prescription. The jury found that there was a right of way over the *locus in quo* to B.'s close:—*Held*: the verdict for *deft.* was right.

Suppose this land, prior to the inclosure, to have been parcel of the waste, the lord may have had the right of way for himself & his tenants, & then every person taking an allotment under the inclosure would take the right of way with it. There was evidence that those who had taken allotments had exercised the right of way; from that the jury might infer that the lord originally had the right of way, & that it passed with the allotments (BAYLEY, J.).—(CODLING v. JOHNSON (1829), 9 B. & C. 933; 4 Man. & Ry. K. B. 671; 8 L. J. O. S. K. B. 68; 109 E. R. 347.)

*Annotation*:—*Apld.* Newcomen v. Coulson (1877), 5 Ch. D. 133.

*Presupposes a lost grant.*—*See* No. 34, *ante*.

*Limitation of uses.*—*See* Sect. 6, sub-sect. 3, B., *post*.

#### SUB-SECT. 2.—WHO MAY PRESCRIBE.

*See, generally, Part III., Sect. 3, sub-sect. 2, ante.*

**656. Lessee of corporation.**—The lessee of a corp'n. may prescribe a *que* estate for a right of way, without showing any deed; for the thing lying in grant is but conveyance to the thing claimed by prescription.

But if he had claimed rent or common in gross, which cannot pass without deed, it had been otherwise (*per Cur.*).—SLACKMAN v. WEST (1623), (Cro. Jac. 673; 79 E. R. 582.)

**657. Owner.—Although tenant in possession.**—Trespass *quare clausum fregit*, etc.; *plen*, that *deft.* was seised in his demesne as of fee of a messuage, etc., in the parish, & that he & all those whose estate, etc., have a right of way for himself, his & their farmers & tenants, occupiers of the messuage, etc., over the *locus in quo* to & from the messuage, etc., as appertaining thereto; replication, that *deft.* & all those, etc., have not the way as appertaining to the messuage, etc.:—*Held*: *deft.*'s showing that he was seised in fee of an ancient messuage in the parish, to which a right of way, as pleaded, over the *locus in quo* belonged, was evidence sufficient to support his plea, although the messuage was let to & in the occupation of a tenant, & *deft.* only occupied a newly built house in the parish at the time of the trespass. Plea that *deft.* was seised in his demesne as of fee, etc., & that he & all those whose estate, etc., have a right of way for himself, his & their farmers & tenants, occupiers, etc., is good, without alleging that *deft.* is occupier.—STOTT v. STOTT (1812), 16 East, 343; 104 E. R. 1119.

*Annotations*:—*Mentd.* Morris v. Dimes (1834), 3 L. J. K. B. 170; Holt v. Daw (1851), 16 Q. B. 990.

**658. Individuals.—Only one named.**—(1) A general way & a private way by prescription are inconsistent, & cannot be claimed together. (2) Prescription for a right of way for A. & others, not naming them, is uncertain, & bad even after verdict. (3) A claim of a way of necessity from A. to B. for all persons is good.

We are of opinion that there may be a way of necessity, for if there be but one road to a place & no other way of going, that is a way of necessity (*per Cur.*).—CHICHESTER v. LETHBRIDGE (1738), Willes, 71; 125 E. R. 1061.

*Annotations*:—*As to* (1) *Refd.* Pinnington v. Galland (1853), 9 Exch. 1. Wheeldon v. Burrows (1879) 12 Ch. D. 31.

*Generally, Mentd.* Rose v. Groves (1843), 5 Man. & G. 613; Dobson v. Blackmore (1847), 9 Q. B. 991; Chamberlain v. West End of London & Crystal Palace Ry. (1862), 2 B. & S. 605; Ricket v. Met. Ry. (1865), 5 B. & S. 156; Buckett v. Mid. Ry. (1867), L. R. 3 C. P. 82; Anglo-Algerian S.S. Co. v. Houlder Line, [1908] 1 K. B. 659.

**659. ———.]—Individuals may by prescription have a right of way** (DIL. LUSHINGTON).—WALTER v. MOUNTAGUE (1836), 1 Curt. 253; 163 E. R. 85.

*Annotations*:—*Refd.* St. Nicholas, Leicester, Vicar v. Langton, [1899] P. 19. *Mentd.* St. Mary Abbots, Kensington, Vicar & Churchwardens v. St. Mary Abbots, Kensington, Inhabitants & Parishioners (1873), Trist. 17; *Re* St. George in the East (1876), 1 P. D. 311; St. Stephen, Walbrook, Rector & Churchwardens & Grocers Co. v. Sun Fire Office Trustees (1883), Trist. 103; Batten v. Gedge (1889), 41 Ch. D. 507; St. John the Baptist, Cardiff, Vicar v. St. John the Baptist, Cardiff, Parishioners, [1898] P. 155; *Re* Bideford Parish, *See* p. Bideford Rector, etc., [1900] P. 314; Davey v. Hinde, [1901] P. 95.

**660. Not inhabitants of district or parish.**—

The inhabitants of a parish or district as distinct from the general public, may possess a right of way, but it must be by express grant, & cannot be presumed from user.

The dedication of a right of way can only be presumed from user in favour of the public.—BERMONDSEY VESTRY v. BROWN (1865), L. R. 1 Eq. 204; 35 Beav. 226; 13 L. T. 574; 30 J. P. 118; 11 Jur. N. S. 1031; 14 W. R. 213; 55 E. R. 882.

*Annotations*:—*Refd.* Vernon v. St. James, Westminster, Vestry (1880), 16 Ch. D. 449. *Mentd.* Nuneaton L. B. R. General Sewage Co. (1875), L. R. 20 Eq. 127; A.-G. v. Biphosphated Guano Co. (1879), 11 Ch. D. 327; Wallasey L. B. v. Gracey (1887), 36 Ch. D. 593; Sheringham U. D. C. v. Holsey (1901), 91 L. T. 225.

#### SUB-SECT. 3.—PRESCRIPTION AT COMMON LAW.

##### A. How Prescriptive Right Established.

*See, generally, Part III., Sect. 3, sub-sect. 4, A. & B., ante.*

**661. Ancient deed.—Supporting user alleged.**—

Where in an action of trespass *deft.* justified, on the ground of a right of way, & proved a constant user of the way with carts & carriages, he was allowed to put in evidence a deed 120 years old relating to the property, as appurtenant to which the way was claimed, & containing a description of the way, for the purpose of showing that the way had always been enjoyed in conformity with the description contained in the deed.—BROWNSERD v. HARRIS (1865), 3 F. & F. 853.

##### B. How Prescriptive Right Defeated.

*See, generally, Part III., Sect. 3, sub-sect. 4, C., ante.*

**662. Part of locus in quo in possession of claimant.**—JACKSON v. SHILLITO (1792), cited in 1 East, p. 381; 102 E. R. 148.

*Annotations*:—*Distd.* Wright v. Rattray (1801), 1 East, 377. *Apld.* Simpson v. Lowthwaite (1832), 3 B. & Ad. 226.

**663. ——— Subsequently conveyed away.—With no reservation of way.**—A claim of a prescriptive right of way from A. over *deft.*'s close unto D., is not supported by proof that a close called C., over which the way once led & which adjoins to D., was formerly possessed by the owner of close A. & was by him conveyed in fee to another without reserving the right of way; for thereby it appears that the prescriptive right of way does not as claimed extend unto D. but stops short at C. *Qu.*: if the claim had been for a prescriptive right of way over *deft.*'s close towards D.—WRIGHT v. RATTRAY (1801), 1 East, 377; 102 E. R. 146.

*Annotation*:—*Distd.* Simpson v. Lowthwaite (1832), 3 B. & Ad. 226.

**664. User not as of right.—Licence.—Enjoyment partly as of right & partly by licence.—Extent of**

**licence smaller than extent of right.]**—In trespass *quare clausum fregit*, deft. pleaded that he & the occupiers of a certain house had, for twenty years, enjoyed, as of right, a certain way "from a certain highway, over pltf.'s close, to deft.'s house & back." The replication alleged that deft. had enjoyed the said way by lease & licence. It was proved that deft. had a right of way over pltf.'s close to the highway, & across it to a field of deft.'s on the other side, & that if a way over pltf.'s close to the highway was ever used for any other purpose than to get to the field on the other side, this was done by pltf.'s licence:—*Held*: a right of way to or from a highway is a right to go to or from it, & to or from each & every place beyond it, to which it leads; & as the licence here pleaded was proved not to extend to the whole of such right, the replication failed.—*COLCHESTER v. ROBERTS* (1839), 5 M. & W. 769; 8 L. J. Ex. 195; 150 E. R. 1632.

*Annotation*:—*Reid*, Holt v. Daw (1851), 16 Q. B. 990.

**665. No pathway defined—Temporary tracks—Wood as pleasure resort.]**—Evidence that in a place of resort for pleasure, as a wood, or the like, people have gone about wherever they pleased, there being no definite enduring trackway in any particular direction, but merely temporary & transitory tracks, not passable in wet weather & varying every season & never proved to be repaired:—*Held*: not evidence on which a jury could properly find either a public highway or a public right of resort for air & exercise, or a prescriptive right of way.—*SCHWINGE v. DOWELL* (1862), 2 F. & F. 845, N. P.

**Extinguishment or suspension.]**—*See* Sect. 10, *post*.

#### SUB-SECT. 4.—PRESCRIPTION UNDER DOCTRINE OF LOST MODERN GRANT.

*See, generally*, Part III., Sect. 3, sub-sect. 5, *ante*.

#### SUB-SECT. 5.—PRESCRIPTION UNDER PRESCRIPTION ACT, 1832, AND SIMILAR ACTS.

*See* Part III., Sect. 3, sub-sect. 6, *ante*, & Prescription Act, 1832 (c. 71).

#### SECT. 5.—CLAIMED BY CUSTOM.

*See* CUSTOM & USAGES, Vol. XVII., p. 23.

#### SECT. 6.—USER AND ENJOYMENT OF RIGHTS OF WAY.

##### SUB-SECT. 1.—IN GENERAL.

**666. Notice of intention to use—Necessity for.]**—If a man makes a feoffment in fee by indenture of his land, reserving a way to him over the land, this is clearly as a grant, & so good, & it is to be used whensoever he will; & he ought not to come to deft. & tell him when he has occasion to use the way, he is not to stop the way at any time, if he doth so an action upon the case will lie against him (*DODDERIDGE, J.*).—*COLLITUM v. TUCKER* (1613), 2 Bulst. 121; 80 E. R. 1000.

**667. ——— Way through house.]**—If a man have a right of way through another house, he cannot use it at unreasonable hours, nor bring an action for stopping the way without notice & request to have it opened.—*TOMLIN v. FULLER*

(1669), 1 Mod. Rep. 27; 2 Keb. 575, 583; 1 Vent. 48; 86 E. R. 705.

**668. Must be to some end.]**—The proper use of a way is to some end, & that ought to be shown.—(*ORRIS v. ALLEN* (1617), Hut. 10; 123 E. R. 1061.

##### SUB-SECT. 2.—WHO MAY ENJOY.

**669. Landlord of servient tenement—& occupying tenant.]**—A plea of right of way, stated a surrender to deft. of a copyhold with all ways, then used by the tenants & occupiers thereof; that deft. was admitted & continued seised, & being so seised & having occasion to use the way, committed the trespass. New assignment that deft. used the way for other purposes, etc.:—*Held*: deft., being landlord, had a right, while the copyhold was in the occupation of the tenant, to use the way to remove an obstruction; & that the words of the plea were sufficiently large to comprehend all the purposes for which a person seised might lawfully use the way.—*PROUD v. HOLLIS* (1822), 1 B. & C. 8; 107 E. R. 4; *sub nom.* *HOLLIS v. PROUD*, 2 Dow. & Ry. K. B. 31; 1 L. J. O. S. K. B. 10.

**670. Licensees of grantee—Servant.]**—*LAWTON v. WARD*, No. 35, *ante*.

**671. ——— Although not specifically named—Included in "assigns."]**—To trespass for entering pltf.'s land, described as land on each side of a certain slip, deft. pleaded that before pltf. was possessed of the land, in which, etc., a certain railway co. were the owners in fee of the said land & slip, & that they demised the land in which, etc., "excepting & reserving thereout the said slip, & the dues payable for the use thereof, & excepting & reserving to the said co., their assigns, officers, servants, & workmen, free access to & from the said slip, for the purpose of using & working the same or otherwise," & that the said co. granted their licence to deft. to work & use such slip, & the plea justified the trespass as being committed in the exercise of such licence:—*Held*: a good defence, as the reservation in the demise enabled the co. to use the slip by themselves or their licensees, & the word "assigns" was not to be construed as limited to persons taking an estate in the land.—*MITCALFE v. WESTAWAY* (1861), 17 C. B. N. S. 658; 34 L. J. C. P. 113; 11 L. T. 673; 10 Jur. N. S. 1202; 144 E. R. 201; *sub nom.* *MITCALFE v. WESTAWAY*, 5 New Rep. 126; 13 W. R. 181.

*Annotation*:—*Fold*, *Hammond v. Prentice*, [1920] 1 Ch. 201.

**672. ——— ———.]**—A grant of a right of way extends to all licensees of the grantee lawfully going to & from the dominant tenement, although the grantee, his "exors., administrators, & assigns, undertenants & servants," are the only persons specified in the grant.—*BAXENDALE v. NORTH LAMBETH LIBERAL & RADICAL CLUB, LTD.*, [1902] 2 Ch. 427; 71 L. J. Ch. 806; 87 L. T. 161; 50 W. R. 656; 18 T. L. R. 700; 46 Sol. Jo. 616.

*Annotation*:—*Fold*, *Hammond v. Prentice*, [1920] 1 Ch. 201.

**673. ——— ———.]**—A grant of a right of way "to the grantees, their heirs & assigns, & their servants, customers, & workmen, & the tenants & occupiers" of the dominant tenement, for all purposes to pass along a road & over a bridge, toll free, extends to licensees of the grantees, & is not limited to the classes of persons specifically mentioned.

Where a grant of a right of way is in general terms & various other words are added to the usual words of limitation, in the absence of any

*Sect. 6.—User and enjoyment of rights of way: Subsects. 2 & 3, A. & B. (a).]*

special circumstances pointing in an opposite direction, the proper inference is that the added words are not intended to be read as exhaustive, but rather as illustrative of the classes of individuals entitled to use the way; & such a grant, being appurtenant to the dominant tenement, ought to be so construed as to secure to the grantee all that is necessary for the reasonable enjoyment of the dominant tenement.—*HAMMOND v. PRENTICE BROTHERS, LTD.*, [1920] 1 Ch. 201; 89 L. J. Ch. 91; 122 L. T. 307; 84 J. P. 25; 36 T. L. R. 98; 64 Sol. Jo. 131; 18 L. G. R. 73.

**674. Persons specified in grant—Specification exhaustive.**—*Sect. 8* of a private local Act of Parliament enacted that it should be lawful for the persons for the time being empowered by that Act, "to grant leases to lay out & appropriate, etc., any part of the said land & hereditaments thereinbefore authorised to be laid out as, & for a way or ways, street or streets, avenue or avenues, square or squares, passage or passages, sewer or sewers, or other conveniences for the general improvement of the estate, & the accommodation of the tenants & occupiers thereof."

*Pltf.*, tenant for life, had granted certain building leases of, & laid out, a certain roadway on part of the said estate, & granted the use of the said roadway to A. & C., their respective exors., administrators & assigns, servants, tenants or occupiers, for the time being, of certain lands specified & leased to the said A. & C., having a covenant from C. to repair the said roadway, etc. *Deft.*, being a tenant of another part of the estate authorised to be leased by the Act of Parliament, used the said roadway, having no right or authority, from or under *pltf.* or A. or C., but claiming to use such roadway, he being a tenant of a part of the estate so leased under the Act of Parliament:—*Held*: he was not authorised to do so, as the way was not public. There was no grant of way over it, nor licence to use it, to him or any one under whom he claimed.—*WHITE v. JACKSON* (1859), 5 H. & N. 53; 29 L. J. Ex. 105; 1 L. T. 189; 24 J. P. 24; 5 Jur. N. S. 1361; 8 W. R. 137; 157 E. R. 1097.

**675. — Or illustrative.**—*HAMMOND v. PRENTICE BROTHERS, LTD.*, No. 673, *ante*.

**676. — "Visitors" of grantee—Include pupils.**—In 1894, B. granted to *deft.*, her exors., administrators, & assigns, owners for the time being of St. W., " & her & their tenants, visitors, & servants " at her & their will & pleasure to pass & repass on foot over a strip of land between St. W. & a street in the rear of it, to the end & intent that the right of way should be appurtenant to the messuage for all purposes connected with the use, occupation, & enjoyment of the same. Before 1894 & up to the present time L. carried on a girl's school at St. W. to which there was also access from the front, & her pupils used the strip of land to the rear with her consent in coming to & going from school. *Pltfs.* claimed an injunction against such user by L.'s pupils:—*Held*: the word "visitors" in the grant ought not to be restricted to those who could come & go as they pleased, but, having regard to the circumstance that the school was so used by the *deft.* when the grant was made, "visitors" must be given a large interpretation & must include pupils. The explanatory words at the end of the grant, while not operating to enlarge it, might be used for the purpose of interpreting what its meaning was, & there must be a declaration that the way could be used by

*deft.*'s pupils.—*THORNTON v. LITTLE* (1907), 97 L. T. 24; 23 T. L. R. 357.

### SUB-SECT. 3.—NATURE AND EXTENT OF USER.

#### A. Access to Way.

**677. Whether confined to one place.**—A public road differs from a private road in this: you make an opening in your fence & go into it in any part of the length of the public road, or at the end, but in a private road you must go in at the usual & accustomed part (*OHAMBRE, J.*)—*WOODYER v. HADDEN* (1813), 5 Taunt. 125; 128 E. R. 634.

*Annotations*:—*Reid. A.-G. & London Property Investment Trust v. Richmond Corp.*, & *Gosling* (1903), 89 L. T. 700; *Tottenham U. C. v. Howley*, [1912] 2 Ch. 633. *Mentl. Wood v. Veal* (1822), 5 B. & Ald. 454; *Bateman v. Bluck* (1852), 18 Q. B. 870; *Vernon v. St. James, Westminster, Vestry* (1880), 16 Ch. D. 449.

**678. — Or according to choice of grantee—Special limitation by covenant.**—A grant of all ways, privileges, & easements to a certain messuage belonging or appertaining, or usually held, occupied, & enjoyed therewith, coupled with a covenant by the grantor, that he will permit & suffer the grantee at all reasonable times to have free access to certain pleasure walks situate in a different close, subject to such regulations for the general ordering of the walks as the grantor may think proper to make, & that he, the grantor, will keep the walks & the fences & gates belonging to them in good & proper repair & condition, does not confer upon the grantee a right to enter the walks at the specific gateway used by the occupier of the messuage at the time of the grant, so as to hinder the grantor from closing that gateway, & opening a new gate in a different part of the close.—*SOMERVILLE (LORD) v. DAWSON* (1849), 13 L. T. O. S. 136.

**679. — — — — —**—*Pltfs.* & *deft.* each purchased lands of one W., which were separated by a road over which a right of way reserved to each, the freehold remaining in W., with a joint obligation to repair it. In the conveyance to *pltfs.*, the land purchased by them was described as containing 31 acres or thereabouts, "which with the abutments & boundaries thereof were more particularly described in the map or plan thereof affixed to & forming part of the indenture, together with full & free liberty, licence, & authority for said *pltfs.*, their successors & assigns & tenants, & all persons coming to or going from the same lands & hereditaments, or any part thereof, to use & enjoy, with horses, carts, & carriages, or on foot, jointly or in common with others the person or persons for the time being entitled to the like liberties, licences, & authorities respectively, the roads or ways leading to & from the same lands & hereditaments, as the same roads or ways are described in the said map or plan." At the time of the conveyance, the land so purchased by *pltf.* was separated from the road by a hedge in which were two gates, one at the upper, the other at the lower end of the road. *Pltfs.* removed the hedge, & built a wall with two gates therein, both at some distance from the spot where the old gates had stood. *Deft.* obstructed the access to these new gates, by excavating the road to the depth of between four & five feet:—*Held*: *deft.* was liable to an action at the suit of *pltf.*; for, whether they were justified in altering the position of the gates or not, they were still entitled to the uninterrupted use of the way as granted to them. *Semble*: the grant was a general grant of a right



of way along the road & every part thereof, & was not limited to a way through the old gates.—**SOUTH METROPOLITAN CEMETERY Co. v. EDEN** (1855), 16 C. B. 42; 25 L. T. O. S. 69, 100; 139 E. R. 670.

*Annotations:—***Consd.** **Williams v. James** (1867), L. R. 2 C. P. 577. **Reid** **Skull v. Glenister** (1864), 16 C. B. N. S. 81; **United Land Co. v. G. E. Ry.** (1873), L. R. 17 Eq. 158; **Wood v. Saunders** (1875), 10 Ch. App. 583, n.; **New Windsor Corpn. v. Stovell** (1884), 27 Ch. D. 665.

**680.** ———.]—Pltf. in 1888 purchased Nos. 1, 2, & 3, H. Cottages, & certain land in the rear thereof, which property was conveyed to him by deed, together with a right of way on foot along the way or passage coloured blue in the plan on the deed, which passage ran from F. Lane along the south side of No. 3 H. Cottages, to the above-mentioned land of pltf. This land was at the date of the conveyance, & had ever since been, used as a nursery garden. The passage was for the greater part of its length about three feet wide, but grew to a width of about ten feet where it reached pltf.'s land, from which a gate about three feet wide opened on to it. Deft. had erected a building, partly on certain adjoining land of his own, & partly on the wider end of the passage, thereby reducing it to a uniform length of about three feet, reducing the frontage of pltf.'s land on the passage by some seven feet, & preventing the erection by pltf. on his land of any greenhouse or other building which could open on the passage by any door unless it occupied the exact site of the three-foot gate:—**Held**: (1) the grant of the footway was not limited to a way suitable for the occupation of the land as a nursery garden, but gave a right to the reasonable use of the way, & any part of it, for all purposes; (2) pltf.'s mode of access to his land was not limited to the gate, but he was entitled to access at whatever point was most convenient to himself; (3) deft.'s building was a substantial interference with pltf.'s right of way, & a mandatory injunction for its removal must be granted.—**SKETCHLEY v. BERGER** (1893), 69 L. T. 754.

**681.** ———.]—**COOKE v. INGRAM**, No. 521, *ante*.

**682.** ———.]—By an indenture made in 1892, the trustees of a settlement under which pltf., then an infant, was tenant in tail male in possession of certain estates, conveyed a farm & lands having a frontage towards the sea, to defts.' predecessors in title. There was reserved to the vendors, including the owner for the time being of the hereditaments remaining subject to the settlement, a right to repurchase part of the land for the purposes of constructing a road & promenade along the sea coast, but the reconveyance of such part was to be subject to a right of way for the purchasers, including persons deriving title under them, over the road & promenade & subject also to an obligation on the repurchasers to erect & maintain a fence, with suitable gates, between the road, & the remainder of the land, the quantity of the land to be thus repurchased,

& the position & character of the fence, & the number, character, & position of the gates, in case the parties should differ about the same, to be settled by arbitration, the arbitrator paying regard to the reasonable requirements & convenience of both parties. By an indenture made in 1907, defts.' predecessors in title reconveyed to pltf., then tenant for life of the hereditaments comprised in the settlement & remaining unsold, a part of the land conveyed by the indenture of 1892, reserving a right of way over such part & the road & promenade intended to be made thereon. The indenture of 1907 contained a covenant by pltf. to erect a fence with gates therein, the character of which was specified in the indenture; & it was agreed that such fence & gates should be accepted in full satisfaction of the obligation to erect a fence with suitable gates contained in the indenture of 1892. The road & promenade, & the fence & gates, specified in the indenture of 1907, had in fact been constructed & provided prior to the execution of such indenture. Subsequently defts. sold a part of the land remaining in them for building purposes & the purchaser requiring them to give him reasonable access to the road, & promenade, they opened a new gate in the fence:—**Held**: the obligation cast upon pltf. to provide a fence & gates did not operate so as to impose a qualification upon the easement over the road & promenade reserved to defts. & accordingly defts. were entitled to access to the road & promenade at other points besides the site of the gates expressly provided for by the indenture of 1907.—(**GULLFORD (EARL) v. ST. GEORGE'S GOLF CLUB TRUST, LTD.** (1916), 85 L. J. Ch. 664; 115 L. T. 179; 32 T. L. R. 578.

#### *B. Limitations of User.*

##### *(a) Right existing by Grant.*

**683. Limited by construction of grant.**—The owner of field A., who had a right of way over pltf.'s close, for the more convenient use of A., made a gateway from field B. into A., mowed both fields, stacked all the hay in A., & some months after sold the whole hay to deft., who carried it all away over the said way. Pltf. brought an action of trespass, deft. justified under the right of way, & pltf. new assigned excess:—**Held**: whether there had been an excess of user was not a question of law; but it was a question of fact for the jury whether the stacking & carrying away was a reasonable & proper user of the way for the purposes of field A., or merely colourably so, & really for the purposes of field B.; & on their finding that the former was the case, deft. was entitled to the verdict on the new assignment.

There is a distinction between the case of a right of way by virtue of a grant & that of one established by prescription, by virtue of user; in a grant the language of the deed is to be construed, & in construing it we are not to forget the maxim that we are to presume most strongly against the

#### **PART VII. SECT. 6, SUB-SECT. 3.—B. (a).**

**683 i. Limited by construction of grant.**—Where a right of way is granted as appurtenant to certain lands, there is a right of unrestricted user of the way in connection with the beneficial enjoyment of the premises to which it is appurtenant by every part owner of the property, but such part ownership confers no right to further burden the land over which the way exists by using it in connection with other adjoining property to which the privilege is not annexed.—**TELFER**

**v. JACOBS** (1888), 16 O. R. 35.—**CAN.**

**683 ii.** ———.]—A deed of conveyance of land from pltf. to defts. recited that the latter had determined to construct waterworks in their municipality, & required the land for buildings & other purposes connected with the waterworks, & that pltf. had agreed to sell them such land for such purposes for the consideration & subject to the conditions set forth. The grant was to defts. & their assigns for ever, for the purposes mentioned in the recital, of the land described, with full right of ingress & egress to & from the said lands

for defts., their employees & others doing business on & about the said waterworks with teams & otherwise, from a certain street, etc., along a certain road, etc.:—**Held**: the grant of the right of way gave to defts. & their employees footway, carriage-way, & way for horses, but conferred no right of way upon persons to whom defts. might sell or lease the land.—**MCLEAN v. ST. THOMAS CITY** (1892), 23 O. R. 114.—**CAN.**

**683 iii.** ———.]—A right of way granted as an easement incidental to a specified property cannot be used by the

*Sect. 6.—User and enjoyment of rights of way: Subsect. 3, B. (a), (b), (c) & (d).]*

grantor; . . . where you have a way by user you cannot extend the purposes beyond those for which it was used, & for which it might reasonably be inferred it would have been used if wanted at the time of the grant (WILLES, J.).—WILLIAMS v. JAMES (1867), L. R. 2 C. P. 577; 36 L. J. C. P. 256; 10 L. T. 664; 15 W. R. 928.

*Annotations:—*Consd. United Land Co. v. G. E. Ry. (1873), L. R. 17 Eq. 158. *Appl.* Wimbledon & Putney Commons Conservators v. Dixon (1875), 1 Ch. D. 362; Wood v. Saunders (1875), 10 Ch. App. 583, n. *Consd.* Harris v. Flower (1901), 74 L. J. Ch. 127; Bailey v. Holborn & Finsbury (1914) 1 Ch. 598. *Refd.* Sloan v. Holliday (1874), 30 L. T. 757; Pym v. Harrison (1876), 33 L. T. 796; Finch v. G. W. Ry. (1879), 5 Ex. D. 254; New Windsor Corp'n. v. Stovell (1884), 27 Ch. D. 665; Milner's Safe Co. v. G. N. & City Ry., [1907] 1 Ch. 208.

684. —[.]—Lands were bought by the Crown under an Act enabling the Crown to buy lands for the purpose of fortifications, but providing that the lands were not to be built upon or sold. By an Act authorising a railway to be made through these lands, the railway co. were obliged to make level crossings giving access to part of the lands then a marsh or pasture. The Crown, under the authority of a subsequent Act, sold a part of the lands, & the purchasers proposed to build houses thereon:—*Held*: the purchasers could build houses thereon, & the occupiers of the houses would be entitled to make use of the level crossings, & an injunction granted against the obstruction of the level crossings, but not so as to prevent the co. from using the railway for the reasonable working of their traffic.

Where a right of way is claimed by user, then, no doubt, . . . the purpose for which the way may be used is limited by the user; for we must judge from the way in which it has been used what the purposes were for which the party claiming has gained the right. But where a right of way is created by grant, or Act of Parliament, then it must depend upon the proper construction of the grant, or Act of Parliament, whether the right of way is to be used for all purposes, or for only limited purposes (MELLISH, L.J.).—UNITED LAND CO. v. GREAT EASTERN RY. CO. (1875), 10 Ch. App. 586; 44 L. J. Ch. 685; 33 L. T. 292; 40 J. P. 37; 23 W. R. 890, L. J.J.

*Annotations:—*Distd. North Canal Co. v. Ynisarwed Resolven Colliery Co. (1875), 10 Ch. App. 465, n. *Consd.* Newcomen v. Coulson (1877), 5 Ch. D. 133; Norton v. L. & N. W. Ry. (1878), 9 Ch. D. 623; Finch v. G. W. Ry. (1879), 5 Ex. D. 254; Sketchley v. Berger (1893), 69 L. T. 754. *Distd.* G. W. Ry. v. Talbot, [1902] 2 Ch. 759. *Consd.* Harris v. Flower (1901), 70 L. T. 669. *Distd.* Taft Vale Ry. v. Canning, [1909] 2 Ch. 48. *Appl.* White v. Grand Hotel Eastbourne, [1913] 1 Ch. 113. *Refd.* Wood v. Saunders (1875), 10 Ch. App. 583, n.; New Windsor Corp'n. v. Stovell (1884), 27 Ch. D. 665; Mid. Ry. v. Gribble, [1895] 2 Ch. 129.

685. —[.]—(1) Deft., the owner of a house with a gateway & a paved road under it leading to a paved yard, & a vacant piece of ground at the rear, agreed to grant to pltf. a lease of the house & vacant ground & the appurtenances, with power to erect on the vacant ground a workshop for the purposes of his business as a gas engineer, & it was stipulated that pltf. should not obstruct the gateway, except for the purposes of ingress & egress. The workshop was erected, & the only access to it by vehicles was through the gateway

& over the yard which were also the only approach to the stables of deft., who carried on business in adjoining premises. Deft.'s vans, before the agreement was entered into, had often stood in the yard when not in use. Pltf. now alleged that deft. blocked up the gateway & yard with his vans, & prevented the access of carts & vehicles to his workshop:—*Held*: under the agreement, pltf. had an implied right of way through the gateway & over the yard for the reasonable purposes of his business; that such right was general & not restricted; & that he was entitled to an injunction to restrain deft.'s obstruction.

(2) The grant of a right of way *per se* & nothing else may be a right of footway or it may be a general right of way, that is a right of way not only for people on foot but for people on horseback, for carts carriages & other vehicles, which it is a question of construction of the grant, & that construction will of course depend on the circumstances surrounding, so to speak, the execution of the instrument (JESSEL, M.R.).

*Prima facie* the grant of a right of way is the grant of a right of way having regard to the nature of the road over which it is granted, & the purpose for which it is intended to be used (JESSEL, M.R.).—CANNON v. VILLARS (1878), 8 Ch. D. 415; 47 L. J. Ch. 597; 38 L. T. 939; 42 J. P. 516; 20 W. R. 751.

*Annotations:—*As to (1) *Refd.* Baxendale v. North Lambeth Liberal & Radical Club, [1902] 2 Ch. 427. *As to* (2) *Consd.* Pottery v. Parsons, [1914] 1 Ch. 704. *Refd.* Milner's Safe Co. v. G. N. & City Ry., [1907] 1 Ch. 208.

686. —[.]—NEW WINDSOR CORPN. v. STOVELL, No. 148, *ante*.

687. —[.]—A railway was constructed in 1847, passing through certain lands from west to east & thereby cutting off all access from the land on the north of the line to a public road which was diverted further south. On the sale of a portion of the land for the purposes of the railway the conveyance was followed by a grant to the landowners of a right of way over a level crossing "for themselves, their agents, servants & workpeople on foot or on horseback, & with carts, carriages, horses & other animals," subject to the co.'s bye-laws relating to level crossings, "for the commodious use of the same crossing & the safe occupation of the lands thereto adjoining." The construction of the level crossing restored the access to the diverted public road which the railway had cut off. For many years the crossing had only been used for agricultural purposes, but the owner of the land on the north of the railway having opened sandpits on his lands, a much greater use of the crossing was made, & a traffic of a commercial character grew up. The railway co. brought an action to restrain deft. from using or allowing the crossing to be used in excess of the way in which it was used for agricultural purposes at the time of the grant:—*Held*: (1) the level crossing having been made for the purpose not only of joining severed parcels of land, but to provide access to a public road, & the grant being in wide terms, it was not a mere accommodation work or way for agricultural purposes, but a right of way for all purposes not incompatible with the running of trains on the railway; (2) it was not in the circumstances *ultra vires* of the railway co.

grantee for the same purposes in respect to any other property.—ROBINSON v. PURDOM (1899), 19 C. L. T. 374; 30 S. C. R. 61.—CAN.

688 *iv.* —[.]—A conveyance of a right of way to a power & light co. for a pole line & any other purpose which

it may use it for & the sole & absolute possession of the right of way does not divest the grantor of his right to cultivate the right of way in such manner as will not interfere with the co.'s poles or pole line.—TARRY v. WEST KOOTENAY POWER & LIGHT CO. (1905), 11 B. C. R. 229.—CAN.

*a. Measure of enjoyment.—Fixed at time of grant.*—The nature of the enjoyment of an easement, at the time of the grant, is the proper measure of enjoyment during the continuance of the grant.—HEWARD v. JACKSON (1874), 21 Gr. 263.—CAN.



to make such a grant.—*SOUTH EASTERN RY. CO. v. COOPER* (1923), 93 L. J. C. H. 292; 22 L. G. R. 109; 87 J. P. Jo. 816, C. A.

**688. Right of "ingress, egress, & regress".—Extent of.]**—A grant of a right of "ingress, egress, & regress," is a grant of a right of way from the *locus a quo* to the *locus ad quem*, & from the *locus ad quem* forth to any other spot to which the grantee may lawfully go, or back to the *locus a quo*.

By a deed of conveyance from a railway co. of a close of land the grantee was given a right of free "ingress, egress, & regress," to & from certain private roads which bounded the close & led to the railway station & on to public highways:—*Held*: the grantee was entitled to pass from the close to the private roads, & thence to the public highways, or in the reverse direction, & was not limited to passing from the close to the railway station, or *vice versa*.—*SOMERSET v. GREAT WESTERN RY. CO.* (1882), 46 L. T. 883.

*Annotation*:—*Reid*. *White v. Grand Hotel, Eastbourne* (1912), 106 L. T. 785

**On alteration of dominant tenement.]—See Nos. 735–743, post.**

(b) *Right claimed by Prescription.*

**689. Claim "ire et redire"—Way intended for all purposes.—After verdict.]**—*WARNER v. GREEN* (1701), 1 Com. 114; 92 E. R. 989.

**690. Limited by user proved.]—(1)** Evidence of a prescriptive right of way for all manner of carriages does not necessarily prove a right of way for all manner of cattle. But it is evidence of a drift-way, for the jury to consider, together with the other evidence.

(2) The extent of the usage is evidence of a right only commensurate with the user.

(3) User of a way for carriages & hogs is *prima facie* evidence of a right of way for all cattle, & the onus of proving the restriction lies on the grantor.

(4) A parson has the *via* or *adibis* over a farm with carts to bring home his tithe, but he can use it for no other purpose (*MANSFIELD, C.J.*).

*Qu.*: whether a way of necessity is commensurate only with the use to which the premises are applied at the time of the conveyance, or with all uses to which they may be converted afterwards.—*BALLARD v. DYSON* (1808), 1 Taunt. 279; 127 E. R. 841.

*Annotations*:—*As to* (1) *Consd.* *Allan v. Gomme* (1840), 11 Ad. & El. 759; *Serif v. Acton L. B.* (1886), 31 Ch. D. 679. *Reid*. *Manifold v. Pennington* (1825), 4 B. & C. 161; *Newcomen v. Coulson* (1877), 5 Ch. D. 133. *As to* (2) *Consd.* *Allan v. Gomme* (1840), 11 Ad. & El. 759. *Reid*. *Cowling v. Higginson* (1838), 4 M. & W. 245.

**691. —.]—COWLING v. HIGGINSON, No. 717, post.**

**692. —.]—DARE v. HEATHCOTE, No. 337, ante.**

**693. —.]—WILLIAMS v. JAMES, No. 683, ante.**

**694. —.]—NEW WINDSOR CORPN. v. STOVELL, No. 148, ante.**

**695. Limited by purposes for which acquired.]—UNITED LAND CO. v. GREAT EASTERN RY. CO., No. 684, ante.**

**On alteration of dominant tenement.]—See Nos. 37, 38, ante.**

(c) *As to Time.*

**696. During retention of certain lands—Way ceasing on alienation.]—ARDLEY v. ST. PANCRA'S GUARDIANS, No. 199, ante.**

**697. To certain times of year—When land under cultivation.]—Pltf.** brought trespass for injury to his land. Defts. pleaded a right of way under

Prescription Act, 1832 (c. 71), & at common law. At the trial, after counsel for defts. had summed up his evidence, the judge allowed an amendment by adding a plea of a limited right of way over pltf.'s land at such times of the year when certain fields of defts. were under cultivation. A verdict was entered for pltf. by consent on all the other issues, & the jury found the issue raised by the added plea for defts.:—*Held*: the amendment was rightly allowed & the added plea was good in law.—*JONES v. BULKELEY* (1871), 24 L. T. 104.

(d) *Over what Portions of Tenement or Way.*

**698. Over what portion of servient tenement—Whether over all.]—A** private right of way over waste land, or a line between two points, is not necessarily a right over every part of the land, & the owner of the soil may enclose on each side of it, leaving a convenient way.

It seems to be a question of law, whether, if there is a private right of way over any land the owners of the land can define or confine it within reasonable limits (*COCKBURN, C.J.*).—*HUTTON v. HAMBORO* (1860), 2 F. & R. 218.

**699. —.]—CLIFFORD v. HOARE, No. 783, post.**

**700. —.]—Defts.,** who were the owners of a large building containing business offices, granted to pltf's. a lease for 21 years of a set of offices in the building, & defts. covenanted to keep in good repair the main walls of the building & the passages & other internal parts used in common by the tenants of the various offices. The building had an entrance door 10 ft. wide leading to a hall 17 ft. 9 in. wide which opened by an archway 6 ft. wide into an inner hall. Pltf's., for the purpose of making shops, proposed to reduce the passage way from the entrance door through the hall to a uniform width of 6 ft. In an action for an injunction to restrain defts. from so doing:—*Held*: pltf's. had not a right to go over every part of the surface of the hall, but had a right to a reasonable user of the way for the purpose of the reasonable enjoyment of their offices, & upon the evidence a passage 6 ft. wide was not sufficient for the purpose.—*STRECK (F. L.) & CO., LTD. v. CITY OFFICES CO., LTD.* (1906), 22 T. L. R. 667.

**701. Whether over whole width—Grass borders.]**

—*Def't.*, the owner of a building estate, conveyed to the predecessor in title of pltf. one of the plots of ground on the estate, & in the conveyance granted to him the right for himself, his heirs, etc., to pass over the several roads made or to be made through the estate, in the same manner & as fully as if the same roads were public roads. Two of the roads on the estate were forty feet wide, twenty feet in the middle being gravelled for cart & carriage traffic, & there being a strip of grass ten feet wide on either side. Pltf., in common with other residents on the estate, was accustomed to walk along these grass strips to & from his house, which was built on the plot of ground so conveyed as above stated. Def't. caused six ditches or trenches, each about fifteen inches wide & ten inches deep, to be cut completely across the strips of grassland at the side of the road near pltf.'s house, the earth taken out of the ditches being banked up at the edges of the ditches, & pltf.'s passage along the strips was thereby rendered difficult & dangerous. Pltf. claimed an injunction against def't. to restrain the continuance of the impediments to his right of way. Def't. contended that pltf.'s right of way was the same as that of the public along a highway,

*Sect. 6.—User and enjoyment of rights of way: Sub-sect. 3, B. (d) & (e) i. & ii.*

& that public ways had similar ditches or trenches cut through the grass at their sides for drainage & similar purposes, & it was proved that in many rural roads in the district such ditches or "grips" were made:—*Held*: (1) the right of the public to use a highway extends to the whole road, & not merely to the part used as *via trita*; (2) these ditches if cut on a public highway would have amounted to a nuisance & obstruction, & therefore, as *plffs.* had the same rights over the road as the public would have over a public highway, he was entitled to the injunction.—*NICOL v. BEAUMONT* (1883), 53 L. J. Ch. 853; 50 L. T. 112.

*Ways of necessity.*—*See* Sect. 3, sub-sect. 2, *ult.*

(e) *Purposes of Dominant Tenement.*  
i. *In General.*

**702. General rule.**—In 1891 certain premises, coloured pink on the plan on the deed, were conveyed to M., together with a right of way over land coloured yellow on the plan on the deed. The land coloured yellow was subsequently conveyed to J., who covenanted to permit the use of the right of way. M. owned adjoining land, coloured blue on the plan, which abutted on a public highway & on which was a public-house, & erected assembly rooms partly on the land to which there was a right of way & partly on the adjoining land. The licensing magistrates objected to a gateway opening on the right of way, but in 1892 a wall was built with an opening for a gateway 6 ft. 9 in. wide, this opening being temporarily closed with sliding scaffold boards. In 1894 the hereditaments formerly belonging to M. were sold to F., together with the right of way, & in Dec. of that year the scaffold boards were removed to enable building material to be taken along the right of way. In 1896 a further application to the magistrates to allow gates to be placed at the gateway was refused, & the magistrates insisted on the gateway being bricked up.

In 1898 the premises, together with the right of way, were conveyed to G. In 1903 an opening was made in the wall & a gate 4 ft. 4 in. wide placed there, & materials for altering the premises were conveyed along the right of way. It was now proposed to sever the assembly rooms from the public-house, & to use them for a factory, the only access to which was over the right of way.

The present owners of the land coloured yellow contended that the right of way had been abandoned; or, if not, if it was used to buildings not wholly erected on the dominant tenement, that the proposed user was excessive:—*Held*: there had been no abandonment of the right of way; but (2) the intended user would be an excessive user of the right of way.

A right of way of this sort restricts the owner of the dominant tenement to the legitimate user of his right, & the ct. will not allow that which is in its nature a burden on the owner of the servient tenement to be increased without his consent & beyond the terms of the grant. I do not think that it makes any difference whether the right of way arises by prescription or grant. The burden imposed on the servient tenement must not be increased by allowing the owner of the dominant tenement to make a use of the way in excess of

the grant (*VAUGHAN WILLIAMS, L.J.*).—*HARRIS v. FLOWER* (1904), 74 L. J. Ch. 127; 91 L. T. 816; 21 T. L. R. 13, C. A.

*Annotation*:—*As to* (2) *Consd.* *Bailey v. Holborn & Frascati*, [1914] 1 Ch. 598.

**703. Access to land beyond dominant tenement.**—*HOWELL v. KING*, No. 34, *ante*.

**704.** —.—.]—*LAWTON v. WARD*, No. 35, *ante*.

**705.** —.—.]—*No other access available.*—*HARRIS v. FLOWER*, No. 702, *ante*.

**706. Whether user bonâ fide for dominant tenement—Question for jury.**—A right of way appurtenant to land passes to the tenant by a parol demise of the land, though nothing is said about it at the time of the demise. A. having a right of way to a close, demised the close to B. The latter, being possessed of an adjoining close, upon which he was erecting certain houses, used the way for carting building materials to A.'s close for the purpose of using them upon his own land:—*Held*: it was properly left to the jury to say whether B.'s use of the road was a *bonâ fide* exercise of the right of way to A.'s close, or a mere colourable mode of getting to his own land.—*SKULL v. GLENISTER* (1864), 16 C. B. N. S. 81; 3 New Rep. 389; 33 L. J. C. P. 185; 9 L. T. 763; 12 W. R. 554; 143 E. R. 1055.

*Annotations*:—*Consd.* *Williams v. James* (1867), L. R. 2 C. P. 577. *Distd.* *Finch v. G. W. Ry.* (1879), 5 Ex. D. 254. *Consd.* *Harris v. Flower* (1901), 74 L. J. Ch. 127. *Refd.* *Royal v. Yaxley* (1872), 20 W. R. 903.

**707.** —.—.]—*WILLIAMS v. JAMES*, No. 683, *ante*.

**708. Accommodation way—No right to lay tramways.**—An estate was intersected by a canal under the powers of its Act, & an accommodation bridge was built by the co., over which a private road, leading across the property to a high road, was carried. Coal pits were opened upon the estate, which, when the canal was made, had been used as a farm. For some time the coals were carried down to the canal by a tramway which did not cross the bridge. The coal owners subsequently carried the tramway across the bridge, excavating the soil of the roadway on the bridge & approaches, in order to carry their coals to a line of railway on the other side of the property. An action for trespass having been commenced, & a writ of injunction applied for by the canal company, the coal owners submitted in the action to judgment for £1 damages & costs, & gave an undertaking not to repeat the trespass complained of. The coal owners having a few months afterwards again laid down the tramway, but without breaking the soil on the bridge:—*Held*: independently of the undertaking in the action, by which the right of the canal co. had been recognised & established, *defts.* right of access to & passage over the accommodation bridge did not justify the making by them of a tramway upon the bridge & the approaches thereto, & injunction granted accordingly.—*NEATH (CANAL CO. v. YNISARWED RESOLVEN COLLIERY CO.)* (1875), 10 Ch. App. 450, L. J.

ii. *Carriage of Goods.*

**709. Carriage of goods from other or adjoining land—Hay.**—A private way by prescription to a certain close shall not be used for the purpose of carrying hay, which grew upon another close.—*WEBSTER v. BACH* (1878), 1 Freem. K. B. 247; 3 Keb. 848; 89 E. R. 177.

PART VII. SECT. 6, SUB-SECT. 3.—  
B. (e) ii.

i. *Ordinarily carried by foot passengers.*—*Plff.* was entitled to a

right of way on foot through a passage across *def't's* premises:—*Held*: *plff.* not entitled to have any burdens carried through the passage save such as would be ordinarily carried by foot

passengers in the user of a footway.—*AUSTIN v. SCOTTISH WIDOWS' FUND ASSURANCE SOCIETY* (1881), 8 L. R. Ir. 197, 385.—*IR.*

**710. — Minerals.]**—(1) By a deed dated 1630, W. & T. conveyed to L. & H. in fee-farm, certain lands in the township of A., "excepting always & reserved out of the grant all mines of coal within the fields & territories of A. aforesaid, together with sufficient way-leave & stay-leave to & from the said mines, with liberty of sinking & digging pit & pits." The grantors covenanted for themselves, their heirs & assigns, "to give & yield to the said L. & H., their heirs & assigns, such accustomed recompense for digging & breaking the ground with the fields & territories of A. aforesaid, in which any pit or pits for the getting of coal should thereafter happen to be sunk & wrought as formerly had been usually given & allowed there in like cases before." By a similar deed of the same date the same grantors conveyed lands in an adjoining township to other persons, B. & P., with a similar exception, reservation & covenant:—*Held*: it was not to be confined to such ways only as were in use at the time of the grant, & in such a direction as was then convenient, but under the reservation in the conveyance of lands in A., the coal owners had no right to carry coals got in B. over lands in A., although from part of the same mineral field.

(2) In an action of trespass for making a railway over ptff.'s close, defts. justified under the above reservation of a way-leave; ptff. new assigned that the trespasses were committed on other & different occasions, & for other & different purposes, & to a greater extent than was necessary, & in other parts of the close. To this deft. suffered judgment by default:—*Held*: on these pleadings it was not competent for ptff. to contend that some species of railway was not within the reservation, but the question was, whether the direction or mode of construction of the railway were authorised by the reservation; that is, such as were reasonably sufficient for the purpose of getting the coal.

*Qu.*: whether this reservation of a sufficient way-leave in 1630 gives a right now to make a railway, with cuttings, embankments & fences, so as to oust the occupier of the soil.—*DAND v. KINGSCOTE* (1840), 6 M. & W. 174; 2 Ry. & Can. Cas. 27; 9 L. J. Ex. 279; 151 E. R. 370.

*Annotations*:—As to (1) *Refd.* Pheysey v. Vicary (1847), 16 M. & W. 484; Bostock v. Sidebottom, Sidebottom v. Bostock (1852), 16 Jur. 1013; Rogers v. Taylor (1857), 1 H. & N. 706; Hamilton v. Graham (1871), L. R. 2 Sc. & Div. 166. As to (2) *Consd.* Bishop v. North (1843), 11 M. & W. 418. *Appl.* Newcomen v. Coulson (1877), 5 Ch. D. 133. *Distd.* Bidder v. North Staffordshire Ry. (1878), 4 Q. B. D. 412. *Consd.* Finch v. G. W. Ry. (1879), 5 Ex. D. 251; Welldon v. Butterley Co., [1920] 1 Ch. 130. *Refd.* Rogers v. Taylor (1857), 1 H. & N. 706; A.-G. v. Cambridge Consumers Gas Co. (1868), L. R. 6 Eq. 282.

**711. — — —.]**—*DURHAM & SUNDERLAND Ry. Co. v. WALKER*, No. 584, *ante*.

**712. — — —.]**—Ptffs. were copyholders of the manor of N.

Deft. was lessee of collieries held of the manor; he was also lessee of mines under freehold land not within the manor. Deft. had a customary right, for which he paid an occupation rent, of using a railway over ptff.'s land, & an underground passage or crut, through the subsoil of ptff.'s land, for the purpose of carrying coal & ironstone from his copyhold mines. He used them, however, for the conveyance of his freehold minerals. Ptffs. applied for an injunction to restrain deft. from using the railway & crut for purposes other than the conveyance of the copyhold minerals. The injunction was granted with costs.—*EARDLEY v. GRANVILLE* (1876), 3 Ch. D. 826; 45 L. J. Ch. 669; 34 L. T. 609; 24 W. R. 528.

*Annotations*:—*Consd.* Powell v. Vickerman (1887), 3 T. L. R. 358; Batten Pool v. Kennedy, [1907] 1 Ch. 256. *Refd.*

*Ruabon Brick & Terra Cotta Co. v. G. W. Ry.*, [1893] 1 Ch. 427; *G. W. Ry. v. Cefn Cribbwr Brick Co.*, [1894] 2 Ch. 157; *Dorcy v. Sanders*, [1919] 1 K. B. 223. *Mentd.* Tucker v. Linger (1882), 21 Ch. D. 18; *Webb v. Knight*, *Hodley v. Webb* (1901), 70 L. J. Ch. 663; *Thomson v. St. Catharine's College, Cambridge*, etc., [1919] A. C. 468.

**713. — — —.]**—H., being the owner of certain land & the mines thereunder, by indenture conveyed the surface to O., but he excepted & reserved a "waggon or cart road" of the width of eighteen feet, to be at all times thereafter kept in repair at his own cost & charges:—*Held*: these words would not enable H. to lay down a railroad or tramway for the carriage of coals raised from neighbouring collieries belonging to him.

By a lease of mines the lessees were authorised to take & use "full & sufficient rail & other ways, paths, & passages to & for the said lessees & their agents, servants & workmen, or others, "to carry away" all or any of the coal, cannel, slack, iron, & ironstone, the produce of the mines thereby demised or any other mines":—*Held*: the lessees, by virtue of this clause, might lay down a railway for the carriage of coals raised by them from the pits of adjoining collieries worked by them, & they were not restricted to using the railway for the carriage of coals raised by or through the pits of the mines demised to them by the above-mentioned lease.—*BIDDER v. NORTH STAFFORDSHIRE Ry. Co.* (1878), as reported in 4 Q. B. D. 412, C. A.

*Annotations*:—*Refd.* Rugby Portland Cement Co. v. L. & N. W. Ry., [1908] 1 K. B. 925. *Mentd.* Jolley & Eldon's Exors. v. N. E. Ry., [1907] 1 K. B. 402.

— — — — — **On inclosure of common.]**—*See* COMMONS, Vol. XI., pp. 66, 67, Nos. 913-916.

**714. — — — Over level crossing.]**—Under Railways (Clauses Consolidation Act, 1815 (c. 20), for the construction by a railway co. of "accommodation works" for the benefit of a landowner whose land is severed by the railway, the landowner is entitled to a convenient passage over the railway sufficient to make good, so far as possible, any interruption which the construction of the railway causes by severance in the working or use of his land, including any alteration or extension of that working or use which could or ought to have been contemplated by the parties when the accommodation works were made & accepted. A railway severed the land of a landowner & crossed on the level a road belonging to him upon which he had a tramway by which goods & traffic from his land were conveyed to a neighbouring port. He had also allowed coals to be conveyed along the tramway to the port from a colliery not situate on his land. On the occasion of the purchase by the railway co. of the portion of the road crossed by the railway & of other land belonging to him taken by the co. the co. entered into an agreement with him that they would construct & maintain certain works "for the accommodation of the owners & occupiers for the time being of the lands adjoining the railway." These works included a level crossing for the tramway. The level crossing was constructed, & the co. entered into a deed of covenant with the landowner in accordance with the agreement. The landowner's successor in title afterwards claimed to be entitled to convey over the level crossing goods & traffic brought on to her land from other places, whether situate on her estate or not:—*Held*: she was not entitled to use the level crossing for the purpose of conveying goods & traffic so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent as enjoyed at or previously to the date of the deed of covenant, or

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as since enjoyed by her or her predecessors in title, if, owing to acquiescence or otherwise, that subsequent enjoyment was binding on the co.—**GREAT WESTERN RY. CO. v. TALBOT**, [1902] 2 Ch. 759; 71 L. J. Ch. 835; 87 L. T. 405; 51 W. R. 312; 18 T. L. R. 775, C. A.

**Annotations:—***Apld.* **Taff Vale Ry. v. Gordon Canning**, [1900] 2 Ch. 48. *Consd.* **White v. Grand Hotel, Eastbourne** (1912), 82 L. J. Ch. 57. *Refd.* **Taff Vale Ry. v. Pontypridd U. D. C.** (1905), 93 L. T. 120; **S. E. Ry. v. Cooper** (1923), 21 L. G. R. 439.

**(f) Agricultural Ways.**

**715. Way for carriages & hogs—Includes way for all cattle.]—****BALLARD v. DYSON**, No. 690, *ante*.

**716. Whether way for general purposes.]—**A right of way for agricultural purposes is a limited & qualified right of way, & does not, necessarily, confer a right to use such way for general & universal purposes. Where A. claimed & proved a right to carry corn & manure over the *locus in quo*:—*Held*: he had not, therefore, a general & unlimited right to carry lime, or the produce of a quarry over the *locus in quo* at all times, & for all purposes.—**JACKSON v. STACEY** (1816), Holt, N. P. 455, N. P.

**Annotation:—***Distd.* **Allan v. Gomme** (1840), 11 Ad. & El. 759.

**717. — Question for jury.]—**Trespass *quare clausum fregit*. Plea, a right of way for the occupiers of a close for 20 years, for horses, carts, waggons, & carriages, at their free will & pleasure. Replication, traversing such right:—*Held*: (1) under this issue *pltf.* might show that *deft.* had a right of way for horses, carts, waggons, & carriages for certain purposes only, & not for all, & was not compelled to new assign; & might show that the purpose for which *deft.* had used the road, & in respect of which the action was brought, was not one of those to which his right extended; (2) evidence of user of a road with horses, carts, & carriages, for certain purposes, does not necessarily prove a right of road for all purposes, but the extent of the right is a question for the jury, under all the circumstances of the case.—**COWLING v. HIGGINSON** (1838), 4 M. & W. 245; 1 Horn & H. 269; 7 L. J. Ex. 265; 150 E. R. 1420.

**Annotations:—***As to* (1) *Consd.* **Skull v. Glenister** (1864), 33 L. J. C. P. 185; **Newcomen v. Coulson** (1877), 5 Ch. D. 133. *As to* (2) *Distd.* **Allan v. Gomme** (1840), 11 Ad. & El. 759. *Apld.* **Dare v. Heathcote** (1856), 25 L. J. Ex. 245. *Consd.* **Wimbledon & Putney Commons Conservators v. Dixon** (1875), 1 Ch. D. 362.

**718. No right to carry minerals.]—****BRADBURN v. MORRIS**, **MORRIS v. BRADBURN**, No. 38, *ante*.

**(g) Carriage Ways.**

**719. No right for all cattle.]—****BALLARD v. DYSON**, No. 690, *ante*.

**720. As evidence of a drift way.]—****BALLARD v. DYSON**, No. 690, *ante*.

**721. Includes carriages laden & empty.]—**To a declaration of trespass for breaking & entering *pltf.*'s close, *deft.* pleaded, that B. being seized thereof, as well as of another close adjoining, granted it to *pltf.*, except a pathway six feet wide, through the *locus in quo* to the other close, for the

owners & occupiers of the latter to go, return, & pass as they had been theretofore used & accustomed to do; & that they had been used & accustomed to go, return & pass by themselves & their servants, & with horses, & that B. having conveyed that close & pathway to *deft.*, he entered the *locus in quo* by himself & his servants, & with horses. *Pltf.* newly assigned that *deft.* had used the way for other & different purposes than the owners & occupiers under whom he claimed were accustomed to use it, to wit, with horses laden with & carrying bricks, stone, & other materials for building; & *deft.* pleaded to the new assignment, that they, under whom he claimed, were used & accustomed to use the way by themselves & their servants & with horses, for all lawful purposes whatsoever, for which reason, *deft.* used the way with horses laden with bricks & building materials, for the purpose of carrying them into his close to build, being lawful purposes, for which he had occasion as owner & occupier to use the way. *Pltf.* in his replication to that plea, stated, that they under whom *deft.* claimed, were not used & accustomed to use, & in fact did not use the way with horses laden with bricks & building materials:—*Held*: this replication was bad on special demurrer, as *pltf.* should have taken issue by stating that *deft.*, & those under whom he claimed, had not a right to the way for all lawful purposes.

If a person claims a right of way for carriages, it will apply to those which are laden as well as those which are not; & for these reasons I concur in thinking that the replication in question is bad (**PARK, J.**).—**TRICKEY v. YEANDALL** (1824), 2 Bing. 26; 9 Moore, C. P. 55; 130 E. R. 214.

**722. Includes a footway.]—****DAVIES v. STEPHENS**, No. 435, *ante*.

**723. No right to carry coals.]—****COWLING v. HIGGINSON** (1838), 4 M. & W. 245; 1 Horn & H. 269; 7 L. J. Ex. 265; 150 E. R. 1420.

**Annotations:—***Distd.* **Allan v. Gomme** (1840), 11 Ad. & El. 759. *Expld.* **Wimbledon & Putney Commons Conservators v. Dixon** (1875), 1 Ch. D. 362. *Distd.* **Newcomen v. Coulson** (1877), 5 Ch. D. 133. *Refd.* **Dare v. Heathcote** (1856), 25 L. J. Ex. 245; **Skull v. Glenister** (1864), 33 L. J. C. P. 185.

**724. Includes room to turn carriage.]—**An indenture of lease demised to K. certain property, including a yard, together "with the right of way" for K., his exors., etc., & his & their servants, horses, carts, & carriages, from D. street to the said yard & workshops, as by K. then enjoyed:—*Held*: where the turning of a carriage or cart is necessary to the convenient enjoyment of the dominant premises such a right of turning over a piece of land may be a part of the right of way to the dominant premises.—**KNOX v. SANSOM** (1877), 25 W. R. 861.

**(h) Wayleaves.**

**725. For carriage of minerals—Whether including a waggon way.]—****PTT v. CLAVERINTH (LADY)** (1720), 1 Barn. K. B. 318; 94 E. R. 215.

**726. — — —.]—**Under the grant of a free & convenient way for the purpose of carrying coals, among other articles, the grantee has a right to lay a framed waggon way. Under a grant of a way from A. to B. in, through, & along

**PART VII. SECT. 6, SUB-SECT. 3.—B. (f).**

**a. No right to use for purposes of timber trade.]—***Defts.* had a right of way to their field through an adjoining field of *pltf.* *Defts.* field had been used for agriculture, & the way through *pltf.*'s field was used by them for ordinary agricultural purposes. *Defts.*, con-

verted their field into a timber depot & began to use the way across *pltf.*'s field for purposes connected with the timber trade:—*Held*: *pltf.* was entitled to an injunction restraining *defts.* from using the way otherwise than for agricultural purposes.—**DESAI BHAGORAI v. DESAI CHUNILAI** (1899), 1 L. R. 24 Bom. 188.—**IND.**

**PART VII. SECT. 6, SUB-SECT. 3.—B. (g).**

**b. Whether footway included.]—**Declaration alleged right of way in *pltf.* for horses, cattle, & carriages, & obstruction to same, & on the trial this was the only claim set up. The judge in charging the jury, told them that if they should find a right of way

a particular way, the grantee is not justified in making a transverse road across the same.—**SENHOUSE v. CHRISTIAN** (1787), 1 Term Rep. 560; 99 E. R. 1251.

**Annotations:—***Distd.* Bidder v. North Staffordshire Ry. (1878), 4 Q. B. D. 412. *Refd.* Blakesley v. Whieldon (1811), 1 Hare, 176; Pwllbach Colliery Co. v. Woodman, [1915] A. C. 631; Taft Vale Ry. v. Cardiff Ry., [1917] 1 Ch. 299.

**727. — Whether for all purposes.**—**DURIAM & SUNDERLAND RY. CO. v. WALKER**, No. 584, *ante*.

**728. — — — — —**—**PROUD v. BATES**, No. 108, *ante*.

(i) *Footways and Other Ways.*

**729. Accommodation way—No right to lay tramways.**—**NEATH CANAL CO. v. YNISARWED RESOLVEN COLLIERY CO.**, No. 708, *ante*.

**730. Footways—No right to draw manure in a cart.**—(1) In case for disturbance of a way, *plffs.* claimed a right for themselves, etc., on foot to go, return, etc., & also to lead & carry away manure, but proved only a grant of way on foot & for horses, oxen, cattle, & sheep:—*Held*: a variance, for the term “lead,” so used, implies drawing in a carriage.

(2) *Plffs.* took issue upon a plea traversing the whole right claimed in the declaration. The right actually interfered with was that of carrying away manure with a wheelbarrow:—*Held*: assuming this privilege to be covered by the grant, *plffs.* could not, by proving so much of the alleged right, entitle themselves to a verdict on the issue generally.

“Leading” implies drawing in a carriage. *Plffs.* admit that they have no right to “lead” in that sense (**PATTERSON, J.**).

If a grant had been put in conferring a right to “lead manure,” the term would have been construed according to the usual mode of leading, that is, by drawing in a cart (**COLERIDGE, J.**).—**BRUNTON v. HALL** (1811), 1 Q. B. 792; 1 Gal. & Dav. 207; 10 L. J. Q. B. 258; 6 Jur. 310; 113 E. R. 1331.

**731. — Whether inclusion of carriage way.**—**WATTS v. KELSON**, No. 250, *ante*.

**732. — — — — — & way for horses.**—In a lease the lessor demised certain hereditaments, together with free liberty & right of way & passage, & of ingress, egress, & regress to & for the lessees & lessee, their or his workmen & servants, & all & every other persons & person by their or his authority or permission, from time to time, & at all times during the continuance of the lease, by, through, & over a certain roadway or passage, jointly with the lessor & other the tenant or tenants, or occupier or occupiers for the time being of the adjoining land:—*Held*: this gave a right of way for foot passengers only, & did not extend to horses & carts.—(**COUSENS v. ROSE** (1871), L. R. 12 Eq. 366; 24 L. T. 820; 19 W. R. 792.

**733. Tithe ways—Whether confined to removal of tithes.**—**BALLARD v. DYSON**, No. 690, *ante*.

for carriages, cattle, or foot passengers, *plff.* should have a verdict:—*Held*: an erroneous direction, & a new trial should be ordered.—**McROBERTS v. McBRIDE** (1875), 3 Pug. 48.—**CAN.**

**PART VII. SECT. 6, SUB-SECT. 3.—B. (i).**

*c. Alleyway—Whether right to carry coals.*—A store, two rooms & cellar connected with the store by hatchway & stairs were leased to *plffs.*, “with the privileges & appurtenances

thereunto belonging.” The rooms communicated with the store, & a door in one of the rooms opened off an alleyway leading from the street to the rear of the premises. A coal chute to the cellar also opened off the alleyway, which was sufficiently wide to allow the coal being carted to the chute. The alleyway was part of the lot upon which the demised premises were, & was in the ownership & possession of *deft.* lessor at the date of the lease. For many years previous to the lease the door off the alleyway had been used

by occupiers of the premises, including *deft.*, who was in occupation at the date of the lease, & coal had always been carted by them to the chute. *Deft.* sought to build upon the alleyway to the extent of blocking up the alleyway door & preventing access to the chute by carts:—*Held*: the tenant was entitled to the unimpaired use of the alleyway since it was in use at the date of the lease as an easement belonging to the premises.—**JONES v. HUNTER** (1896), 1 N. B. Eq. Rep. 250.—**CAN.**

**734. — — — — —**—Unless a tithe owner has a right of way to carry tithe off titheable lands within his parish, by grant of the owner of the fee or by prescription, he has *prima facie* only a right to use such road for that purpose as is used at the time by the occupier to carry off the other nine-tenths; & if he has any further right to use any other way from the particular close, because used by the occupier for other agricultural purposes, or for more convenient use of the close, though not for the purpose of carrying off the crop, that right can only exist while such way continues, without being stopped up by the occupier.—**JAMES v. DODS** (1833), 2 Cr. & M. 266; 4 Tyr. 101; 3 L. J. Ex. 47; 149 E. R. 760.

*C. Alteration of Dominant Tenement.*

*See, generally*, Part VI., Sect. 2, sub-sect. 2, D. (a), *ante*.

**735. Whether corresponding alteration of user permissible—Interpretation of grant.**—A deed reserved to *deft.* a right of way over a yard “to the stable & loft over the same, & the space or opening under the loft, & now used as a woodhouse,” & also the use of the yard “in common with *plff.* & his tenants for the time being, it being the intent that the whole of the yard should lie open & undivided as the same then was, without any other building to be erected thereon, & the yard should be used in common by the occupiers of *plff.*’s & *deft.*’s messuages, in the same manner as the tenants thereof had been accustomed to use the same.”

*Defts.* converted the loft & the space thereunder, which had been used as a woodhouse, into a cottage:—*Held*: (1) the deed did not justify *deft.* in using the yard after the cottage was built, for that such a user was not the accustomed user which had been reserved; (2) the reservation of the way “to the space or opening under the loft, & now used as a woodhouse,” was to be taken as identifying the locality, & confining the way to a piece of open ground generally, & not specifically to a woodhouse; but that the conversion of the open space to a cottage was an alteration of substance, & *deft.* had no right of way to the cottage.—**ALLAN v. GOMME** (1840), 11 Ad. & El. 759; 3 Per. & Dav. 581; 9 L. J. Q. B. 258; 113 E. R. 602.

**Annotations:—***As to* (1) *Consd.* Henning v. Burnet (1852), 8 Exch. 187. *Distd.* Newcomen v. Coulson (1877), 5 Ch. D. 133. *Consd.* Finch v. G. W. Ry. (1879), 5 Ex. D. 254. *Refd.* Skull v. Glenister (1861), 16 C. B. N. S. 81; United Land Co. v. G. E. Ry. (1873), L. R. 17 Eq. 158; Milner’s Safe Co. v. G. N. & City Ry., [1907] 1 Ch. 208; White v. Grand Hotel, Eastbourne, [1913] 1 Ch. 113. *As to* (2) *Consd.* Wimbledon & Putney Common Conservators v. Dixon (1875), 1 Ch. D. 362; White v. Grand Hotel, Eastbourne, [1913] 1 Ch. 113. *Refd.* Finch v. G. W. Ry. (1879), 5 Ex. D. 254.

**736. — — — — —**—**HENNING v. BURNET**, No. 145, *ante*.

**737. — — — — —**—A lease contained a covenant to do nothing to the annoyance or damage of the lessor or his adjoining tenants or occupiers. The lease granted a right of way over a certain passage as then used & enjoyed by the lessee. At

**Sect. 6.—User and enjoyment of rights of way: Subsect. 3, C. & D. (a) & (b).]**

the date of the lease the lessee used the passage for the purposes of a business carried on in the premises, & the lessor, who occupied the adjoining premises, used to lock the gate of the passage in the evening, & keep it locked until the morning. Many years afterwards the lessee's representative turned part of the business premises into a place for entertainments, & claimed a right of entry to his premises at all hours. The lessor's representative filed a bill for injunction against the nuisance, & against being prevented from locking the gate at night:—*Held*: he was entitled to the injunction asked for.—*COLLINS v. SLADE* (1874), 23 W. R. 199.

*Annotation*:—*Distd.* *Baxendale v. North Lambeth Liberal & Radical Club* (1902), 87 L. T. 161.

**738.** ———. ]—In 1883, F., applts.' predecessor in title, & P., resp.'s predecessor in title, who were owners of adjacent properties, made a verbal agreement by which F. agreed to set back a party wall which bounded his property in order to give P. a more convenient access by widening a private road on his property, & P. agreed to give F. a right of way along the road to a gate nine feet wide, to be made in the wall to give access to the back of the property. In 1911 applts. widened the gate to fifteen feet, & set back the party wall:—*Held*: under the agreement they had no right of access except by a gate of the original width in the original place.—*GRAND HOTEL, EASTBOURNE, LTD. v. WHITE* (1913), 84 L. J. Ch. 938; 110 L. T. 209; 58 Sol. Jo. 117, H. L.; *affg.* S. C. *sub nom.* *WHITE v. GRAND HOTEL, EASTBOURNE, LTD.*, [1913] 1 Ch. 113, C. A.

*Annotation*:—*Refd.* *Bailey v. Holborn & Finsbury* [1915], 84 L. J. Ch. 913; 1 Ch. 598; *Vino v. Wenham* (1915), 84 L. J. Ch. 913.

**739.** ———. **Under statute.** ]—*UNITED LAND CO. v. GREAT EASTERN RY. CO.*, No. 684, *ante*.

**740.** ———. ]—By an award under an Inclosure Act, it was directed that certain of the allottees & the owners for the time being of their allotments should for ever thereafter have a way-right & liberty of passage for themselves, their respective tenants & farmers, as well on foot as on horseback, & with their carts & carriages, & to lead & drive their horses, oxen, & other cattle from the common highway over the east end of the allotments to their respective allotments, doing as little damage to the soil or the corn, grass, or herbage, as might be, & in case the allottees should "street out" the way, that the same should always remain eleven yards wide, but the road was not to be a way of right for any other persons whomsoever than as aforesaid. The owner of one of the allotments commenced building houses upon it, & began to lay down a metalled road where there had only been an ordinary cart track over the adjoining allotments:—*Held*: the allottees were not confined to the use of the road for agricultural purposes only, but were entitled to construct a substantial road way suitable for the purposes to which the land was now in course of being applied.

It is said the provision that the allottees shall do as little damage as may be to the soil or the corn, grass, or herbage, prohibits what is now being done. . . . It appears to me that these words by no means limit the right of the grantee to use the way for all reasonable purposes (*JESSEL, M.R.*).

It was conceded to be the principle of law that the grantee of a right of way has a right to enter

upon the land of the grantor over which the way extends for the purpose of making the grant effective, that is, to enable him to exercise the right granted to him. That includes not only keeping the road in repair but the right of making a road (*JESSEL, M.R.*).—*NEWCOMEN v. COULSON* (1877), 5 Ch. D. 133; 46 L. J. Ch. 459; 30 L. T. 385; 25 W. R. 469, C. A.

*Annotations*:—*Fold.* *Finch v. G. W. Rly.* (1879), 5 Ex. D. 254. *Consd.* *Harris v. Flower* (1904), 90 L. T. 669. *Refd.* *New Windsor Corpn. v. Stovell* (1884), 27 Ch. D. 665.

**741.** ———. **Grant of unrestricted use.]**

Where there is an express grant of a private right of way to a particular place to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for purposes for which access would be required at the time of the grant. By an inclosure award a road was set out as a carriage road & drift way from a highway to certain of the inclosed lands. Defts., a railway co., acquired some of these lands, & built a cattle pen thereon adjoining their railway, & used the road for the passage to & from the highway of cattle that were to be or had been conveyed on their railway, such user being much greater than the user at the time of the grant, which was exclusively for agricultural purposes:—*Held*: this was a lawful user on their part, & they were not restricted to the user which existed at the time of the grant.—*FINCH v. GREAT WESTERN RY. CO.* (1879), 5 Ex. D. 254; 41 L. T. 731; 44 J. P. 8; 28 W. R. 229.

*Annotations*:—*Distd.* *Harris v. Flower* (1904), 74 L. J. Ch. 127. *Refd.* *New Windsor Corpn. v. Stovell* (1884), 27 Ch. D. 665; *Taff Vale Rly. v. Gordon Canning*, [1909] 2 Ch. 48.

**742.** ———. **Not in contemplation of grantor.]**

—*MILNER'S SAFE CO., LTD. v. GREAT NORTHERN & CITY RY. CO.*, No. 288, *ante*.

**743.** ———. **Substantial increase of servitude**

—**Such increase a question of fact.]**—Where a level crossing has been made under sect. 68 of Railway Clauses Consolidation Act, 1845 (c. 20), to connect agricultural lands severed by a railway, the landowner's future user of the crossing is not restricted to the purposes, such as agricultural purposes, for which it was used at the time the railway was constructed; but he is not entitled to use it so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent as enjoyed at that time. Whether the change of user increases the burden is a question of fact in each case.

For many years after the time it was made an agricultural level crossing was used for the occasional passage of sheep & cattle, the keys of the gates being borrowed from a neighbouring signalman, who kept the signals at danger till the animals had crossed.

The neighbourhood having changed its agricultural character, the landowner let a field to a tennis club, who claimed the gates & used the crossing daily in large numbers. It was proved that this user was exceedingly dangerous to the club members, & would subject the railway co. to a greatly increased strain & burden in watching their line & managing their traffic so as to avoid accidents:—*Held*: this user was unlawful, & would, if necessary, be restrained by injunction.—*TAFF VALE RY. CO. v. GORDON CANNING*, [1909] 2 Ch. 48; 78 L. J. Ch. 492; 100 L. T. 845.

*Annotations*:—*Fold.* *S. E. Ry. v. Cooper* (1923), 21 L. G. R. 439. *Refd.* *White v. Grand Hotel, Eastbourne* (1912), 82 L. J. Ch. 57.

**744.** ———. **Reasonable user question for jury.]**

—*HAWKINS v. CARBINES*, No. 779, *post*.

**745.** ———. **Under prescriptive right—Not sup-**



ported by evidence of such user.]—*WIMBLEDON & PUTNEY COMMONS CONSERVATORS v. DIXON*, No. 37, *ante*.

746. ———.]—In an action for trespass over plff.'s yard, at the back of deff.'s house it was found that for upwards of twenty years, during which deff. had occupied his house as a dwelling-house, he had possessed a right of way across the yard to his back door for himself & his friends. During the last two years deff. had opened a small shop in one room of his house, & a few customers had crossed the yard for the purpose of going to the shop by the back door. Upon the plea to a new assignment to the plea of the right of way, the jury had found for plff. :—*Held*: this was not such an alteration in the dominant tenement that the facts could constitute an excess of deff.'s user of his right of way; & the verdict must be entered for deff. on the new assignment.—*SLOAN v. HOLLIDAY* (1874), 30 L. T. 757; 38 J. P. 682.

747. ———.]—*BRADBURN v. MORRIS*, *MORRIS v. BRADBURN*, No. 38, *ante*.

748. Right extinguished.]—*ALLAN v. GOMME*, No. 735, *ante*.

749. ———.]—Capable of being revived.]—*MILNER'S SAFE CO., LTD. v. GREAT NORTHERN & CITY RY. CO.*, No. 288, *ante*.

#### D. Construction, Alteration and Repair of Ways.

##### (a) Construction and Alteration.

750. Construction—Liability for—On grantees.]—*OSBORN v. WISE*, No. 601, *ante*.

751. ———.]—*INGRAM v. MORECRAFT*, No. 769, *post*.

752. ———.]—Right of way to house—Laying flagstones in front of house door.]—A. granted to B., his heirs & assigns, occupiers of certain houses abutting on a piece of land about eleven feet wide, which divided those houses from a house then belonging to A. the right of using the piece of land as a foot or carriage way; & gave him "all other liberties, powers, & authorities, incident or appurtenant, needful or necessary to the use, occupation, or enjoyment of the road, way, or passage":—*Held*: under these words B. had a right to put down a flagstone upon this piece of land in front of a door opened by him out of his house into this piece of land.

At common law, the right to repair is incident to the grant of a way (*HEATH, J.*).—*GEHRARD v. COOKE* (1806), 2 Bos. & P. N. R. 109; 127 E. R. 565.

Annotation :—*Mentd.* *Cardigan v. Armitage* (1823), 1 B. & C. 197.

753. ———.]—Right to enter grantor's land.]—*NEWCOMEN v. COULSON*, No. 740, *ante*.

754. ———.]—Method of—Whether reasonable—Question for jury.]—Waste lands, under which there are mines of coal, are inclosed by virtue of an Act of Parliament, giving to the lord one-sixteenth part of the whole, & reserving to him a right to make all convenient & necessary ways over the lands that were waste, for getting & carrying away the coals, to be made at his free will & pleasure in as beneficial a manner as if the Act had not passed. An assignee of that lord made a waggon-way across an allotment, & dug

up the adjoining soil to raise the low parts of the ground to form a level road :—*Held*: (1) the question for the jury was, whether or not the road made was such as a prudent man would have made over his own land; (2) he had a right to take the adjoining soil to make it a level one.—*ABSON v. FENTON* (1823), 1 B. & C. 195; 1 L. J. O. S. K. B. 94; 107 E. R. 73.

755. Alteration—Digging a trench—For purpose of drainage.]—*DIKE & DUNSTON'S CASE* (1586), Godb. 52; 78 E. R. 32.

756. ———.]—Making a transverse road.]—*SENHOUSE v. CHRISTIAN*, No. 726, *ante*.

757. ———.]—To suit modern requirements—Wayleave for coals granted in 1630.]—*DAND v. KINGSCOTE*, No. 710, *ante*.

758. ———.]—Grantor having notice of—When estopped from objecting.]—Where a passage was not included in demised premises, but the lessee had a right of way over it to his shop, the lessor, who knew that the lessee was repairing the passage, by his conduct, encouraged the lessee to spend money on the passage under the mistaken belief that he had a right to do so, & also allowed the lessee to put up a signboard before the execution of the lease :—*Held*: the lessor was not entitled, after all the work had been completed, to set up his legal right to the passage, & to compel the lessee to restore the passage to its original state, & to remove the signboard.—*CIVIL SERVICE MUSICAL INSTRUMENT ASSOCN., LTD. v. WHITEMAN* (1899), 68 L. J. Ch. 484; 80 L. T. 685; 63 J. P. 441; 43 Sol. Jo. 507.

##### (b) Repair.

See Part V., *ante*.

759. General rule.]—Case for obstructing a right of way between two specified termini over a close called the Terrace Walk. The way was claimed as appurtenant to a messuage, in general terms, without reference to any obligation to repair. On the trial of an issue joined on a traverse of the right of way, the easement proved was a right to pass forwards & backwards over every part of the close, & not merely between the termini specified in the declaration; & it was shown that the easement was enjoyed under a grant thereof to D., his heirs, tenants & assigns, & to certain other persons, "he, they & every of them, from time to time, contributing & paying a ratable share & proportion towards repairing & amending the Terrace Walk":—*Held*: (1) no variance, the easement proved being only larger than the easement alleged, & not different in kind; (2) the obligation to repair was not in the nature of a condition precedent, & need not be alleged in the declaration.

The easement was granted in 1675; there was evidence that, for ten years next before the commencement of the action, part of the way claimed had become public :—*Held*: (3) it was not necessary to state in the declaration that such part had become public.

That [the liability to repair] is not a condition incident by law to the grant of a right of way: it is not even an obligation to which the grantee is subject: it is no more than this that if he wants the way to be repaired he must repair it himself

#### PART VII. SECT. 6, SUB-SECT. 3.—D. (a).

d. Construction—Old way rendered impracticable by owner of servient tenement—Liability to construct new way.]—Where resps. were declared entitled in place of a servitude road, which had been rendered impracticable by

the acts of applt., to a road along a specified route, & applt. was ordered to construct along that route a safe, practicable & convenient road & drift, on appeal the ct., whilst affirming the judgment below in other respects, relieved applt., on payment of £20 to resp., from the obligation of constructing any road or drift.—*RUBIDGE v.*

*MCCABE & SONS* (1913), App. D. 433.—S. AF.

e. Alteration—Way originally definitely set out—Consent necessary.]—A line of way when definitely set out cannot subsequently be altered without consent.—*DHUNDIRAJ, ETC. v. RAMCHANDRA* (1922), I. L. R. 46 Bom. 910.—IND.

*Sect. 6.—User and enjoyment of rights of way: Subsect. 3, D. (b). Sects. 7 & 8.]*

(COLERIDGE, J.).—DUNCAN v. LOUCH (1845), 6 Q. B. 904; 14 L. J. Q. B. 185; 4 L. T. O. S. 350; 9 Jur. 340; 115 E. R. 341.

**760. Right of grantee to repair.**—GERRARD v. COOKE, No. 752, *ante*.

**761. Liability of grantor.**—POMFRET v. RICHROFT, No. 482, *ante*.

**762. — By agreement.**—TAYLOR v. WHITEHEAD, No. 765, *post*.

**763. — Express or implied.**—It was contended that, according to the common law, the person in enjoyment of an easement is bound to do the necessary repairs himself. That may be true with regard to easements in general, but it is subject to the qualification that the grantor of the easement may undertake to do the repairs either in express terms or by necessary implication (BOWEN, L.J.).—MILLER v. HANCOCK, [1893] 2 Q. B. 177; 69 L. T. 214; 57 J. P. 758; 41 W. R. 578; 9 T. L. R. 512; 37 Sol. Jo. 558; 4 R. 478, C. A.

*Annotations.*—**Consd.** Huggett v. Miers, [1908] 2 K. B. 278. **Refd.** Powell v. Thorncliffe (1910), 102 L. T. 600; Fairman v. Perpetual Investment Bldg. Soc., [1923] A. C. 74. **Mentd.** Hopkins v. G. E. Ry. (1895), 60 J. P. 86; Blake v. Woolf (1898), 47 W. R. 8; Hargreaves, Aronson v. Hartopp, [1905] 1 K. B. 472; Cavalier v. Pope, [1906] A. C. 428; Lewis v. Ronald (1909), 101 L. T. 534; Lucy v. Bawden, [1914] 2 K. B. 318; Dobson v. Horsley, [1915] 1 K. B. 634; Groves v. Western Mansions (1916), 33 T. L. R. 76; Hart v. Rogers, [1916] 1 K. B. 646; Dunster v. Hollis, [1918] 2 K. B. 795; Murphy v. Hurly, [1922] 1 A. C. 369; Cockburn v. Smith (1923), 40 T. L. R. 113.

**764. — — — — —**—It is clear that, as a general rule, the grant of an easement imposes no obligation on the owner of the servient tenement to do anything in the nature of repair. Anything that may be requisite for the enjoyment of the easement by way of repair must be done by the owner of the dominant tenement for himself; but the statement of the law on the subject by LORD MANSFIELD in *Taylor v. Whitehead*, No. 765, *post*, which was referred to by BOWEN, L.J., in *Miller v. Hancock*, No. 763, *ante*, is to the effect that, though by the common law he who has the use of a thing ought to repair it, the grantor may bind himself. Therefore we start in such a case with the position that, unless there be circumstances which point to the contrary conclusion, any repair which may be necessary, would have to be done by the tenants. It was, however, pointed out in *Miller v. Hancock*, No. 763, *ante*, that there may be cases in which, either by express agreement or by necessary implication, the landlord of premises, let as these were, contracts with the tenants to do any repairs which may be necessary, or possibly to do something

more than repairs; but it appears to me that, unless such a contract could be shown to have been made by the landlord, either in express terms or by necessary implication, there would be no duty cast upon the landlord in such a case to repair (SIR GORELL BARNES, P.).—HUGGETT v. MIERS, [1908] 2 K. B. 278; 77 L. J. K. B. 710; 99 L. T. 326; 24 T. L. R. 582; 52 Sol. Jo. 481, C. A.

*Annotations.*—**Refd.** Lucy v. Bawden, [1914] 2 K. B. 318; Dobson v. Horsley, [1915] 1 K. B. 634; Dunster v. Hollis, [1918] 2 K. B. 795; Fairman v. Perpetual Investment Bldg. Soc., [1923] A. C. 74. **Mentd.** Lewis v. Ronald (1909), 101 L. T. 534; Powell v. Thorncliffe (1910), 102 L. T. 600; Hart v. Rogers, [1916] 1 K. B. 646; Murphy v. Hurly, [1922] 1 A. C. 369.

**765. Liability of grantee—At common law.**—(1) It is not a good justification in trespass that deft. has a right of way over part of pltf.'s land, & that he had gone over the adjoining land, because the way was impassable from being overflowed by a river.

(2) I entirely agree that by common law he who has the use of a thing ought to repair it. The grantor may bind himself; but here he has not done it (LORD MANSFIELD, C.J.).

If this had been a way of necessity the question would have required consideration; but it is not so pleaded (BULLER, J.).—TAYLOR v. WHITEHEAD (1781), 2 Doug. K. B. 745; 99 E. R. 475.

*Annotations.*—*As to* (1) **Refd.** Weston v. Foster (1836), 2 Bing. N. C. 701. *As to* (2) **Apld.** Miller v. Hancock, [1893] 2 Q. B. 177. **Consd.** Jones v. Pritchard, [1908] 1 Ch. 630. **Apld.** Lucy v. Bawden (1914), 110 L. T. 580. **Refd.** Bullard v. Harrison (1815), 4 M. & S. 387; Huggett v. Miers, [1908] 2 K. B. 278. *Generally.* **Mentd.** Thomas v. Jones (1838), 1 Horn & H. 201.

**766. — — — — —**—MILLER v. HANCOCK, No. 763, *ante*.

**767. — — — — —**—HUGGETT v. MIERS, No. 764, *ante*.

**768. — Under express agreement.**—DUNCAN v. LOUCH, No. 759, *ante*.

**769. — — — — —**—*Semble*: where one grants to another a right of way the latter must bear the expense of making it available by forming the road, keeping it in repair, & erecting the necessary fences.—INGRAM v. MORECRAFT (1863), 33 Beav. 49; 55 E. R. 284.

**770. — Right to enter land of grantor.**—NEWCOMEN v. COULSON, No. 740, *ante*.

**771. Liability of occupier of servient tenement.**—In an action on the case for not repairing a private road leading through deft.'s close, it is sufficient for pltf. to allege that deft. as occupier of the close is bound to repair. But if the deft. prescribe in right of his own estate, he must show the estate in right of which he claims the privilege.—RIDER v. SMITH (1790), 3 Term Rep. 766; 100 E. R. 848.

*Annotation.*—**Refd.** Powell v. Salisbury (1828), 2 Y. & J. 391.

—KERRIGAN v. HARRISON (1920), 47 O. L. L. 548; 54 D. L. R. 258; 18 O. W. N. 263.—CAN.

**g. Liability of grantee.**—Pltf.'s predecessors in title had granted to deft.'s predecessors in title a right of way over land afterwards conveyed to pltf., such right of way being conditioned upon the grantees thereof "fencing & keeping in repair" the roadway over which the easement was granted. Shortly afterwards the grantees fenced the sides of the roadway, & put gates at each end of it, which, after remaining many years, rotted away.—*Held*: the right of way was dependent upon deft.'s maintaining fences not merely at the sides of the way in question, but also at the ends of it, where there might be gates as part of the fences.—CLENDENAN v. BLATCHFORD (1888), 15 O. R. 285.—CAN.

#### PART VII. SECT. 6. SUB-SECT. 3.—D. (b).

**760 l. Right of grantee to repair.**—E., owning land through which V. Street ran part of the way, from north to south, conveyed to pltf. four acres south of that street, "with the exception of continuing V. Street across said lot." Afterwards E. conveyed to W. by a statutory deed 65 acres adjoining pltf.'s land on the south & W. conveyed to deft.—*Held*: by the deed to pltf. the continuation of V. Street was excepted out of the land conveyed; this continuation was, when E. conveyed to W., a way actually used across pltf.'s land to W.'s land, & so passed by the deed to W. & from him to deft., who was therefore not liable in trespass for entering to repair the way.—HEBNER v. WILLIAMSON (1880), 44 U. C. R. 593.—CAN.

**1. Liability of grantor—By agreement—Subsequent performance rendered illegal.**—In 1911, deft. conveyed to G. land in a village together with a right of way over a road. In the deed of conveyance deft. covenanted "to maintain the said road & bridges thereon in as good condition as the same are now." In 1913, G. conveyed a portion of the land to pltf. The road having ceased to exist by reason of the encroachment of the waters of Lake Erie, this action was brought for a declaration that deft. was bound by his covenant to restore the road & for damages for breach of the covenant in not maintaining the road.—*Held*: the legal effect of the encroachment was to vest in the Crown the soil thus covered by water; deft. had no right to rebuild the road; & subsequent events having rendered the performance of the covenant illegal, deft. was excused from performing it.



## SECT. 7.—DEVIATION.

**772. Obstruction by grantor—Alternative way open—Grantee not bound to deviate.]—**HORN v. TAYLOR (1607), Noy, 128; 74 E. R. 1092.

*Annotation:—*Apld. Deacon v. S. E. Ry. (1889), 61 L. T. 377.

**773. ——— Right against grantor.]—**(1) The grantee of a right of way which has been obstructed by the grantor has a right to deviate over the grantor's land.

(2) The grantee is entitled to have this right protected by the ct. so long as the obstruction exists, without the necessity of proceeding against the grantor for the removal of the obstruction.

(3) Notice of a right of way, & also of an obstruction to it, is also notice of the grantee's right of deviation.

(4) The grantor of a right of way over a towing path along a private canal built a bridge over the canal, which entirely blocked up the towing path, & obliged the grantee to go through the grantor's land around the foot of the bridge in order to rejoin the towing path. Purchasers from the grantor of the land over which this right of way existed, attempted to prevent the grantee from using the substituted way which the building of the bridge had obliged him to use:—*Held*: the grantee was entitled to an injunction restraining the purchasers from interfering with his use of the substituted way; but the injunction must be limited to the period during which the obstruction of the towing path by the bridge might continue & was not to extend so as to authorise the grantee to use the substituted way for any other purpose than towing barges.

(5) We think that defts. who purchased from the grantor with notice have no better right as against pltf. than the grantor himself would have had (LORD SELBORNE, C.).—SELBY v. NETTLEFOLD (1873), 9 Ch. App. 111; 43 L. J. Ch. 359; 29 L. T. 661; 38 J. P. 404; 22 W. R. 142, L. C. & L. J.

**774. ——— Right against purchaser of servient tenement—With notice of obstruction.]—**SELBY v. NETTLEFOLD, No. 773, *ante*.

**775. ——— Action for removal unnecessary—With notice of obstruction.]—**SELBY v. NETTLEFOLD, No. 773, *ante*.

**776. ———.]—**A level crossing over a railway formed part of an old road which had been set out in an enclosure award as a private road for the use of persons who had land abutting on the road, & certain other persons, including defts. By agreement between pltf.'s predecessor in title & the railway co. this level crossing was closed by the railway co. Defts. finding that this obstruction existed, went over land belonging to pltf., whereupon pltf. sued them for trespass:—*Held*: the action failed, inasmuch as pltf., being a party to the closing up of the right of way, could not complain of defts.' deviating on to his land in order to get past the obstruction.—STACEY v. SHERRIN (1913), 29 T. L. R. 555, D. C.

## PART VII. SECT. 7.

**h. Obstruction by owner of dominant tenement—Alternative way open—Person entitled to right of way not bound to deviate.]—**The owner of land over which there is right of way by an ancient pathway cannot, without the consent of the parties entitled to the right, substitute another path & shut up the ancient pathway.—TARINEECHURN CHUCKERBUTTY v. TARINEECHURN CHUCKERBUTTY (1866), 1 Ind. Jur. N. S. 6.—IND.

**k. ———.]—**When the owner of a dominant tenement has

acquired a prescriptive right to take water from a tank on the servient tenement, & has for this purpose used a particular means of access for the statutory period, he has acquired a right to reach the water by means of such definite mode of access, & the servient owner, at his own discretion, may not substitute for his own use some other means of access.—JIBANANDA CHAKRABARTY v. KALIDAS MALIK (1914), 1 L. R. 42 Cal. 161.—IND.

**l. Right of owner of dominant tenement to divert course—Upon due notice—New way equally practicable & con-**

**777. Obstruction caused by natural causes—Flooding.]—**TAYLOR v. WHITEHEAD, No. 705, *ante*.

**778. Obstruction caused by non-repair.]—**BULLARD v. HARRISON (1815), 4 M. & S. 387; 105 E. R. 877.

*Annotation:—Mentd.* Russell v. Shenton (1842), 3 Q. B. 449.

**779. Effect of alteration of servient tenement.]—**Where premises are demised or conveyed "with right of way thereto," it may be a question for the jury what is a reasonable use of such right. Where a right of way was expressed to be "through the gateway" of pltf., which gateway led to other premises of pltf., & at the time of the lease, carts could come in to load & unload, & turn round, & go out again, but, through alterations of the premises, could not now do so without slightly trenching upon pltf.'s premises:—*Held*: (1) in the reasonable use of the right of way defts. had a right to do this; & (2) what was a reasonable user was for the jury.—HAWKINS v. CARRINES (1857), 27 L. J. Ex. 44.

**780. Use of deviated way—Limited to continuance of obstruction.]—**SELBY v. NETTLEFOLD, No. 773, *ante*.

**781. ——— Must not exceed uses of original way.]—**SELBY v. NETTLEFOLD, No. 773, *ante*.

**782. Pleading deviation—When right to original way must be shown.]—**Trespass for breaking & entering pltf.'s close, & damaging the fences, etc. Plea of justification under a right of way. New assignment, that the action was brought for a trespass on a certain other portion of the said close. Plea to the new assignment, pltf. obstructed the way in the first plea mentioned, by digging a trench across the same, & because deft. could not remove the obstruction, he did, for the purpose of avoiding the same, & using the way, depart out of the same, along the said other portion of the close in the new assignment mentioned, & because the said fences in the new assignment mentioned were standing on a portion of the close in the new assignment mentioned, & that without breaking or damaging the same he could not go over the residue of the said close in which, etc., he did necessarily a little break & damage the said fences, etc. Replication, *de injuria*:—*Held*: (1) the right of way stated in the plea to the declaration was not admitted by pltf. in his new assignment; (2) the right being re-asserted, though informally, in the plea to the new assignment, it was put in issue by the replication, so as to throw the onus of proving it on deft.—ROBERTSON v. GANTLETT (1847), 16 M. & W. 289; 4 Dow. & L. 548; 16 L. J. Ex. 156; 8 L. T. O. S. 368; 153 E. R. 1198.

## SECT. 8.—DISTURBANCE.

**783. What amounts to—General rule—Substantial interference.]—**Pltf. purchased two of several plots of building land of which deft. was

*venient.*—The owner of a farm over which the owners of a dominant tenement have a servitude of right of way may, upon due notice to the owners of the dominant tenement, divert the course of the road over his farm, provided that the new road is equally practicable & convenient to such owners.—ROBIDGE v. MCCABE & SONS (1913), App. 1, 433.—S. AF.

## PART VII. SECT. 8.

**m. What amounts to—General rule.]—**The owner or occupier of the freehold cannot build over a way so as

## Sect. 8.—Disturbance.]

mtgee. in fee. The conveyance, to which deft. & the mtgor. were both parties, contained a grant of a right of way in these terms: "Together with full & free right & liberty for the grantee, his heirs, etc., at all times & for all purposes, etc., with or without horses, carriages, etc., to pass & re-pass over & along the roads or intended roads & ways delineated in the plan," & also a covenant by deft. that he had not "done, omitted, or knowingly suffered or been party or privy to anything whereby the premises conveyed, or any part thereof, were or might be impeached, affected, or incumbered in title, estate, or otherwise howsoever, or whereby he was in any wise hindered from granting & releasing the same premises, or any part thereof, in manner aforesaid." Another plot had previously been sold to A. In the conveyance to A., to which deft. as mtgee. was a party, the mtgor. covenanted with A. that he would at his own expense "pave & complete & make fit for use, & at all times maintain in good repair, a private road, & will make such road of a width of not less than forty feet throughout its entire length." This was the road over which a right of way was granted to pltf. in his conveyance. In this deed was also a proviso that it should be lawful for A. "to erect & maintain a *porte-cochere* or projection extending over the foot pavement of the said private road, provided that the plan thereof be submitted to the mtgor., & approved of by him." This portico when finished projected about two feet into the carriage way of the private road, but there was ample space left for the convenient enjoyment by pltf. of the way granted to him:—*Held*: (1) there being no substantial interference with the right of way or easement granted to pltf., he was not entitled to maintain an action against deft. upon his covenant; (2) if there had been such interference with any right of pltf., however small the damage, deft. was sufficiently a "party or privy" to the conveyance to A. as to have rendered him liable.—CLIFFORD v. HOARE (1874), L. R. 9 C. P. 362; 43 L. J. C. P. 225; 30 L. T. 465; 22 W. R. 828.

*Annotations*:—As to (1) *Consd. Petley v. Parsons*, [1914] 2 Ch. 653. *Held*, Skelchey v. Berger (1893), 69 L. T. 754; *Strick v. City Offices Co.* (1906), 22 T. L. R. 667.

784. ———.]—Where a right of way over land laid out as a roadway is granted or reserved to the owner of adjoining land as appurtenant thereto & to every part thereof, he is not entitled to have the roadway left unfenced for ever, but to reasonable access to the roadway. In the case of a public highway any appreciable obstruction is actionable; but to enable the grantee of a private right of way to prevent the erection of a gate across the way he must show it will be a substantial obstruction to his easement.

Deft. granted to pltf. a piece of land to the extreme south of the bulk of his own land, & an adjoining piece of land, coloured blue on a plan,

to interfere with the enjoyment by a holder of the right of way of the general or particular use for which it was granted.—DELGADO v. BAYNE, JOHNSTON & Co. (1904), 9 Nfld. L. R. 14.—*NFLD.*

n. ———.]—A right of passage for boats in the rainy season over a channel wholly in another man's land is, in respect of extent, analogous to an ordinary right of way; & the dominant owner cannot complain of the servient owner's narrowing the channel, so long as the latter, by so doing, does not prevent the former from passing & re-passing as conveniently as he has always been accustomed to

do.—DOORGA CHURN DHUR v. KALLY COOMAR SEN (1881), 1 L. R. 7 Calc. 145; 8 C. L. R. 375.—*IND.*

o. ———.]—In order to constitute an unlawful interference with an easement the interference must be substantial & it must be clear that it is operating to the grantee's prejudice.—MCKELLAR v. GUTHRIE, [1920] N. Z. L. R. 729.—*N.Z.*

p. ———.]—*Erection of fence—With reasonable gateways.*—The owner of an allotment in a residential suburb, was proceeded against by the owner of the adjoining allotment. Deft.'s land adjoined a lane on complainant's land, & deft. was entitled to a right of

to the north of the land so granted, reserving to himself, his heirs & assigns, owner or owners, of a messuage & land adjoining the blue land on the north, & his & their tenants & servants & all other persons authorised in that behalf by him & them, from time to time & at all times & for all purposes, to pass & re-pass, with or without animals, carts & carriages over & along a road ten feet wide covenanted to be made by pltf. on the blue land; & pltf. by the same deed, as beneficial owner granted to deft. in fee simple the same right of way "as appurtenant to the same land & every part thereof." Pltf. made the ten foot road on the blue land, deft.'s fence along the middle of it being moved back to the boundary of his own land on the north. Deft. built shops on his land & at the south-east corner thereof removed his fence for some sixteen feet along the roadway, so placing his shop frontage at this point that he left a triangular piece of his own land vacant, & bounded on one side by the frontage, on another by a public highway, & on the third side by the sixteen feet of blue road. Pltf. then put a railway along this sixteen feet & erected a gate across the eastern entrance from the highway to the blue road. Deft. promptly removed both railway & gate:—*Held*: (1) this was a private right of way; (2) it had not been substantially interfered with, & pltf. was entitled to erect a gate, which, however, must be kept open during business hours & must never be locked; (3) deft. was entitled only to reasonable access to the blue road, & pltf. was entitled to erect a fence with a gate in it along the sixteen feet.—PETTEY v. PARSONS, [1914] 2 Ch. 653; 84 L. J. Ch. 81; 111 L. T. 1011; 30 T. L. R. 655; 58 Sol. Jo. 721, C. A.

785. ———.]—*Disturbance in fact—Not amounting to inconvenience.*—In an action on the case for obstructing a private right of way for husbandry purposes, the jury found that the way was narrowed, but not to the inconvenience of pltf.:—*Held*: that finding amounted to a verdict for deft. upon "Not guilty."

The real effect of the finding is, that pltf.'s right has not been obstructed. He has a right to go over deft.'s close, & that right he has continued to exercise. He had no right to go over every part of the close, or even every part which he had gone over before, unless that part was specifically given to him (DENMAN, C.J.).—GREEN v. SOUTH (1848), 12 L. T. O. S. 124.

786. ———.]—*Not merely anticipatory.*—BRADBURN v. MORRIS, MORRIS v. BRADBURN, No. 38, ante.

787. ———.]—*Simultaneous collective acts—One such individual act causing no disturbance.*—(1) The acts of several persons may together constitute a nuisance, which the ct. will restrain, though the damage occasioned by the acts of any one, if taken alone, would be inappreciable.

P. was the owner of an inn, the yard of which was approached by a passage over adjoining

way over the lane. Complainant sought an order for the construction of a fence along the boundary. Deft. objected that the erection would obstruct the right claimed by deft. to enter on the lane at any & every point:—*Held*: an undertaking being given by complainant to allow any reasonable gateways in the fence, such fence would not constitute any substantial interference with deft.'s easement.—ROSE v. CORDEN, [1921] V. L. R. 617.—*AUS.*

q. ———.]—*Erection of gates.*—An arrangement made between pltf. & B., whereby the latter "was allowed to go through" pltf.'s land, was superseded by an arrangement whereby,

property of M. P. & M. agreed to alter their boundary, & substitute a new passage for the old one. M. accordingly conveyed to P. a small strip of land reaching across the end of the new passage where it entered the yard, & granted to P., his heirs, etc., "rights of way at all times & for all purposes along a passage intended to run between the piece of land hereinbefore conveyed & a street called T." By another deed, P. released his rights of way over the old passage. Pltf. was a lessee of the inn & yard under P. Defts. were tenants of M., occupying warehouses on his property, & the bill was filed to prevent defts. from allowing carts & waggons to remain stationary in the passage in course of loading & unloading, so as to obstruct the access to the yard:—*Held*: (2) the necessity of the business of defts. did not give them any right to occupy the passage by stationary obstructions when any other person having a right of way required to pass; (3) the right of way was not a right in gross, but was appurtenant to the property occupied by pltf., so that his lease gave him a right to the enjoyment of it.

Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience which a person entitled to the use of the way has a right to prevent (JAMES, L.J.).—*THORPE v. BRUMFITT* (1873), 8 Ch. App. 650; 37 J. P. 742, L. JJ.

*Annotations*:—As to (1) *Consd.* Blair & Sumner v. Deakin, Eden & Thwaites v. Deakin (1887), 57 L. T. 522. *Apprvd.* & *Apld.* Lambton v. Mellish, Lambton v. Cox, [1894] 3 Ch. 163. *Consd.* Sadler v. G. W. Ry., [1895] 2 Q. B. 688. *Refd.* Sadler v. G. W. Ry. (1896), 45 W. R. 51. As to (2) *Refd.* Fritz v. Hobson (1880), 42 L. T. 225; A-G v. Scott, [1905] 2 K. B. 160. As to (3) *Consd.* Fritz v. Hobson (1880), 42 L. T. 225.

**788. —Erection of gates—Though keys supplied therefor.**—It is an obstruction to a person's free right of way if another person locks gates across such way, & it is no answer to the complaint as to the obstruction to say that keys for the gates will be supplied.—*GUEST'S ESTATES, LTD. v. MILNER'S SAFES, LTD.* (1911), 28 T. L. R. 59.

**789. What persons responsible—All contributing to disturbance.**—*CORBY v. HILL*, No. 795, post.

**790. By consent—Laying down gas pipes—On request of grantees.**—Occupation roads laid out through an estate for the use & convenience of the inhabitants are not thereby dedicated to the public. An estate was purchased for the purpose of building houses; a part was laid out as private roads, & upon a partition, the owners taking the roads covenanted that the other freeholders & the occupiers of the houses should have the full use & enjoyment of the roads in as absolute a manner as if they were public roads:—*Held*: a request to be supplied with gas by a minority of the occupiers of houses was sufficient, without the consent of the freeholders, to justify the breaking up the roads by the gas co. to lay down their pipes to comply with such request. On appeal the decision was affirmed, as every occupier had the same right, for the purpose of his use & enjoyment, to call in all such aid as he might have

done if the roads had been public roads.—*SELBY v. CRYSTAL PALACE GAS CO.* (1862), 4 De G. F. & J. 246; 31 L. J. Ch. 595; 6 L. T. 790; 26 J. P. 676; 8 Jur. N. S. 830; 10 W. R. 636; 45 E. R. 1178, L. JJ.

**791. On compulsory purchase—Substitution of other way—Relative convenience of old & new way—Railways Clauses Act, 1845 (c. 20), s. 53.**—By a special Act incorporating Railway Clauses Act, 1845 (c. 20), a ry. co. were authorised to widen their existing railway, & on the parliamentary plans the existing line of railway was delineated, & there were dotted lines on either side indicating the limits of deviation. The co. constructed a portion of their widening outside the limits shown by one of the dotted lines & upon land taken by them from pltf., who brought this action against them for an injunction, but did not show that he had sustained any special damage by reason of their acts.

It is competent to the ry. co. to take land for the purpose of making a substituted way. That has been decided in years gone by. The present way is in some places narrower than it was before, & it is said not to be so convenient as before; but if it is sufficiently wide for the purpose for which it exists—that is to say, to let a horse go to & from the stable—that would seem to satisfy pltf.'s right. There is no absolute right to seven feet all the way along; & when you look at the above sect. it amounts to this: it is drawn in such a way that there is a certain latitude in giving the substituted way. It is to be "as convenient as the former, or as near as may be." The learned judge has found as a fact that this is a sufficiently convenient way, & I see no reason to differ from him on that ground. It might have been straighter or more convenient, but still it is a reasonable way, & as good as the co. can give under the circumstances (LINDLEY, L.J.).—*FINCH v. LONDON & SOUTH WESTERN RY. CO.* (1890), 44 Ch. D. 330; 59 L. J. Ch. 458; 62 L. T. 881; 38 W. R. 513; 6 T. L. R. 223, C. A.

*Annotations*:—*Refd.* Cardiff Ry. v. Taff Vale Ry., [1905] 2 Ch. 289. *Mentd.* Protheroe v. Tottenham & Forest Gate Ry., [1891] 3 Ch. 278.

**792. —Penalty for failure to provide—Railway Clauses Act, 1845 (c. 20), ss. 53, 54.**—By sect. 53 of above Act, if a railway co., in the exercise of their powers find it necessary to cut through, raise, sink, or use any part of any road, either public or private so as to render it impassable or dangerous, they shall before commencing such operations cause a sufficient road to be made instead of the road to be interfered with; & by sect. 54 they are, in default of so doing liable to a penalty which, in the case of a private road shall be paid "to the owner thereof":—*Held*: the owner of the soil of any part of that portion of a private road which has been interfered with may sue to recover the penalty but that only one such penalty is recoverable from the railway co.—*LEWELLYN v. VALE OF GLAMORGAN RY. CO.*, [1898] 1 Q. B. 473; 67 L. J. Q. B. 305; 78 L. T. 70; 46 W. R. 290; 14 T. L. R. 204; 42 Sol. Jo. 251, C. A.

—**Compensation for.**—See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 136, 137, 143,

in consideration of 150 cords of wood & the making of a road by B., the latter was to have a right of way through the same land. Pltf. was to erect & keep up the gate at one end, & B. was to keep up the gate at the other end of the road. The wood was delivered, & the road made, according to the terms of the agreement. Pltf. subsequently erected three additional

gates along the course of the right of way, which were not necessary for the enjoyment of the land. The bill was filed to restrain deft. from using the way except upon the terms of shutting those three gates when going through:—*Held*: the right of way having been purchased when there were but two gates, pltf. had no right to fetter the enjoyment of the way by adding

additional gates.—*KATNER v. BEADLE* (1881), 29 Gr. 266.—*CAN.*

r. — — — — — *R. v. McDONALD* (1886), 12 O. R. 381.—*CAN.*

s. — — — — — *Pltf.* & deft. were tenants of holdings held under a common landlord. Deft. had acquired a right of way over pltf.'s holding. Across the end of this way.

**Sect. 8.—Disturbance. Sect. 9: Sub-sect. 1.]**

144, 185, Nos. 228, 230, 232, 239, 240, 273, 274, 276, 280, 282, 283, 655.

**Remedies for—Abatement.]—See Part XII., Sect. 2, sub-sect. 1, post.**

**Legal proceedings.]—See Sect. 9, sub-sect. 1; Part XII., Sect. 2, sub-sect. 2, post.**

**SECT. 9.—ACTIONS IN RESPECT OF WAYS.****SUB-SECT. 1.—ACTION FOR DISTURBANCE.**

*See, generally, Part XII., post.*

**793. When action lies.]—POMFRET v. RICOFT, No. 482, ante.**

**794. —.]—REIGNOLDS v. EDWARDS, No. 614, ante.**

**795. —.]—**On a private road leading to a county lunatic asylum, along which persons had been accustomed to pass by the leave of the owners, & were likely to continue to pass, deft. being about to build, received leave to place materials, & in pursuance thereof placed his materials in such a way as to obstruct the road & to make it dangerous to persons using it, & did not give notice to such persons by signal or otherwise. An injury having been caused thereby to the horse of pltf. while lawfully using the road:—*Held*: (1) deft. was liable to an action by pltf. for the injury sustained; (2) it was not necessary to aver in the declaration that the materials were so placed by deft. without the permission of the owners & occupiers of the soil, as such allegation would raise an immaterial issue.

(3) If this way had been a public highway, & deft. had placed an obstruction upon it, no action would have lain for that unless some individual had sustained an injury therefrom. It seems to me that the rule of law is precisely the same in respect of a private way, whether by prescription or by license. If the exercise of that right be obstructed, the party injured thereby has a right of action, just the same as if the way had been a public one. The qualification of the license set up by deft. was introduced by the jury: I did not put it to them; for, I did not consider it any part of the case. If the obstruction was placed upon the road with the unqualified leave of the owners

where it entered the county road, pltf. erected a gate for the convenient use of his holding. Deft. was allowed free ingress & egress through the gate:—*Held*: no obstruction of the right of way.—**FLYNN v. HARTE, [1913] 2 I. R. 322.—IR.**

**PART VII. SECT. 9, SUB-SECT. 1.**

**793 i. When action lies.]—**In an action for obstructing a right of way:—*Held*: the obstruction without actual damage gave the grantee a cause of action, for it was an interference with his easement, which, if submitted to would become a right.—**PLUMB v. MCGANNON (1871), 32 U. C. R. 8.—CAN.**

**793 ii. —.]—**Where in building their road defts. left a subway under a trestle bridge, & the evidence showed that pltf., the owner of the land crossed by the railway at this point, had enjoyed the open & continuous use of this subway as of right ever since 1862, but that defts. were now proceeding to fill it up:—*Held*: though pltf. could not prevent the filling up of the subway he was entitled to damages for his property in the easement.—**WELLS v. NORTHERN RY. CO. (1887), 14 O. R. 594.—CAN.**

**793 iii. —.]—**Pltf. claimed damages for obstruction of a right of way for foot passengers. The right of way was proved:—*Held*: pltf. was entitled to recover.—**SAMPSON v. SAMPSON (1890), 23 N. S. R. 38.—CAN.**

**793 iv. —.]—**An action for damages for removal & destruction of pltf.'s portions of his farm as separated by the railway right of way, & for a *mandamus*:—*Held*: pltf. was entitled to damages for depreciation in value of his land, by the underpass having been removed.—**LESLIE v. LIZIE MARQUETTE RY. CO. (1911), 30 O. W. R. 832; 3 O. W. N. 477; 25 O. L. R. 326.—CAN.**

**793 v. —.]—**The obstruction of a private right of way is not actionable unless there is a real substantial interference with the enjoyment of it.—**DEVANEY v. MCNAN (1920), 69 D. L. R. 231; 51 O. L. R. 106.—CAN.**

**793 vi. —.]—**If a party owns a right of way which is interfered with, but not substantially, he has no cause of action.—**COHEN v. BOONE (1921), 64 D. L. R. 429; 50 O. L. R. 368.—CAN.**

**793 vii. —.]—**In a suit for the removal of a building which defts.

of the soil, all persons contributory to the injury sustained by the pltf. therefrom would be jointly & severally responsible to him for it. As to the declaration, I have nothing to add to what has fallen from the rest of the ct. (**BYLES, J.**).—**CORRY v. HILL (1858), 4 C. B. N. S. 556; 27 L. J. C. P. 318; 31 L. T. O. S. 131; 22 J. P. 386; 4 Jur. N. S. 512; 6 W. R. 575; 140 E. R. 1209.**

**Annotations:—**As to (1) **Consd. Hounsell v. Smyth (1860), 7 C. B. N. S. 731; Pickard v. Smith (1861), 10 C. B. N. S. 470. Distd. Bolch v. Smith (1862), 7 H. & N. 736; Gallagher v. Humphrey (1862), 27 J. P. 5; Castle v. Parker (1868), 18 L. T. 367. Follid. White v. Franco (1877), 2 C. P. D. 308. Consd. Heaven v. Pender (1883), 11 Q. B. D. 503; Lowery v. Walker (1909), 101 L. T. 873. Apld. Kimber v. Gas Light & Coke Co., [1918] 1 K. B. 439. Refd. Marfell v. South Wales Rty. (1860), 7 Jur. N. S. 240; Robbins v. Jones (1863), 33 L. J. C. P. 1; Gautret v. Egerton (1867), L. R. 2 C. P. 371; Smith v. London & St. Katharine Docks Co. (1868), L. R. 3 C. P. 326; Dublin, Wicklow, & Wexford Rty. v. Slattery (1878), 3 App. Cas. 1155; Burohell v. Hickisson (1880), 50 L. J. Q. B. 101; Tolhausen v. Davies (1888), 57 L. J. Q. B. 392; Harris v. Perry, [1903] 2 K. B. 219. Generally, **Mentd. Watkins v. G. W. Rty. (1877), 46 L. J. Q. B. 817; Daniels v. Jones (1880), De Colyar's County Court Cases 146; Latham v. Johnson & Nephew, [1913] 1 K. B. 398.****

**796. — Condition precedent to action—Notice & request to remove obstruction—Passage way through house.]—TOMLIN v. FULLER, No. 667, ante.**

**797. — User of way long impossible.]—BOWER v. HILL, No. 502, ante.**

**798. Form of action—Way in gross only—Action in covenant.]—ANON. (1345), Jenk. 17; 145 E. R. 13.**

**799. — — —.]—ANON. (1347), Jenk. 20; 145 E. R. 15.**

**Annotation:—Refd. James v. Plant (1836), 4 Ad. & El. 749.**

**800. — Action on the case.]—MORRIS v. EDGINGTON, No. 49, ante.**

**801. — —.]—**An assize or an action on the case, lies for disturbance in stopping a way upon pltf.'s freehold.—**ALSTON v. PAMPHYN (1596), Cro. Eliz. 466; 78 E. R. 719.**

**802. — —.]—COLLIER v. TUCKER, No. 666, ante.**

**803. — Injunction restraining obstruction.]—**By a deed of agreement it was stipulated that, for certain considerations, deft. should grant to pltf. his heirs, etc., full & free permission "to use at all times the roads & ways in & through his (deft.'s) estate." There were two roads traversing deft.'s estate, at the further extremity of which,

had erected & which was an obstruction to pltf.'s right to use a courtyard adjoining their residences:—*Held*: the suit being brought in respect of an interference with a private easement, was maintainable without proof of special damage.—**FATEHYAB KHAN v. MUHAMMAD YUSUF, MUHAMMAD YUSUF v. FATEHYAB KHAN (1887), 1 L. R. 9 All. 431.—IND.**

**793 viii. —.]—**An indictment having been found against a party for the obstruction of an alleged right of way, deft. applied for a writ of *certiorari* to remove the said indictment from the criminal to the civil side of the ct. The writ was granted, on the ground that a view jury was absolutely necessary in a case of this kind.—**IL. v. MAGILL (1859), 8 Cox, C. C. 216.—IR.**

**803 i. Form of action—Injunction restraining obstruction.]—**Defts. closed a gateway leading across a level crossing of their railway over which there was a public right of way. Pltf. alleged that by the closing of this gateway access to his bungalow during the monsoon was completely stopped; & he sued to have the gateway reopened. It was contended by defts. that pltf. was only entitled to com-

where his land terminated, certain existing obstructions were continued by deft. so that pltf., whilst he had the use of the roads over deft.'s estate, could not pass beyond it:—*Held*: an injunction to restrain deft. from continuing the existing or making any other obstructions at the extremity of his land would be granted.—*PHILLIPS v. TREEBY* (1862), 6 L. T. 796; 8 Jur. N. S. 999, L. C.; *affg.* 3 Giff. 632.

**804.** ———.] —Where pltf. established by evidence a right of using a *cul-de-sac* for the purpose of his property which was at the head of a road, & farthest from its outlet, but did not prove any grant of a right, a decree was made declaring that it was the duty of deft., who had premises lower down the road, so to arrange the use of the road by him as best to facilitate the reciprocal rights to the use of it by other persons entitled to use it, not to leave stationary obstructions in the road when others required to use it, & in such case to remove any such obstruction immediately, with an injunction to restrain the use of the road by deft. in any other manner.—*SHOESMITH v. BYERLEY* (1873), 28 L. T. 553; 21 W. R. 668.

**805.** ———.] —*CANNON v. VILLARS*, No. 685, *ante*.

**806.** ———.] —This was an action to restrain deft. council from breaking down or destroying certain hedges or fences on pltf.'s farms, or in any way trespassing upon an alleged footpath leading from H. to C. Pltf. alleged that the footpath in question was his own private way & not a public right of way. Deft. council, who had alleged that the path was a public right of way, now admitted pltf.'s claim & consented to an injunction.—*PROSSER v. LLANDAFF & DINAS POWIS RURAL DISTRICT COUNCIL* (1915), 79 J. P. Jo. 389.

**807.** ——— **Mandatory injunction.**—*SKETCHLEY v. BERGER*, No. 680, *ante*.

**808. Who may sue—Reversioner.**—A reversioner cannot sue for the obstruction of a right of way, unless the obstruction be such as either permanently injures the estate, or operates in denial of the right.—*HOPWOOD v. SCHOFIELD* (1837), 2 Mood. & R. 34, N. P.

*Annotation*:—*Reid*. Metropolitan Asscn. for Improving the Dwellings of the Industrial Classes v. Petch (1858), 5 C. B. N. S. 504.

**809.** ———.] —A declaration in case by a reversioner alleged that pltf. was entitled to a right of way for his tenants over a certain close of deft.; & charged that deft. wrongfully locked, chained, shut, & fastened a certain gate standing in & across the way, & wrongfully kept the same so locked, etc., & thereby obstructed the way; & that, by means of the premises, pltf. was injured in his reversionary estate:—*Held*: the declaration was sufficient, inasmuch as such an obstruction might occasion injury to the reversion, & it must be assumed, after verdict, that evidence to that effect had been given.—*KINGILL v. MOOR* (1850), 9 C. B. 364; 1 L. M. & P. 131; 19 L. J. C. P. 177; 14 L. T. O. S. 443; 14 Jur. 790; 137 E. R. 934.

*Annotations*:—*Apld.* Metropolitan Asscn. for Improving

the Dwellings of the Industrial Classes v. Petch (1858), 5 C. B. N. S. 504. *Consd.* Norwich Corp'n. v. Brown (1883), 48 L. T. 898. *Reid*. Bell v. Mid. Rty. (1861), 10 C. B. N. S. 287; *Leader v. Moody* (1875), 44 L. J. Ch. 711; *Mott v. Shoolbred* (1875), 44 L. J. Ch. 380; *Noble v. Harrison* (1892), 37 Sol. Jo. 131; *Mayfair Property Co. v. Johnston*, [1891] 1 Ch. 508. *Mentd.* Simpson v. Savage (1856), 1 C. B. N. S. 347.

**808 i. Who may sue—Reversioner.**—A reversioner has a cause of action against his tenant, before the expiration of the tenancy, for placing an obstruction of a permanent nature upon a way appurtenant to the denied premises.—*M'CARTHY v. CUNNINGHAM* (1877), 3 V. L. R. 59.—*AUS.*

**a. Pleadings—No averment of knowledge of vicious nature of dog.**—In an action for disturbance of a right of way, the plaint stated that deft.

decessors in title had proceeded to stop up the way or obstruct the use of it by respts. they could have been restrained by injunction, & applt. was in no better position.—*SMITH v. CHRISTIE* (1901), 24 N. Z. L. R. 561.—*N.Z.*

**t. Action for trespass.**—A question of infringement of right of way can properly be tried in the form of an action for trespass.—*HOFMEYER v. HOFMEYER* (1875), Buch. 141.—*S. AF.*

the Dwellings of the Industrial Classes v. Petch (1858), 5 C. B. N. S. 504. *Consd.* Norwich Corp'n. v. Brown (1883), 48 L. T. 898. *Reid*. Bell v. Mid. Rty. (1861), 10 C. B. N. S. 287; *Leader v. Moody* (1875), 44 L. J. Ch. 711; *Mott v. Shoolbred* (1875), 44 L. J. Ch. 380; *Noble v. Harrison* (1892), 37 Sol. Jo. 131; *Mayfair Property Co. v. Johnston*, [1891] 1 Ch. 508. *Mentd.* Simpson v. Savage (1856), 1 C. B. N. S. 347.

**810. ——— Permanency of obstruction.**—

By a particular sect. of the Act of Incorporation of a railway co. the owners of lands adjoining the line were empowered to lay down or extend either upon their own lands or on lands on the side thereof belonging to the co., or upon the lands of any other persons, with the consent of such other persons, any collateral or continuous branch from such respective lands, etc., to communicate with the railway for the purpose of bringing carriages upon or across the same. Pltf. in 1839 with the assent of the co. made a siding on his land connecting the railway with a wharf, part of which was in his own occupation & other part in that of certain tenants; & down to 1857 the co. carried coals & other goods for pltf. & his tenants, placing the trucks on the siding & so sending them down to the wharf. In the course of that year, however, the co., with a view, as the jury thought of diverting the trade from pltf.'s wharf to another wharf in which they were interested, gave pltf. notice under another sect. of their Act that after Sept. 30 they would no longer provide him with locomotive power for the conveyance of his goods along their line, & on Oct. 1 they placed carriages & other things across the junction for the purpose, as the jury found, of permanently obstructing & preventing pltf. & his tenants having access to the wharf by means of their railway. Neither pltf. nor his tenants had availed themselves at this time of the authority given to them by the Act of Parliament to provide locomotive power of their own, & consequently they were not in a position to be actually obstructed. The tenants, however, finding their trade destroyed, removed from pltf.'s wharf & carried their business to the co.'s wharf:—*Held*: these wrongful acts of the co. constituted such a permanent obstruction & injury to pltf.'s right to the use of his siding as to entitle him as a reversioner to maintain an action.—*BELL v. MIDLAND RY. CO.* (1861), 10 C. B. N. S. 287; 30 L. J. C. P. 273; 4 L. T. 293; 7 Jur. N. S. 1200; 9 W. R. 612; 142 E. R. 462.

*Annotations*:—*Reid*. Beckett v. Mid. Rty. (1867), L. R. 3 C. P. 82; *Mayfair Property Co. v. Johnston*, [1891] 1 Ch. 508. *Mentd.* Thompson v. Hill (1870), L. R. 5 C. P. 564; *Powell Duffryn Steam Coal Co. v. Taff Vale Rty.* (1875), 29 L. T. 575; *Mott v. Shoolbred* (1875), 44 L. J. Ch. 380; *Addis v. Gramophone Co.*, [1909] A. C. 488.

**811. Against whom action lies—Mortgagee of grantor.**—*CLIFFORD v. HOARE*, No. 783, *ante*.

**812. Necessity for proof of title.**—*CANTRELL v. STEPHENS* (1851), Sty. 300; 82 E. R. 727.

**813.** ———.] —*ST. JOHN v. MOODY* (1675), 1 Vent. 274; 2 Lev. 148; 3 Keb. 531; 86 E. R. 184, Ex. Ch.

*Annotations*:—*Consd.* Birt v. Strobe (1696), 12 Mod. Rep. 97. *Reid*. Rosewell v. Pryor (1701), 6 Mod. Rep. 116. *Mentd.* Iveson v. Moore (1699), 1 Ld. Raym. 486; *Crowther v. Oldfield* (1705), 2 Ld. Raym. 1225.

**808 i. Who may sue—Reversioner.**—

A reversioner has a cause of action against his tenant, before the expiration of the tenancy, for placing an obstruction of a permanent nature upon a way appurtenant to the denied premises.—*M'CARTHY v. CUNNINGHAM* (1877), 3 V. L. R. 59.—*AUS.*

**a. Pleadings—No averment of knowledge of vicious nature of dog.**—In an action for disturbance of a right of way, the plaint stated that deft.

*Sect. 9.—Actions in respect of ways: Sub-sects. 1 & 2. Sect. 10. Part VIII. Sects. 1 & 2.]*

**814.** —[—Action for disturbing one of a way, which he ought to have, use & enjoy:—*Held*: good, although no title by prescription shown.—*WINFORD v. WOLLASTON* (1689), 3 Lev. 266; 83 E. R. 682.

*Annotations*:—*Reid*. *Rider v. Smith* (1790), 3 Term Rep. 766; *Kooystra v. Lucas* (1822), 1 Dow. & Ry. K. B. 506.

**815.** —[—Where a common or a way is claimed the title ought to be set forth in the declaration (*HOLT, C.J.*).—*ANON.* (1693), 12 Mod. Rep. 35; 88 E. R. 1147.

**816.** *Pleadings—Prescription for way as appurtenant to house—Whether antiquity of house to be pleaded.*—*HARRISON v. ROOKE* (1625), Palm. 420; Benl. 160; 81 E. R. 1151; *sub nom.* *HARRISON v. PECK*, Lat. 110.

**817.** —[—*Easements proved different from easement alleged—When a variance.*—*DUNCAN v. LOUCH*, No. 759, *ante*.

**818.** —[—*Condition attaching to easement—When to be set out.*—*DUNCAN v. LOUCH*, No. 759, *ante*.

**819.** —[—*Mode of claim to be pleaded—Whether by grant or prescription.*—*HARRIS v. JENKINS*, No. 464, *ante*.

**820.** —[—*Locus in quo—Termini & general course.*—*HARRIS v. JENKINS*, No. 464, *ante*.

**821.** *Delay in bringing action—Damage caused slight—Effect of.*—[Where there has been delay in the assertion of a legal right, & the damage sustained is slight, the ct. will not grant an injunction to restrain infringement.

This principle applied to the case of a railway co. constructing its line so as to leave for the passage of a private road two intervals of nine feet three inches each, instead of one interval of twelve feet, as required by Railway Clauses Consolidation Act, 1845 (c. 20), s. 49.—*WINTIE v. BRISTOL & SOUTH WALES UNION RY. CO.* (1862), 6 L. T. 20; 10 W. R. 210.

*Decree in action—Against lord of manor—On whom binding.*—*See* *COPYHOLDS*, Vol. XIII., p. 54, No. 642.

#### SUB-SECT. 2.—ACTION FOR TRESPASS.

**822.** *By whom maintainable—Whether by reversioner.*—[A reversioner cannot maintain an action on the case against a stranger for merely entering upon his land held by a tenant on lease though the entry be made in exercise of an alleged right of way, such an act during the tenancy not being necessarily injurious to the reversion.—*BAXTER v. TAYLOR* (1832), 5 B. & Ad. 72; 1 Nev. & M. K. B. 11; 2 L. J. K. B. 65; 110 E. R. 382.

*Annotations*:—*Consd.* *Kidgill v. Moor* (1850), 9 C. B. 364. *Folld.* *Damper v. Bassett*, [1901] 2 Ch. 350. *Reid*. *Bower*

wrongfully & injuriously kept & continued a vicious & dangerous dog upon his lands, & close to the way, so that pltf. & his family, etc., could not safely or securely, or without dread or apprehension, pass or repass along such way:—*Held*: bad, for not averring that deft. knew that the dog was of a vicious & mischievous nature, or that he kept it upon the way or in such circumstances as to cause reasonable danger or apprehension in the user of the way.—*GRAINGER v. FINLAY* (1858), 7 I. C. L. R. 417; 10 Ir. Jur. 175.—*IR.*

#### PART VII. SECT. 9, SUB-SECT. 2.

##### b. Pleadings—Justification of way

by defendant.—*Necessity for written agreement.*—[*Trespass quare clausum fregit*. Plea, *liberum tenementum*. Replication, demise to deft. from pltf. from year to year. Rejoinder, that after the demise it was consented & agreed that deft. & his servants, etc., should have leave to pass & repass in & over the close, in which, etc.:—*Held*: to support this rejoinder, a written agreement at least, if not one under seal, should be proved.—*BROUGHAM v. BALFOUR* (1853), 3 C. P. 297.—*CAN.*

c. —[—*Whether evidence of way of necessity admissible.*—[Under a plea of right of way, where evidence was received of way of necessity, it is

*v. Hill* (1835), 1 Hodg. 45; *Mott v. Shoolbred* (1875), 23 W. R. 545. *Mentd.* *Tucker v. Newman* (1839), 11 Ad. & El. 40; *Dobson v. Blackmore* (1847), 9 Q. B. 991; *Johnstone v. Hall* (1856), 2 K. & J. 414; *Mumford v. Oxford, Worcester & Wolverhampton Ry.* (1856), 1 H. & N. 34; *Simpson v. Savage* (1856), 1 C. B. N. S. 347; *Cooper v. Crabtree* (1881), 19 Ch. D. 193; *Rust v. Victoria Graving Dock Co. & London & St. Katharine Dock Co.* (1887), 36 Ch. D. 113; *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508; *Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287.

**823.** —[—*Damage sufficiently permanent—Excessive user.*—*DURHAM & SUNDERLAND RY. CO. v. WALKER*, No. 584, *ante*.

**824.** —[—*By occupier.*—*DURHAM & SUNDERLAND RY. CO. v. WALKER*, No. 584, *ante*.

**825.** *Pleadings—Justification of way by defendant—Mistake in terminus a quo—No ground for new trial.*—[In trespass, deft. prescribes for a way over the close in which, etc., & mistakes the terminus a quo, in his plea; verdict for deft.:—*Held*: a new trial would be refused, the merits having been tried.—*SAMPSON v. AP. LEYARD* (1771), 3 Wils. 272; 95 E. R. 1051.

**826.** —[—*How far intervening closes need be set out.*—[In pleading a prescriptive private way, it is not necessary to describe all the closes intervening between the two termini: & therefore where, to trespass for breaking & entering pltf.'s closes, deft. pleaded "that he was seised in fee of land next adjoining to one of the said closes in which," etc., & then claimed, in respect of the land, a way from the land unto & into, through, over, & along the closes in which, etc., & unto & into certain common king's highway; & at the trial deft. proved a prescriptive right of way from his land into & over the land of third persons, & thence into & over pltf.'s closes, & thence into a common highway:—*Held*: the plea was sufficiently proved: & this, though it appeared that part of deft.'s land did adjoin to one of pltf.'s closes, & that, by permission of the latter, deft. had sometimes used a way from that part of his land over pltf.'s adjoining close, as well as the way to which the plea was meant to refer.—*SIMPSON v. LEWTHWAITE* (1832), 3 B. & Ad. 226; 1 L. J. K. B. 126; 110 E. R. 85.

*Annotation*:—*Folld.* *Holt v. Daw* (1851), 16 Q. B. 990.

**827.** —[—[To a declaration *quare clausum fregit*, deft. pleaded that he was the occupier of a close called B., with certain lands thereunto adjoining, & another close called M., with two other closes next adjoining thereto, & that he & the respective occupiers of the several closes & lands, had enjoyed a right of way for twenty years from the close called B., over the locus in quo, into & unto the close called M.:—*Held*: inasmuch as the termini of the way claimed were specially described by name, & two closes at least in respect of which the way was claimed were specially described by name, & as deft. was not bound to prove his right in respect of any but the two named closes, the plea was sufficiently

too late to object after the trial that such evidence was not receivable.—*TEED v. BEEBE* (1858), 2 Thom. 426.—*CAN.*

d. —[—[Pltf. sued deft. for taking his cattle. Plea, justifying as for distress *damage feasant* on deft.'s land. Replication, that pltf. demised to deft. the land mentioned in the plea, reserving a right of way along the west side thereof; & the alleged trespass was the use of such way. Rejoinder, that the trespass was beyond the right of way. Surjoinder, that at the time of the lease there was a fence along the east side of the way, to prevent horses, etc., straying therefrom: that deft. covenanted by the lease to keep such



certain though all the closes in respect of which the right of way was claimed were not specially described, either by name or by all their metes & bounds.—*HOLT v. DAW* (1851), 16 Q. B. 990; 20 L. J. Q. B. 385; 17 L. T. O. S. 198; 15 Jur. 1074; 117 E. R. 1161.

## SECT. 10.—SUSPENSION AND EXTINGUISHMENT.

*See, generally, Part V., ante.*

**Ways of necessity.**—*See* Sect. 3, sub-sect. 2, F., *ante.*

**On alteration of dominant tenement.**—*See* Sect. 6, sub-sect. 3, C., *ante.*

## Part VIII.—Light.

### SECT. 1.—IN GENERAL.

**828. No natural right to light — Over adjoining land.**—*TAPLING v. JONES*, No. 841, *post.*

**829.** ———.] — In considering whether an obstruction to ancient lights amounts to an actionable nuisance, the test is not whether so much light has been taken as materially to lessen the enjoyment & use of the house that its owner previously had, but whether so much is left as is enough for the comfortable use & enjoyment of the house according to the ordinary requirements of mankind.

Apart from express contract or grant, the owner of a house has no right to any access of light to the windows thereof over his neighbour's land until he has acquired it by prescription, or under the Act. When he has so acquired it, he has a house with an easement of light attached to it. Any substantial interference with his comfortable use & enjoyment of his house, according to the usages of ordinary persons in that locality, is actionable as a nuisance at common law. . . . The dominant owner was never entitled either by prescription or under the Act to all the light that came through his windows. It was not enough to show that some light had been taken, but the question always was whether so much had been taken as to cause a nuisance. . . . It is still, as it always has been, a question of nuisance or no nuisance, but the test of nuisance is not—How much light has been taken, & is that enough materially to lessen the enjoyment & use of the house that its owner previously had? but—How much is left, & is that enough for the comfortable use & enjoyment of the house according to the ordinary requirements of mankind (*FARWELL, J.*).—*HIGGINS v. BETTS*, [1905] 2 Ch. 210; 74 L. J. Ch. 621; 92 L. T. 850; 53 W. R. 549; 21 T. L. R. 552; 49 Sol. Jo. 535.

*Annotation* :—*Apld.* *Whitehouse v. Hugh* (1905), 22 T. L. R. 89.

### SECT. 2.—NATURE OF EASEMENT.

**830. Definition.**—(1) To constitute an actionable obstruction of ancient lights it is not enough that the light is less than before. There must be a substantial privation of light, enough to render

the occupation of the house uncomfortable according to the ordinary notions of mankind &, in the case of business premises, to prevent pltf. from carrying on his business as beneficially as before.

(2) The nature of the right to light & of an infringement was not altered by Prescription Act, 1832 (c. 71).

A period of twenty years' enjoyment as specified in the above Act of the access & use of light to a building creates an absolute & indefeasible right immediately on the expiration of the period of twenty years. . . . The period is not a period in gross, but a period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question (*LORD MACNAGHTEN*).

(3) The test of the right is, I think, whether the obstruction complained of is a nuisance, &, as it appears to me, the value of the test makes the amount of right acquired depend upon the surroundings & circumstances of light coming from other sources, as well as the question of the proximity of the premises complained of. . . . In each of such cases it becomes a question of degree, & the question is in each case whether it amounts to a nuisance which will give a right of action (*LORD HALSBURY, C.*).

(4) The right of a person who is owner or occupier of a building with windows, privileged as ancient lights, in regard to the protection of the light coming to those windows, is a purely legal right. It is an easement belonging to the class known as negative easements. It is nothing more nor less than the right to prevent the owner or occupier of an adjoining tenement from building or placing on his own land anything which has the effect of illegally obstructing or obscuring the light of the dominant tenement (*LORD MACNAGHTEN*).

(5) A judge who exercises the functions of both judge & jury cannot be expected to view the premises himself, even if he considers himself an expert in such matters. But I have often wondered why the ct. does not more frequently avail itself of the power of calling in a competent adviser to report to the ct. upon the question. There are plenty of experienced surveyors accustomed to deal with large properties in London who might be trusted to make a perfectly fair & impartial report,

fences in repair, but removed it, whereby pltf.'s horses strayed from the way upon deft.'s land. Rebutter, that the lease contained covenants allowing pltf. to enter on the land & view the state of repair, & that deft. would repair according to notice; that pltf. directed deft. to remove the fence along the east side of the way, & use the rails for other purposes, which deft. with the pltf.'s assistance, & as the act of pltf., accordingly did; & this is the removal referred to in the surrejoinder.—*Held*: the jury were justified in finding the rebutter proved by deft., whether it was a good answer in law to the surrejoinder not being a question for them.—*WIXON v. PICKARD* (1867), 25

U. C. R. 307.—*CAN.*

### PART VIII. SECT. 1.

**828 i. No natural right to light—Over adjoining land.**—The owner of a house, the light coming to which is obstructed by an erection made upon adjoining land by a person who *quâd* such adjoining land, is a trespasser, may possibly have an action against the person causing obstruction, even though he has not obtained by prescription an easement of light. But where the person causing such obstruction is the rightful owner of the adjoining land, or acting with the permission of the owner, no such action as aforesaid will lie against him unless pltf. has ac-

quired an easement.—*DHUMAN KHAN v. MUHAMMAD KHAN* (1896), 1 L. R. 19 All. 153.—*IND.*

**828 ii.** ———.] — Where land fronting a street is leased for the erection of buildings, such buildings would ordinarily be lighted at front & back, & if the lessor happens to be the owner of land adjoining also fronting on the street, then in the absence of special circumstances there would be no implied grant by him of a right to light over such adjoining land, & a lessee putting up buildings with windows overlooking that land would do so at his own risk.—*STEVENS v. NATIONAL MUTUAL LIFE ASSOC. OF AUSTRALIA, LTD.* (1913), 32 N. Z. L. R. 1140.—*N.Z.*

*Sect. 2.—Nature of easement. Sect. 3: Sub-sects. 1 & 2, A. & B.]*

subject, of course, to examination in ct. if required (LORD MACNAGHTEN).

(6) In some cases, of course, an injunction is necessary—if, for instance, the injury cannot be fairly compensated by money—if deft. has acted in a high-handed manner—if he has endeavoured to steal a march upon pltf. or to evade the jurisdiction of the ct. In all these cases an injunction is necessary, in order to do justice to pltf. & as a warning to others. But if there is really a question as to whether the obstruction is legal or not, & if deft. has acted fairly & not in an unneighbourly spirit, I am disposed to think that the ct. ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the ct. ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money (LORD MACNAGHTEN).

(7) The common form of injunction which has been in use since the case of *Yates v. Jack*, No. 920, *post*, is not altogether free from objection. I think it would be better that the order, when expressed in general terms, should restrain deft. from erecting any building so as to cause a nuisance or illegal obstruction to pltf.'s ancient windows, as same existed previously to the taking down of the house which formerly stood on 'the site of defts.' new buildings. If the action is brought to a hearing before defts.' new buildings are completed, & there seems to be good grounds for pltf.'s apprehensions, an order, I think, might be conveniently made in that form with costs up to the hearing, & liberty to pltf. within a fixed time after completion to apply for further relief by way of mandatory injunction or damages, as he may be advised (LORD MACNAGHTEN).

(8) It is impossible to assert that any man has a right to a fixed amount of light ascertainable by metres & bounds (LORD DAVEY).

(9) There is no rule of law that if a person has 45 degrees of unobstructed light through a particular window left to him he cannot maintain an action for a nuisance caused by diminishing the light which formerly came through that window. Experience shows that it is, generally speaking, a fair working rule to consider that no substantial injury is done to him where an angle of 45 degrees is left to him, especially if there is good light from other directions as well (LORD LINDLEY).

(10) The general principle deducible appears to be that the right to light is in truth no more than a right to be protected against a particular form of nuisance, & that an action for the obstruction of light which has in fact been used & enjoyed for twenty years without interruption or written consent cannot be sustained unless the obstruction amounts to an actionable nuisance (LORD LINDLEY). —*COLLS v. HOME & COLONIAL STORES, LTD.*, [1904] A. C. 179; 73 L. J. Ch. 484; 90 L. T. 687; 53 W. R. 30; 20 T. L. R. 475, H. L.; *reversg.* S. C. *sub nom.* HOME & COLONIAL STORES, LTD. v. COLLS, [1902] 1 Ch. 302, C. A.

*Annotations:—As to (1) Consd. Higgins v. Betts*, [1905] 2 Ch. 210. *As to (2) Follid. Hyman v. Van Den Bergh*, [1908] 1 Ch. 167. *Reftd. Morgan v. Fear*, [1907] A. C. 425. *As to (3) Consd. Jolly v. Kline*, [1907] A. C. 1. *Appl. Poleno & Allfort v. Rushmer*, [1907] A. C. 121. *Follid. Paul v. Robson* (1914), 83 L. J. P. C. 304. *Appl. Litchfield-Speer v. Queen Anne's Gate Syndicate* (No. 2), [1919] 1 Ch. 407. *Reftd. Andrews v. Walte*, [1907] 2 Ch. 500; *Clarke & Gorst v. Horrocks* (1908), 24 T. L. R. 486;

*Heath v. Brighton Corp.* (1908), 98 L. T. 718; *Browne v. Flower*, [1911] 1 Ch. 219. *As to (5) Reftd. Heath v. Brighton Corp.* (1908), 98 L. T. 718. *As to (6) Consd. Slack v. Leeds Industrial Co-op. Soc.*, [1923] 1 Ch. 431. *Reftd. Cowper v. Laidlor*, [1903] 2 Ch. 337. *As to (7) Follid. Higgins v. Betts*, [1905] 2 Ch. 210. *Appl. Anderson v. Francis*, [1906] W. N. 160. *As to (8) Appl. Ankerson v. Connelly*, [1907] 1 Ch. 678. *As to (10) Consd. Davis v. Marrable*, [1913] 2 Ch. 421. *Generally, Consd. Ambler v. Gordon*, [1905] 1 K. B. 417; *Griffith v. Clay*, [1912] 2 Ch. 291; *Paul v. Robson* (1914), 83 L. J. P. C. 304. *Reftd. Cowper v. Milburn* (1908), 52 Sol. Jo. 316; *Bailey v. Holborn & Frascati*, [1914] 1 Ch. 598. *Mentd. Hammerton v. Dysart*, [1916] 1 A. C. 57; *Prosperity v. Lloyds Bank* (1923), 39 T. L. R. 372.

**831. Analogous to servitude.**—There are many cases in which the principle has been recognised, that one landowner cannot, by altering the condition of his land, deprive the owner of the adjoining land of the privilege of using his own as he might have done before. Thus, he cannot, by building a house near the margin of his land, prevent his neighbour from excavating his own land, although it may endanger the house; nor from building on his own land, although it may obstruct windows, unless, indeed, by lapse of time, the adjoining land has become subject to a right analogous to what in the Roman Law was called a servitude (CRESSWELL, J.). —*SMITH v. KENRICK* (1849), 7 C. B. 515; 18 L. J. C. P. 172; 12 L. T. O. S. 556; 13 Jur. 362; 137 E. R. 205.

*Annotations:—Reftd. Angus v. Dalton* (1878), 4 Q. B. D. 162. *Mentd. Humphries v. Brogden* (1850), 12 Q. B. 739; *Chasenore v. Richards* (1859), 7 H. L. Cas. 349; *Scots Mines Co. v. Leadhills Mines Co.* (1859), 34 L. T. O. S. 34; *Baird v. Williamson* (1863), 15 C. B. N. S. 376; *Hodgkinson v. Ennor* (1863), 4 B. & S. 229; *Williamson v. Baird* (1863), 10 Jur. N. S. 152; *Hylands v. Fletcher* (1868), L. R. 3 H. L. 330; *Crompton v. Lea* (1874), L. R. 19 Eq. 115; *Smith v. Fletcher* (1874), L. R. 9 Exch. 64; *Humphries v. Cousins* (1877), 2 C. P. D. 239; *West Cumberland Iron & Steel Co. v. Kenyon* (1879), 11 Ch. D. 782; *A.-G. v. Tonline* (1880), 14 Ch. D. 58; *Whalley v. L. & Y. Ry.* (1884), 13 Q. B. D. 131; *Jordonson v. Sutton Southcoates & Drypool Gas Co.*, [1899] 2 Ch. 217; *Batcheller v. Tunbridge Wells Gas Co.* (1901), 65 J. T. 680; *Salt Union v. Brunner, Mond*, [1906] 2 K. B. 822; *Greyvensteyn v. Hattingh*, [1911] A. C. 355; *Hoare v. McAlpine* (1922), 92 L. J. Ch. 81.

**832. Negative easement.**—*COLLS v. HOME & COLONIAL STORES, LTD.*, No. 830, *ante*.

**833. — Over servient tenement as a whole.**—Pltf. sought to recover damages for the alleged obstruction to his ancient light caused by the erection on part of defts'. servient tenement of a building having a tower 35 feet high & 10 feet square in the place of a portion of the previous building, which was only 12 feet 6 inches high, notwithstanding the fact that by the lowering of the remaining buildings on deft.'s servient tenement the total amount of light coming to the dominant tenement over the servient tenement was in no way diminished:—*Held*: (1) defts. were entitled to credit for the new or increased light coming over their lowered buildings & were not, in the circumstances, liable to pay any compensation, but that, having once taken credit for the new or increased light, they could not subsequently deprive the dominant tenement of it by restoring the lowered buildings to their former height; (2) the right to ancient light enjoyed by the dominant tenement was a negative easement over the servient tenement considered as a whole, & since the decision in *Colls v. Home & Colonial Stores*, No. 830, *ante*, pltf. had no property or right in or to any particular cones or pencils of rays of light coming in any particular direction over any particular portion of the servient tenement, & therefore, the variation in the heights of the buildings on the servient tenement, although altering the sky line over which the ancient light used to come, conferred no right of action on pltf., provided the interference thereby





**SECT. 3.—Acquisition of right: Sub-sect. 2, B. & C. (a).]**

a subsequent temporary intermission of enjoyment, not amounting to abandonment; nor is it liable to be affected or prejudiced by any attempt to extend it beyond that which, having been enjoyed uninterruptedly during the required period, is declared by the statute to be not liable to be defeated; (2) The owner of a building does not exceed the limits of his right by opening new windows therein, overlooking his neighbour's land. The only remedy in the power of the adjoining owner is, to build on his own land, & so to shut out the offensive window. But, in doing this, he cannot lawfully obstruct ancient lights; (3) A. was possessed of premises which originally consisted of three storeys, with one ancient window in each storey. He altered the windows in the two lower storeys, but so as to make them both occupy a portion of the old apertures, retaining the window in the third storey unaltered. He also built two additional storeys in each of which he opened a new window. After these alterations were completed, B. who was erecting new premises upon the site of buildings which he had pulled down, built up a wall to such a height as to obscure the whole of the lights in A.'s building, it being impossible for B. to obstruct or block up A.'s upper windows, without also obstructing or blocking up the portion of the windows which occupied the position of the ancient windows, or to obstruct them in a manner more convenient (to B.) than by building up the wall as it was built. After B.'s wall was finished, A. caused the altered windows in his building to be restored to their original state, & the new windows in the two upper storeys to be blocked up, & then called upon B. to pull down his wall, & so to restore his (A.'s) premises to their former light & air; & upon his refusal to do so, brought an action for obstructing & continuing the obstruction of his ancient lights:—*Held*: the obstruction of A.'s ancient lights was unlawful. The opening of a new window being in itself an innocent act, cannot therefore destroy existing rights in one party, or give new, or revive old rights in another.

Some confusion seems to have arisen from speaking of the right of the neighbour in such a case as a right to obstruct the new lights. His right is, a right to use his own land by building on it as he thinks most to his interest; & if, by so doing he obstructs the access of light to the new windows, he is doing that which affords no ground of complaint. He has a right to build; & if he thereby obstructs the new lights, he is not committing a wrong (LORD CRANWORTH).—*TAPLING v. JONES* (1865), 20 C. B. N. S. 166; 11 H. L. Cas. 290; 5 New Rep. 403; 34 L. J. C. P. 342; 12 L. T. 555; 29 J. P. 611; 11 Jur. N. S. 309; 13 W. R. 617; 144 E. R. 1067, II. L.; *affg.* S. C. *sub nom.* JONES *v.* TAPLING (1862), 12 C. B. N. S. 826, Ex. Ch.; (1861), 11 C. B. N. S. 283.

*Annotations*:—As to (1) *Consd.* Ladyman *v.* Grave (1870), 24 L. T. 55; National Provincial Plate Glass Insco. Co. *v.* Prudential Assoc. (1877), 6 Ch. D. 757. *Consd. & Apd.* Newson *v.* Pender (1884), 27 Ch. D. 43. *Consd.* Greenwood *v.* Hornsey (1886), 33 Ch. D. 471. *Apd.* Scott *v.* Pape (1886), 31 Ch. D. 554. *Consd.* A.-G. *v.* Queen Anne's & Garden Mansions Co. (1889), 37 W. R. 572; Colls *v.* Home & Colonial Stores, [1904] A. C. 179. *Consd. & Expld.* Hyman *v.* Van Den Bergh, [1908] 1 Ch. 167. *Consd.* Levett *v.* Gas Light & Coke Co., [1919] 1 Ch. 24. *Refd.* Binckes *v.* Pash (1861), 11 C. B. N. S. 324; Lanfranchi *v.* Mackenzie (1867), L. R. 4 Eq. 421; Courtauld *v.* Legh (1869), L. R. 4 Exch. 126; Wheaton *v.* Maple, [1893] 3 Ch. 48; Jordonson *v.* Sutton, Southcoates & Drypool Gas Co., [1898] 2 Ch. 614. As to (3) *Distd.* Heath *v.* Bucknall (1869), L. R. 8 Eq. 1. *Apd.* Slaight *v.* Burn (1869), 5 Ch. App. 163; Aynsley *v.* Glover (1875), 10 Ch. App. 283. *Distd.* Fowlers *v.* Walker (1880), 49 L. J. Ch. 598. *Refd.* Weatherley *v.* Ross (1863), 1 Hem. & M. 349; Dent *v.*

Auction Mart Co., *l'Ilgrim v. Same*, Mercers' Co. *v.* Same (1866), 12 Jur. N. S. 447; Martin *v.* Headon (1866), 35 L. J. Ch. 602; Reel. Comrs. for England *v.* Kine (1880), 14 Ch. D. 213; Frechette *v.* Compagnie Manufacturière de St. Hyacinthe (1883), 9 App. Cas. 170; Dicker *v.* Popham, Radford (1890), 63 L. T. 379; Simpson *v.* Godmanchester Corp., [1897] A. C. 696; Andrews *v.* Waite, [1907] 2 Ch. 500. *Generally*, *Mentd.* Robinson *v.* Grave (1872), 27 L. T. 648.

**842.** —.—.]—(1) Prescription Act, 1832 (c. 71), has not altered the law as to the nature & extent of light to which the owner of an ancient light is entitled.

(2) The owner of an ancient light is entitled to prevent his neighbour from obstructing the access of light so as to render the house possessing the ancient light substantially less fit for occupation.—*KELK v. PEARSON* (1871), 6 Ch. App. 809; 24 L. T. 890; 36 J. P. 196; 19 W. R. 605, L. J.

*Annotations*:—As to (1) *Apprd.* City of London Brewery Co. *v.* Tennant (1873), 9 Ch. App. 212. *Consd.* Scott *v.* Pape (1886), 31 Ch. D. 554. *Apprd.* Colls *v.* Home & Colonial Stores, [1904] A. C. 179. *Refd.* Leech *v.* Schweder (1874), 9 Ch. App. 463. As to (2) *Distd.* City of London Brewery Co. *v.* Tennant (1873), 9 Ch. App. 212. *Consd.* Dickinson *v.* Harbottle (1873), 28 L. T. 186. *Apd.* Stanley *v.* Alderley *v.* Shrewsbury (1875), L. R. 19 Eq. 616; Warren *v.* Brown, [1902] 1 K. B. 15. *Consd.* Colls *v.* Home & Colonial Stores, [1904] A. C. 179. *Apprd.* Jolly *v.* Kine, [1907] A. C. 1. *Refd.* Ecol. Comrs. for England *v.* Kine (1880), 14 Ch. D. 213; Paul *v.* Robson (1914), 83 L. J. P. C. 304. *Generally*, *Mentd.* Baltic Co. *v.* Simpson (1876), 24 W. R. 390.

**843.** —.—.]—CITY OF LONDON BREWERY CO. *v.* TENNANT, No. 475, *ante*.

**844.** —.—.]—AYNSLEY *v.* GLOVER, No. 389, *ante*.

**845.** —.—.]—COLLS *v.* HOME & COLONIAL STORES, LTD., No. 830, *ante*.

**846.** —.—.]—HYMAN *v.* VAN DEN BERGH, No. 465, *ante*.

**847. Whether extends to whole light enjoyed.**—(1) The right acquired under Prescription Act, 1832 (c. 71), s. 3, is a right to the access & use of the whole or a substantial part of the particular cone of light which has passed for the statutory period over the servient to the dominant tenement (FRY, L.J.).

The word "access" in the sect. refers not to the access through the aperture of the dominant, but to the freedom of passage over the servient, tenement, although the aperture which admits the light into the dominant tenement defines the area which is to be kept free over the servient tenement. "The right thereto" means the right to the same access & use of light to & for any building.

(2) The Act does not require any identity, structural or otherwise, in the building which, after the twenty years, is to enjoy the right with the building which has acquired the right; but the right, although not in gross, but one which must be claimed in respect of a building, may be claimed in respect of any building which is enjoying the whole or a substantial part of the light which passed into the dominant tenement through the old aperture. Consequently, no alteration in the plane of the windows of the dominant tenement, either by advancing or setting back the building, will destroy the right so long as the owner of the dominant tenement can show that he is using through the new apertures in the wall of the new building the same, or a substantial part of the same, light which passed through the old apertures into the old buildings.

(3) But the right to relief may be lost, even where there is no substantial alteration, if the owner of the dominant tenement has by his alteration so confused the evidence that he cannot prove the identity of the light.

S., in 1872, pulled down a building in the east

wall of which were ancient lights, & erected on the site a new building with larger & more numerous windows. No record was preserved of the positions or dimensions of the ancient lights, but it was found as a fact that substantial portions of six of the new windows corresponded with three of the ancient lights. The east wall had been advanced by distances varying from 2 feet 3 inches to 13 inches, the effect of which was slightly to alter the plane of the new windows:—*Held*: the alteration made by S. did not amount to an abandonment of his right, & pltf. was entitled to an injunction to restrain any obstruction of so much of the six new windows as corresponded with the three ancient lights.

(4) Since the statute, as before, the right remains a right to have an amount of access of light to & through apertures in a house or building which would be sufficient for the use & occupation of the building. It is not a right in gross, but a right to light in connection with a "dwelling-house, workshop, or building," the building, workshop, or dwelling-house being the means by which the light is enjoyed for a period of twenty years, & by which the right to enjoy it is acquired (*BOWEN, L.J.*).—*SCOTT v. PAPE* (1886), 31 Ch. D. 554; 55 L. J. Ch. 426; 54 L. T. 399; 50 J. P. 645; 34 W. R. 405; 2 T. L. R. 310, C. A.

*Annotations*:—As to (1) *Consd. Greenwood v. Hornsey* (1886), 33 Ch. D. 471; *Colls v. Home & Colonial Stores*, [1904] A. C. 179. As to (2) *Apd. Andrews v. Waite*, [1907] 2 Ch. 500. *Refd. Smith v. Baxter*, [1900] 2 Ch. 138. As to (3) *Refd. Wilgram v. Fryer* (1887), 56 L. J. Ch. 1098; *Ankersen v. Connolly* (1907), 96 L. T. 681. As to (4) *Refd. Andrews v. Waite*, [1907] 2 Ch. 500. *Generally, Mentd. Slack v. Leeds Industrial Co-op. Soc.*, [1923] 1 Ch. 431.

—*J*.—*Sec, generally, Sect. 4, sub-sect. 1, B., post.*

### C. In Respect of what Property Right can be acquired.

#### (a) Only in Respect of Buildings.

**848. General rule.**—*SCOTT v. PAPE*, No. 817, *ante*.

**849. "Dwelling house, workshop or building"—What is—Church.**—*NORFOLK (DUKE) v. ARBUTHNOT*, No. 342, *ante*.

**850. ——— Timber stage.**—(1) The words "other building" used in Prescription Act, 1832 (c. 71), s. 3, in connection with "any dwelling-house, workshop"—mean some building of a like character with a dwelling-house or workshop, & will not necessarily include every structure which may be a building for the purposes of the Metropolitan Building Acts.

(2) A right by way of easement to the uninterrupted access of air not coming by any definite channel but over the general unlimited surface of the alleged servient tenement cannot be acquired under Prescription Act, 1832 (c. 71), s. 2, by mere enjoyment for the statutory period, & the fact that the alleged dominant & servient tenements were both held under a common lessor, either of itself, or at any rate when coupled with the fact that the lease of the servient tenement was the earlier, negatived any claim to the easement as arising out of implied covenant.

Pltf.'s predecessor in title, a lessee, before 1843, erected on the demised land a permanent structure for the purpose of storing & seasoning timber & for exhibiting it to customers. The structure

consisted of several floors or stages, & was substantially constructed with solid balks of upright timber or standards fixed in stone bases built on solid piers. The standards were tied together with longitudinal balks or cross-beams which supported floors or stages of solid planks, & were also connected by diagonal braces. The ends of the several floors were open & unglazed, & served for drying timber & admitting light. The light & air came over an open yard held by deft., under a lease originally granted by pltf.'s lessor. Deft. commenced building over this open yard. Pltf. brought an action to restrain him from building so as to interfere with pltf.'s right to light & air to his structure for storing timber over deft.'s yard:—*Held*: (3) in order to satisfy Prescription Act, 1832 (c. 71), s. 2, with regard to his right to light, it was not enough to show merely that at some time light came through a particular access, whilst at another time it did not, but that pltf. must show that the building had enjoyed the access of light by a definite access for the statutory period, & that, as pltf. had failed to show this, his claim could not succeed, & it was unnecessary to decide whether the structure was a building within the Act or not; (4) pltf. had also failed with regard to his right to air, as he had not shown an uninterrupted access of air to his structure through a definite channel for the statutory period.—*HARRIS v. DE PINNA* (1886), 33 Ch. D. 238; 56 L. J. Ch. 344; 54 L. T. 770; 50 J. P. 486; 2 T. L. R. 529, C. A.

*Annotations*:—As to (1) *Consd. A.-G. v. Queen Anne Garden & Mansions Co.* (1889), 60 L. T. 759; *Clifford v. Holt*, [1899] 1 Ch. 698. *Refd. Colls v. Home & Colonial Stores*, [1904] A. C. 179. As to (2) *Refd. Aldin v. Latimer* (Clark, Muirhead, [1894] 2 Ch. 437; *Chastey v. Auckland*, [1895] 2 Ch. 389; *Colls v. Home & Colonial Stores*, [1904] A. C. 179; *Kilgour v. Gaddes*, [1904] 1 K. B. 457. As to (4) *Distd. Cooper v. Straker* (1888), 40 Ch. D. 21. *Generally, Mentd. Foster v. Fraser*, [1893] 3 Ch. 158.

**851. ——— Unconsecrated chapel.**—(1) The effect of the decision in *Moore v. Hall*, No. 927, *post*, is, that light required for a special purpose is not protected under Prescription Act, 1832 (c. 71), unless it has been previously used for that special or a like purpose, or there is a reasonable probability of its being so used. There is, however, no rule that such special amount of light must have been used for the ordinary prescriptive length of time.

(2) A memorial chapel, unconsecrated, used for Church of England, & Presbyterian services & for confirmation & other classes, & decorated with stained windows & mural mosaics is a "building" within sect. 3 of the above Act, entitled to protection with regard to the light necessary not only for conducting the services & classes, but also for the designed illumination of the works of art.—*A.-G. v. QUEEN ANNE GARDEN & MANSIONS CO.* (1889), 60 L. T. 759; 37 W. R. 572; 5 T. L. R. 430.

*Annotations*:—As to (1) *Fold. Lazarus v. Artistic Photographic Co.*, [1897] 2 Ch. 214. *Refd. Corbett v. Jonas*, [1892] 3 Ch. 137. As to (2) *Consd. Clifford v. Holt*, [1899] 1 Ch. 698.

**852. ——— Greenhouse.**—A greenhouse is a "building" within Prescription Act, 1832 (c. 71), &, therefore, if it has ancient lights, may be protected by injunction against interference with the access of light.—*CLIFFORD v. HOLT*, [1899] 1 Ch. 698; 68 L. J. Ch. 342; 80 L. T. 48; 63 J. P. 22; 15 T. L. R. 86; 43 Sol. Jo. 113.

**853. ——— Erection not roofed in.**—(1) The

### PART VIII. SECT. 3, SUB-SECT. 2.—O. (a).

*Dwelling-house—What is—Erection not completed.*—To acquire by prescription a right to uninterrupted access of light & air through the

windows of a dwelling-house, it is sufficient that the building in respect of which the right is claimed has assumed the appearance & outward aspect of a dwelling-house for more than twenty years before the time of

the commencement of the suit, though not completed or used as a dwelling-house for twenty years before that time.—*HANJIVAN D'AS HANJIVAN D'AS v. MAYARAM SAMAL D'AS* (1892), 1 Bom. 148.—*IND.*

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erection could not be a dwelling-house or building until it was completed by being roofed in (BRAY, J.).

(2) The action was premature, & could not be brought until there had been twenty years' access of light to the dwelling-house or building (BRAY, J.).

—BARFF v. MANN, CROSSMAN & PAULIN, LTD. (1905), 49 Sol. Jo. 794.

**(b) Nature of Apertures.**

**854. Skylight.**—HARRIS v. KINLOCH & Co., [1895] W. N. 60.

**855. Glazed roof of conservatory.**—In 1873 pltf. erected upon his property adjoining that of deft. a conservatory with a glazed roof sloping down to the vertical side of the conservatory which side stood practically on the boundary line between the two properties. That vertical side was glazed, having sashes hung on hinges from the top, & made to open outwards over deft.'s property. Pltf. at the time of the erection of his conservatory signed an agreement to pay 1s. a year as an acknowledgment for "allowing the windows in my conservatory adjoining to open on to & overlook" deft.'s property. The annual payments under the agreement were made down to 1888, when the conservatory was converted into a passage, the glazed side being bricked up, leaving the glazed roof as a skylight to the passage. In 1901 deft. built a wall on his land along the boundary line, carrying it above pltf.'s skylight so as to obstruct the access of light thereto. In an action to restrain the obstruction of the skylight as an ancient light:—*Held*: the skylight was a window overlooking deft.'s property within the terms of the agreement, & consequently, the access of light having been enjoyed by consent or agreement in writing within Prescription Act, 1832 (c. 71), s. 3, pltf.'s action failed.—EASTON v. ISTEAD, [1903] 1 Ch. 405. 72 L. J. Ch. 189; 87 L. T. 705; 51 W. R. 245; 47 Sol. Jo. 158, C. A.

**856. Doorway.**—The occupier of a house or workshop who, weather permitting, opens an ordinary doorway for the purpose of admitting additional light to his house or workshop cannot claim a prescriptive right to light through the doorway under Prescription Act, 1832 (c. 71), s. 3.

Pltf. was the occupier of premises fronting on a narrow passage. These premises were used for the business of wood turnery & contained two doorways, one on the ground floor & one on the first floor, the doors of which pltf., when the weather permitted, was in the habit of keeping open for the purpose of admitting additional light to his premises. Defts. were the owners of premises on the opposite side of the passage, & in 1917 they acquired premises adjoining those of pltf. & erected a bridge or gangway connecting their premises. This bridge or gangway substantially diminished the amount of light coming to pltf.'s doorways:—*Held*: pltf. was not entitled to a prescriptive right of light to the doorways.—LEVET v. GAS LIGHT & COKE Co., [1919] 1 Ch. 24; 88 L. J. Ch. 12; 119 L. T. 761; 35 T. L. R. 47; 63 Sol. Jo. 69.

**D. By and Against Whom Right may be acquired.**

**857. By lessee—Tenements under common landlord—Against adjoining lessee.**—(1) Pltf. &

deft. occupied houses adjoining each other as tenants under leases both of which were granted by same lessor on same day, viz. Dec. 18, 1788, & both expiring at same time. Deft. by building on his own premises obstructed a window in the house of pltf. though the latter had had an uninterrupted enjoyment of light & air for more than twenty years:—*Held*: the circumstance of the two houses being held under same landlord, & for same term, did not prevent the one tenant from acquiring an indefeasible right to light as against the other.

(2) Although that [*Truscott v. Merchant Taylors' Co.*, No. 840, ante] is not precisely the case now before the ct., yet it recognises the intention of the legislature to adopt a simple & short period for the acquisition of the right to light, & that the enjoyment need not be as of right (POLLOCK, C.B.).—FREWEN v. PHILLIPS (1861), 11 C. B. N. S. 449; 30 L. J. C. P. 356; 25 J. P. 676; 7 Jur. N. S. 1246; 9 W. R. 786; 142 R. R. 871, Ex. Ch.

*Annotations*:—As to (1) *Consd.* Harris v. De Pinna (1886), 33 Ch. D. 238. *Fold.* Mitchell v. Cantrill (1887), 37 Ch. D. 56. *Consd.* Wheaton v. Maple, [1893] 3 Ch. 48. *Distd.* Kilgour v. Gaddes, [1904] 1 K. R. 457. *Fold.* Morgan v. Fear, [1907] A. C. 425. *Appl.* Richardson v. Graham, [1908] 1 K. B. 39. As to (2) *Appl.* Bewley v. Atkinson (1879), 13 Ch. D. 283. *Refd.* Collis v. Home & Colonial Stores, [1901] A. C. 179; Mallam v. Rose, [1915] 2 Ch. 222.

**858.** — — — — —]—A landowner granted a lease to pltfs. of a house & land with their appurtenances, except rights, if any, restricting the free use of any adjoining land, or the appropriation at any time thereafter of any such land for building or other purposes, obstructive or otherwise. More than twenty years after this lease, the subsequent lessee of an adjoining piece of land commenced to build on it in such a way as to obstruct pltf.'s lights. Pltf. having brought an action & moved for an injunction:—*Held*: the exception of any right restricting the free use of the adjoining land did not operate as an agreement or consent on the part of the lessee that the owners of the adjoining land might always have a right to obstruct the access of light to pltf.'s house within the exception of Prescription Act, 1832 (c. 71), s. 3, & therefore, pltf. had acquired an absolute prescriptive right to the light, & was entitled to an injunction.—MITCHELL v. CANTRILL, (1887), 37 Ch. D. 56; 57 L. J. Ch. 72; 58 L. T. 29; 36 W. R. 229, C. A.

*Annotations*:—*Distd.* Haynes v. King, [1893] 3 Ch. 439. *Fold.* Ruscoe v. Grounsell (1903), 89 L. T. 426; Morgan v. Fear, [1907] A. C. 425. *Appl.* Richardson v. Graham, [1908] 1 K. B. 39. *Consd.* Mallam v. Rose, [1915] 2 Ch. 222. *Refd.* Robson v. Edwards (1893), 62 L. J. Ch. 378; Wheaton v. Maple, [1893] 3 Ch. 48.

**859.** — — — — —]—Two tenements were held under leases from same landlord. The lessee of the first enjoyed access of light to his windows over the second tenement for more than twenty years prior to the expiration of his lease. He continued to hold under an agreement for a lease for a term still running. The lease of the second tenement was subsequently surrendered. The landlord granted a lease to a new tenant:—*Held*: the tenant of the first tenement has a right to access of light over the second tenement.—ROBSON v. EDWARDS, [1893] 2 Ch. 146; 62 L. J. Ch. 378; 68 L. T. 195; 41 W. R. 509; 37 Sol. Jo. 285; 3 R. 336.

*Annotations*:—*Consd.* Fear v. Morgan, [1906] 2 Ch. 406. *Fold.* Richardson v. Graham, [1908] 1 K. B. 39. *Refd.* Wheaton v. Maple, [1893] 3 Ch. 48.

**PART VIII. SECT. 3, SUB-SECT. 2.—D.**

**1. By lessee—Against assignee of lease—Assignor retaining part of land.**—Pltf., being lessee of land on which there were two houses, assigned the

lease to deft., excepting one of the houses during the remainder of the term:—*Held*: deft. was liable to an action for obstructing windows existing in pltf.'s house at the time of the

assignment, though only recently constructed, the exception being construed as a grant by deft. from which he could not derogate.—LONGMAID v. McNICHOL (1857), 3 All. 497.—CAN.

**860.** ——— & common landlord.]—Under Prescription Act, 1832 (c. 71), s. 3, where two adjoining tenements are held by different lessees under a common landlord, & one lessee has enjoyed the access & use of light in respect of his tenement over the other tenement for a period of twenty years without interruption, he acquires an absolute & indefeasible right to light as against that other tenement, & this right enures in favour of that lessee & his successors not only as against the adjoining lessee, but as against the common landlord, & all succeeding owners of the adjoining tenement.—*MORGAN v. FEAR*, [1907] A. C. 425; 76 L. J. (Ch. 660; 51 Sol. Jo. 702, H. L.).  
*Annotation*:—*Folld.* *Richardson v. Graham*, [1908] 1 K. B. 39.

**861.** ——— Against landlord.—Occupying adjoining tenement.]—*R.*, the owner of two leasehold messuages, held on a term for 99 years, demised one for the residue of the term, less one day, to *L.*, he himself occupying the other, in which he carried on the trade of a jeweller. *L.*, on entering, paid a premium of £300, & a rent of £7 10s. was reserved. Subsequently *R.* became, by the completion of twenty years' uninterrupted enjoyment, entitled to the use of windows in the rear of his house, looking into a yard, upon which the house demised by him also looked, as ancient lights. In the demise there was a covenant restraining each party from building on the space between the backs of the houses so as to obstruct the light & air between certain points marked in an annexed plan. *L.* pulled down his house & commenced building nearer & higher than the former erections. On bill filed to restrain him:—*Held*: there was a violation of the covenant, a material injury in the obstruction of light & air, & a clear right to the ancient lights, & a perpetual injunction would be granted, with costs.—*ROLASON v. LEVY* (1868), 17 L. T. 641.

**862.** Against reversioner.—If right acquired against owner of leasehold interest.]—*SIMPER v. FOLEY*, No. 553, *ante*.

**863.** ———.]—*LADYMAN v. GRAVE*, No. 880, *post*.

Against Crown.]—*See* Nos. 317, 358, *ante*.

### E. Nature of User.

#### (a) In General.

**864.** Need not be as of right.]—Prescription Act, 1832 (c. 71), s. 2, requires that the easements there mentioned shall have been enjoyed by persons "claiming right thereto"; but in sect. 3, which relates to the access of light, there is no such expression; & I think the omission is made purposely (*MAULE, B.*).—*FLIGHT v. THOMAS* (1840), 11 Ad. & El. 688; 3 Per. & Dav. 442; 113 E. R. 575, Ex. Ch.; *on appeal* (1841), 8 Cl. & Fin. 231, H. L.

*Annotations*:—*Refd.* *Glover v. Coleman* (1874), L. R. 10 C. P. 108. *Mentd.* *Harbridge v. Warwick* (1849), 5 Exch. 552; *Eaton v. Swansea Waterworks Co.* (1851), 17 Q. B. 267; *Rowbotham v. Wilson* (1857), 8 E. & B. 123; *Ladyman v. Grave* (1871), 25 L. T. 52; *Hollins v. Verney* (1881), 13 Q. B. D. 304; *Cooper v. Straker* (1888), 40 Ch. D. 21.

**865.** ———.]—*TRUSCOTT v. MERCHANT TAILORS' CO.*, No. 840, *ante*.

**866.** ———.]—*FREWEN v. PHILIPPS*, No. 857, *ante*.

**867.** ——— Verbal permission.]—An actual enjoyment of lights for twenty years, even under a permission verbally asked for by the occupier of a house, & given by the person having right to obstruct, is sufficient to confer a right under Prescription Act, 1832 (c. 71), s. 3. The enjoyment under that sect. need not be as of right, or adverse.—*LONDON CORPN. v. PEWTERERS' CO. (MASTER, WARDENS, ETC.)* (1842), 2 Mood. & R. 409, N. P.

*Annotation*:—*Mentd.* *Rogers v. Taylor* (1858), 27 L. J. Ex. 173.

**868.** ——— Tenants under same landlord.]—*HARRIS v. DE PINNA*, No. 850, *ante*.

**869.** ———.]—*KILGOUR v. GADDES*, No. 309, *ante*.

**870.** Must be in one & the same channel.]—*HARRIS v. DE PINNA*, No. 850, *ante*.

**871.** Alteration of user.—During period of acquisition.]—(1) The question whether the right to the access of light to a building which has been enjoyed through one window is preserved upon an alteration of the building depends on the identity of light, not on the identity of aperture.

(2) In cases where the light comes to any window over the roof of higher buildings, at an angle, & the building is altered by advancing the wall in which the window is, the right to access of light will be preserved if any window or aperture in the new wall intercepts & gives access to any substantial part of the light which passed through the old window. It makes no difference that the new window or aperture is at a much higher level than the old window.

(3) No alteration of a building, which would not involve the loss of a right to light when indefeasibly acquired, will, if made during the currency of the statutory period, prevent the acquisition of the right.—*ANDREWS v. WAITE*, [1907] 2 Ch. 500; 76 L. J. (Ch. 676; 97 L. T. 428).

—*See, generally*, Sect. 5, sub-sect. 2, *post*.

**872.** Meaning of "access."]—*SCOTT v. PAPE*, No. 847, *ante*.

#### (b) Actual Enjoyment.

**873.** Unfinished house.]—To acquire a right to the access of light & air by actual enjoyment under Prescription Act, 1832 (c. 71), s. 3, it is not necessary that the house should be occupied, or that it should be fit for immediate occupation during the statutory period.

A house was structurally completed, the roof finished, the floors laid, & the windows put in, but it was not internally completed nor fit for habitation. It so remained till within a period of twenty years before action, & was then finished:—*Held*: the owner was entitled to maintain an action for the obstruction of his windows.—*COURTAULD v. LEIGH* (1869), L. R. 4 Exch. 126; 38 L. J. Ex. 45; 19 L. T. 737; 17 W. R. 466.

*Annotations*:—*Folld.* *Collis v. Laugher*, [1891] 3 Ch. 659. *Refd.* *Cooper v. Straker* (1888), 40 Ch. D. 21; *Smith v. Baxter*, [1900] 2 Ch. 138; *Ambler v. Gordon*, [1905] 1 K. B. 417. *Mentd.* *Collis v. Home & Colonial Stores*, [1904] A. C. 179.

**874.** ———.]—A right to the light & air coming to the windows of a building, which may grow into the statutory right acquired by twenty years' user & enjoyment as of right & without interruption, commences when the exterior walls of the building

grant of the right will be presumed. No such grant will be presumed unless the owner of the adjoining land, & those through whom he claims his title, knew or had the means of knowing that the light & air were being so enjoyed.—*LING v. PUGLEY* (1878), 2 P. & B. 303.—*CAN.*

### PART VIII. SECT. 3, SUB-SECT. 2.— E. (a).

**g. Knowledge of owner of adjoining land necessary.]**—No grant is necessary to authorise a person to put windows in a house of his own land, & if the owner of the adjoining land

allows the light & air to pass into & through them uninterruptedly for a period of twenty years, it will be inferred from such non-obstruction for that period of time, that the adjoining owner has consented to the enjoyment of such light & air, & for the purpose of quieting the title, a

**Sect. 3.—Acquisition of right: Sub-sect. 2, E. (b) & F. (a) & (b).]**

with the spaces for the windows are completed, & the building is properly roofed in, although the window-sashes & the glass may not be put in & the interior may not be finished until some time afterwards.—*COLLIS v. LAUGHER*, [1894] 3 Ch. 659; 63 L. J. Ch. 851; 71 L. T. 226; 43 W. R. 202; 8 R. 760.

**Annotations:—***Reid. Smith v. Baxter*, [1900] 2 Ch. 138. *Mentd. Colls v. Home & Colonial Stores*, [1904] A. C. 179.

**875. —.]—***BARRETT v. MANN, CROSSMAN & PAULIN, LTD.*, No. 853, *ante*.

**876. Continuous user not necessary—Shutters occasionally opened.]—**(1) The use of light has been "enjoyed" with a building within the meaning of Prescription Act, 1832 (c. 71), s. 3, if the owner of the building has had the amenity or advantage of using the access of light. It is not necessary that there should have been a continuous user.

(2) The owner of a building having windows with movable shutters, which are opened at his pleasure for admission of light, acquires a right to light under sect. 3 of the above Act at the end of twenty years, if he opens the shutters at any time he pleases for the admission of light during those twenty years, & if also there is no such interruption of the access of the light over the neighbouring land as is contemplated by sect. 4.

(3) In such a case, if it be proved that the window-openings have remained unchanged for twenty years, & that the shutters were constructed so that they might be opened or closed at the pleasure of the owner of the building, the onus is thrown upon the owner of the neighbouring land to prove that the right has not been acquired.—*COOPER v. STRAKER* (1888), 40 Ch. D. 21; 58 L. J. Ch. 26; 59 L. T. 849; 37 W. R. 137; 5 T. L. R. 53.

**Annotations:—***As to (1) Distd. Croyke v. Hatfield Chase Corp.* (1896), 12 T. L. R. 383. *As to (2) Apld. Smith v. Baxter*, [1900] 2 Ch. 138. *Reid. Colls v. Home & Colonial Stores*, [1904] A. C. 179.

**877. Question of fact.]—***SMITH v. BAXTER*, No. 466, *ante*.

**F. Length of User.**

**(a) In General.**

**878. Whether twenty years next before commencement of suit.]—**Under Prescription Act, 1832 (c. 71), ss. 3 & 4, a party is prescriptively entitled to the access & use of light, if his enjoyment thereof commenced twenty years next before the bringing of an action in which the right is contested, provided such enjoyment has not at any time been interrupted, & the interruption acquiesced in for a whole year.

Accordingly, where A. had the free access of light & air through a window of his house for nineteen years & 330 days, & B. then raised a wall

which obstructed the light, & the obstruction was submitted to only for 35 days, when A. brought an action to remove it:—*Held*: the right of action was complete; the twenty years' enjoyment was to be reckoned from the commencement of the enjoyment to the time of bringing the action, & an interruption of the enjoyment, in whatever period of the twenty years it might have happened could not be deemed an interruption within the meaning of the Act, unless it was acquiesced in for a whole year.—*FLIGHT v. THOMAS* (1841), 8 Cl. & Fin. 231; West, 671; 5 Jur. 811; 8 E. R. 91, H. L.

**Annotations:—***Consd. Harbridge v. Warwick* (1849), 3 Exch. 552. *Apld. Glover v. Coleman* (1874), L. R. 10 C. P. 108. *Consd. Hollins v. Verney* (1884), 13 Q. B. D. 304; *Cooper v. Straker* (1888), 40 Ch. D. 21. *Reid. Eaton v. Swansea Waterworks Co.* (1851), 17 Q. B. 267; *Rowbotham v. Wilson* (1857), 8 E. & B. 123; *Ladyman v. Grave* (1871), 25 L. T. 52.

**879. —.]—**To a declaration for obstructing ancient lights, deft. pleaded the custom of London to build on ancient foundations to any height; that deft. was possessed of an ancient messuage adjoining plffs.' premises, & towards which the windows in the declaration mentioned looked; & that, pursuant to the custom, he built thereon, & thereby unavoidably a little obscured plffs.' windows. To this plea plffs. replied that the access of light & air to the windows in question had been enjoyed as of right & without interruption by the respective occupiers of plffs.' messuage for & during the full period of twenty years before the obstruction, & for & during the full period of twenty years next before the commencement of a suit, or action, wherein plffs.' claim in this action, & to the access & use of light & air, was & is brought into question:—*Held*: (1) the twenty years' enjoyment of the access & use of light to a dwelling-house, etc., under Prescription Act, 1832 (c. 71), ss. 3 & 4, was to be taken to be the period next before some action or suit wherein the claim should have been brought in question, & consequently, the replication was good; (2) the custom to re-build to any height upon ancient foundations in the city of London was destroyed by sect. 3 of the above Act.—*COOPER v. HURBUCK* (1862), 12 C. B. N. S. 456; 31 L. J. C. P. 323; 6 L. T. 826; 9 Jur. N. S. 575; 142 E. R. 1220.

**Annotations:—***As to (1) Consd. Hyman v. Van Den Bergh*, [1907] 2 Ch. 516. *Reid. Colls v. Home & Colonial Stores*, [1904] A. C. 179; *Hyman v. Van Den Bergh*, [1908] 1 Ch. 167.

**880. — Light ancient before passing of statute.]—**Lights uninterruptedly enjoyed for twenty years anterior to the passing of Prescription Act, 1832 (c. 71), are ancient lights. But, in a case where lights had become ancient lights before the statute:—*Held*: sect. 4 of the Act, stating that the period of twenty years, mentioned

**PART VIII. SECT. 3, SUB-SECT. 2.—**  
**F. (a).**

**878 i. Whether twenty years next before commencement of suit.]—**In order to establish a right to light, it is sufficient if the parties claiming the right & their predecessors in title have actually enjoyed the light in the character of an easement for more than twenty years before the commencement of the proceedings, occupying the land on which the building stands, as of right, during that period; & it is immaterial whether they have had a good title to the land throughout the period.—*NEW ZEALAND LOAN & MERCANTILE AGENCY CO., LTD. v. WELLINGTON CORPN.* (1890), 9 N. Z. L. R. 10.—*N.Z.*

**h. — Light & Air Act, 1894—**

**Effect of.]—**Plff. was the owner of an old wooden house erected on land adjoining a section which remained vacant until deft. erected a brick building upon it early in 1907. One of the rooms in the house, used as a bedroom, was lighted by a window on the south side. There had been an uninterrupted user of this light for upwards of twenty years prior to the coming into operation of the above Act which repeals sect. 3 of Prescription Act, 1832 (c. 71), but preserves rights then existing to user of light & air. The above Act, however, does not repeal sect. 4 of the Imperial Act, which provides that the period of twenty years' uninterrupted user necessary to constitute a prescriptive right shall be the period of twenty years next before action brought, & it was

therefore urged on behalf of deft., whose building substantially reduced the light formerly enjoyed, that, as there had been a statutory interruption of the easement, i.e. from the time the above Act first came into operation to the time of action, plffs.' right was barred though not having been litigated within the twelve months prescribed by sect. 4 of the Imperial Act:—*Held*: the above Act preserved whatever rights plff. possessed at the time that Act came into operation, & stereotyped the position which then existed & that she was therefore entitled to recover from deft. reasonable damages for the loss of light.—*WESTNEY v. HAHN* (1907), 26 N. Z. L. R. 1396.—*N.Z.*

**k. Burden of proof.]—**In an action



К 2

*Sect. 3.—Acquisition of right: Sub-sect. 2, F. (b) & (c). Sect. 4: Sub-sect. 1, A.]*

through a window against which deft. had about fourteen months before action brought erected a permanent building which obstructed it, & pltf. had taken no active measures to cause the obstruction to be removed, but had several times, himself or by his tenant, complained of & protested against it:—*Held*: it was a question proper to be left to the jury whether or not there had been such a submission to or acquiescence in the interruption of the enjoyment as to deprive pltf. of the right to the light. *Semble*: the same sort of evidence of user or enjoyment need not be given in the case of a light as in the case of a claim of a right of way.—*GLOVER v. COLEMAN* (1874), L. R. 10 C. P. 108; 44 L. J. C. P. 66; 31 L. T. 684; 23 W. R. 163.

*Annotations*:—*Refd.* *Norfolk v. Arbutnot* (1880), 5 C. P. D. 390; *Presland v. Bingham* (1889), 41 Ch. D. 268.

**891. Interruption fluctuating & temporary—Onus of proof.**—In an action for an injunction or damages for interference with the ancient lights of pltf.'s house by raising an old party wall fifteen feet above its original height, deft. pleaded that he had for several years been in the habit of piling up empty packing-cases against the wall to a height exceeding the new wall. The evidence was conflicting as to the minimum height of the pile of packing-cases, & as to the time they remained there, but it was proved that they were removed from time to time, some to be returned to the owners, & the rest to be broken up:—*Held*: there had been no interruption of pltf.'s enjoyment of light within Prescription Act, 1832 (c. 71), s. 4, & the pltf. were entitled to an inquiry as to damages. *Semble*: if, in an action for obstruction of light, it appears on pltf.'s evidence that there has been some interruption, which in its nature is permanent, the onus is on pltf. of proving that such interruption did not in fact continue with his acquiescence for a year; but if the interruption is in its nature fluctuating & temporary, the onus of proving that it in fact continued & was acquiesced in by pltf. for a year, lies on deft.—*PRESLAND v. BINGHAM* (1889), 41 Ch. D. 268; 60 L. T. 433; 53 J. P. 583; 37 W. R. 385, C. A.

**892. Adverse obstruction.**—*SMITH v. BAXTER*, No. 466, *ante*.

**893. Alteration in user.**—*ANDREWS v. WAITE*, No. 871, *ante*.

(c) *User under Agreement.*

**894. Necessity for written agreement.**—*PLASTERERS' CO. v. PARISH (CLERKS' CO.)*, No. 888, *ante*.

**895. —**—*MAILLAM v. ROSE*, No. 887, *ante*.

**896. What amounts to written agreement.—Document signed by owner of dominant tenement.**—K., the owner in fee of a freehold house, in 1814 put out four new windows, & signed & gave to S., the owner in fee of an adjacent freehold house overlooked by those windows, a document declaring that they were put out & remained upon the leave of S., & that he, K., would, on the request of S., or his heirs or assigns, at any time thereafter block up same, & in the meantime would pay S., his heirs & assigns, 6d. a year for the indulgence. This document was not signed

by S. The rent was paid down to 1859. In 1877 S.'s successor in title called upon K.'s successor in title, who had bought the property in 1805 with notice of the document but had never paid any rent under it, to block up the four windows, & proceeded to obstruct the access of light to them. K.'s successor in title thereupon brought this action against him for an injunction, claiming to have acquired an indefeasible right to the access of light to the four windows by actual enjoyment for twenty years without intermission:—*Held*: (1) the enjoyment of light by K. & his successors had been by virtue of the document of 1814, & such document, although signed by K. only, was a consent or agreement expressly made or given for the purpose of such enjoyment within the meaning of Prescription Act, 1832 (c. 71), s. 3, so as to prevent K. & his successors from acquiring any right to the access & use of light under that sect.; (2) the agreement, having been acted upon by payment of rent thereunder to within twenty years from the commencement of the action, was enforceable in equity irrespective of the statute.

(3) It was proved that in 1859 the agent of the owner of S.'s tenement paid to him 6d., stating verbally that it was for the lights in G.'s house, the house which had belonged to K.:—*Held*: the agent being dead, this was evidence of payment of the rent by G. in 1859.—*BEWLEY v. ATKINSON* (1879), 13 Ch. D. 283; 49 L. J. Ch. 153; 41 L. T. 603; 28 W. R. 638, C. A.

*Annotations*:—*As to* (1) *Consd.* *Ruscoe v. Grounsell* (1903), 89 L. T. 426; *Hyman v. Van den Bergh*, [1907] 2 Ch. 516; *Smith v. Colbourne*, [1914] 2 Ch. 533. *Refd.* *Mitchell v. Cantrill* (1887), 37 Ch. D. 56; *Simpson v. Godmanchester Corp.* (1895), 64 L. J. Ch. 837; *Gardner v. Hodgson's Kingston Brewery Co.*, [1901] 2 Ch. 198. *Generally, Mentd.* *Re Thompson, Ex p. Baylis*, [1891] 1 Q. B. 462; *Re Jones*, [1895] 2 Ch. 719; *Greenhalgh v. Brindley*, [1901] 2 Ch. 324; *Bake v. French* (No. 2), [1907] 2 Ch. 215; *Tucker v. Oldbury U. C.* (1912), 81 L. J. K. B. 668.

**897. — Reservation in lease—Rights restricted free use of adjoining land.**—*MITCHELL v. CANTRILL*, No. 858, *ante*.

**898. — Proviso in lease—Reserving right to build on adjoining land.**—Pltf. were lessees, under four leases, dated Feb. 17, 1870, from the Ecclesiastical Comrs., for a term of sixty years from Dec. 25, 1867, of four houses on the south side of a street in London. The street was 31 feet wide. At the date of the leases there were on the north side of the street, opposite to pltf.'s houses, four old houses, also belonging to the Comrs., which were thirty & a half feet in height. Pltf.'s houses were nearly 44 feet in height. Each of pltf.'s leases contained a declaration that "notwithstanding anything herein contained, the lessors shall have power, without obtaining any consent from, or making any compensation to, the lessee, to deal as they may think fit with any of the premises adjoining or contiguous to the hereditaments hereby demised, & to erect, or suffer to be erected, on such adjoining or contiguous premises, any buildings whatsoever, whether such buildings shall or shall not affect or diminish the light or air which may now, or at any time during the term hereby granted, be enjoyed by the lessee, or the tenants or occupiers of the hereditaments hereby demised." The leases provided that "the word 'lessors' shall be taken to mean & include the Ecclesiastical Comrs., their successors & assigns, & other the reversioner or reversioners for

**892 1. Adverse obstruction.**—Deft. in 1855 or 1856 built a house on his lot adjoining pltf.'s, having three windows looking out on pltf.'s land. In 1864 deft. raised his house more than three feet,

& none of the windows being more than three feet high, the position of each of them was thus entirely changed:—*Held*: he had acquired no right under C. S. U. C., c. 88, s. 38, for that he had

not enjoyed the access or use of the light at the same place for the statutory period.—*HALL v. EVANS* (1877), 42 U. C. R. 190.—*CAN.*



The time being of the premises, so far as same will admit, unless the context or nature of the case may require a different construction." From the late of the leases, until the building by deft., a period of more than twenty years, no alteration was made in the houses opposite pltf.'s houses. On July 19, 1892, an agreement was entered into between the Comrs. & deft., by which, in consideration of his pulling down & rebuilding the four old houses opposite to pltf.'s houses, in accordance with plans to be approved by the Comrs., they agreed to grant to deft. leases of the sites of the old houses & the buildings to be erected thereon. In pursuance of this agreement deft. pulled down the old houses, & was, with the approval of the Comrs., building new ones, which had already reached a height of 53½ feet, & were intended to be, when completed, about five or six feet higher. It was admitted that the new buildings would obstruct pltf.'s light:—*Held*: (1) The above clause in pltf.'s leases prevented them from acquiring a right to light under Prescription Act, 1832 (c. 71), s. 3; (2) pltf.'s leases & deft.'s agreement respectively passed by implication the subsoil of the street, *usque ad medium filum viae*, subject to the rights of the local authority in the surface of the street, & therefore, deft.'s premises were "adjoining or contiguous" to those of pltf.; (3) deft. was an "assign" of the benefit of the agreement between the Comrs. & pltf.; (4) deft. was entitled to build so as to obstruct pltf.'s lights.—*HAYNES v. KING*, [1893] 3 Ch. 439; 63 L. J. Ch. 21; 69 L. T. 855; 42 W. R. 56; 3 R. 715.

**899. Glazed roof of conservatory.**—*EASTON v. STED*, No. 855, *ante*.

**900. — Inscription on stone.**—*R.*, the owner in fee of a house & the adjoining land in 1816 conveyed the house in fee simple to J., the predecessor of pltf. At the same time a stone was built into the wall of the house, upon which was inscribed: "1816. This stone is placed by J. to perpetuate R.'s right to build within nine inches of this & any other building." The access of light to the windows of the house over the adjoining land was continuously enjoyed from 1816 to 1901 when deft. erected a building on the adjoining land which obstructed that access of light:—*Held*: the inscription could not be construed as consent or agreement "expressly made or given for the purpose" of the enjoyment of light within the meaning of Prescription Act, 1832 (c. 71), s. 3,

& pltf. had an absolute right to the access of light.—*RUSCOE v. GROUNDSELL* (1903), 89 L. T. 426; 20 T. L. R. 5, C. A.

**901. Who may give consent—Person having right to obstruct.**—*LONDON CORPN. v. PEWTERERS' CO.* (MASTER, WARDENS, ETC.), No. 867, *ante*.

**902. — Tenant in possession.**—*HYMAN v. VAN DEN BERGH*, No. 465, *ante*.

**903. Effect of agreement—Whether incumbrance created.**—(1) A contract to sell buildings described by a plan which shows windows does not imply any warranty of a legal right to the access of light to those windows.

(2) The existence of an agreement which prevents the statutory period of prescription beginning to run does not create an incumbrance on the property, & the non-disclosure of such an agreement does not invalidate the contract. A clause in such an agreement that the owner of the buildings will block up the windows is an affirmative covenant only & cannot be enforced against subsequent purchasers.

(3) A further clause in such an agreement that the adjoining owner may enter & build up the windows in default of the owner of the buildings doing so is a mere revocable licence & does not give the adjoining owner any interest in the land, & if it did give such an interest, it would be void for perpetuity.

None of the points mentioned above make the title too doubtful to be forced upon a purchaser.—*SMITH v. COLBOURNE*, [1914] 2 Ch. 533; 84 L. J. Ch. 112; 111 L. T. 927; 58 Sol. Jo. 783, C. A.

#### SECT. 4.—EXTENT OF EASEMENT.

##### SUB-SECT. 1.—PROTECTION FROM INTERFERENCE AMOUNTING TO NUISANCE.

###### A. In General.

**904. Interference must amount to nuisance.**—

(1) An action on the case lies for erecting a hogstye so near the house of pltf. that the air thereof was corrupted; so of a lime-kiln, if the smoke enters pltf.'s house so that he cannot dwell there: so of a dye-house, etc., if the filth runs into his fish pond, etc.

(2) Where an easement or profit by prescription is pleaded, another prescription cannot be pleaded in destruction of such easement or profit.

#### PART VIII. SECT. 4, SUB-SECT. 1.—A.

**904 i. Interference must amount to nuisance.**—*Deft.*, being the owner of certain land, on the east end of which was a house lighted by windows on the west side, sold & conveyed part of the land, including that part upon which he house was built, to pltf. *Deft.* subsequently built a high fence very close to the house, entirely on his own land, but up to the boundary line. The fence cut off the light, & by excluding the air impaired the ventilation, & the snow & ice collected in the narrow space between the fence & the house, from which it could not be removed, & when melting in the spring he water could not run away, but oaked through the walls of the house:—*Held*: *deft.* could not derogate from his own grant, & as pltf. was thus deprived of that comfortable & reasonable enjoyment of the house which he had a right to expect, an injunction was granted restraining *deft.* from continuing the fence in such way as to interfere with that enjoyment.—*KUTSCH v. SPRY* (1907), 9 O. W. R. 96; 14 O. L. R. 233.—*CAN.*

**904 ii.**—*Deft.*'s house originally was a little higher than pltf.'s house. *Deft.* pulled down this house, & on the site began to build a new house. *Pltf.* sued for an injunction, alleging that this house, which would be of much greater height than the old one, would completely block up his ancient windows & cause him material damage:—*Held*: although pltf.'s light had been sensibly diminished by *deft.*'s new building, there had not been such large, material, & substantial damage as to require interference by injunction, nor had pltf.'s room been rendered unfit for the purpose for which it might reasonably be expected to be used, but pltf. was entitled to damages.—*GHANASHAM NILKANT NADKARNI v. MORORA RAMCHANDRA PAT* (1891), 1 L. R. 18 Boin. 474.—*IND.*

**904 iii.**—To give a cause of action for the obstruction of light, the diminution of light must be sensible.—*MANNING v. GRESHAM HOTEL CO.* (1867), 1 L. R. 1 C. L. 115.—*IR.*

**904 iv.**—*Deft.*'s windows of the back return of M.'s house looked into a passage or yard nine feet wide. The

opposite wall of G.'s house was thirty feet high. G. proposed to take down the existing wall of his house, & rebuild it at a height of sixty feet. The *ct.*, being of opinion that the windows would be deprived of a considerable amount of sky area, granted a prohibitory injunction.—*MAGUIRE v. GRATTAN* (1868), 1 R. 2 Eq. 246.—*IR.*

**904 v.**—*Deft.* Though there be an undoubted obstruction of light, yet, where such obstruction is trivial the *ct.* will not grant a mandatory injunction.—*SANKEY v. GUNN* (1894), 28 L. L. T. 128.—*IR.*

**904 vi.**—*Deft.* In an action for the obstruction of ancient light in pltf.'s building:—*Held*: an obstruction, amounting to an actionable nuisance, had been caused by the new building, & an injunction should be granted.—*BLACK v. SCOTTISH TEMPERANCE LIFE ASSURANCE CO.*, [1908] 1 L. R. 541; 42 L. L. T. 191.—*IR.*

**904 vii.**—*Deft.* Where appet.'s affidavit showed that foundations were being laid for a building which when

**Sect. 4.—Extent of easement: Sub-sect. 1, A. & B.]**

(3) An action on the case lies for obstructing light & air, but not for obstructing a prospect.—**ALDRED'S CASE** (1610), 9 Co. Rep. 57 b; 77 E. R. 816.

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**905.** —]—Where an application was made for an injunction to restrain building, so as to stop up lights, not being ancient lights:—**Held:** it would be refused.

If the house were built on the old foundation, it would entitle plffs. to their lights as an ancient messuage; but if on the new foundation, then the party must show a new agreement, or something to import one. . . . I am of opinion it is not a nuisance contrary to law; for it is not sufficient to say it will alter plff.'s lights, for then no vacant piece of ground could be built on in the city. It is true the value of plff.'s house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man from building on his own ground (**LORD HARDWICKE, C.**).—**FISHMONGERS' Co. v. EAST INDIA Co.** (1752), 1 Dick. 163; 21 E. R. 232, L. C.

**Annotations:—****Consd.** A. G. v. Nichol (1809), 16 Ves. 338. **Expld.** *Jackson v. Newcastle* (1864), 3 De G. J. & Sm. 275. **Consd.** *Colls v. Home & Colonial Stores*, [1904] A. C. 179; *Jolly v. Kino*, [1907] A. C. 1. **Refd.** *Wynstanley v. Lee* (1818), 2 Swan. 333; *Squire v. Campbell* (1836), 1 My. & Cr. 459; *Soltan v. De Held* (1851), 2 Sim. N. S. 133; A. G. v. Sheffield Gas Consumers Co. (1853), 3 De G. M. & G. 304; *Arcedeckno v. Kelk* (1858), 32 L. T. O. S. 331; *Warren v. Brown*, [1900] 2 Q. B. 722; *Rushmer v. Polsue & Alfiori*, [1906] 1 Ch. 234; *Paul v. Robson* (1914), 83 L. J. P. C. 304.

**906.** —]—(1) Service of *subpoena* necessary in the case of special injunction; but the practice having been unsettled *deft.* was put to dissolve upon the merits; & plff. permitted to show cause by affidavit.

(2) Injunction against darkening ancient windows not in every case affecting the value of premises, that would support an action. The effect must be that material injury, amounting to nuisance which should not only be redressed by damages, but upon equitable principles prevented.—**A. G. v. NICHOL** (1809), 16 Ves. 338; 3 Mer. 687; 33 E. R. 1012, L. C.

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erected would obstruct his view, interfere with the free access of air, & be otherwise detrimental to the value of his property:—**Held:** these allegations did not make out a case of such irreparable injury as to justify the granting of an interim interdict.—**HOTCHIN v. FRANCIS** (1919), 40 N. L. R. 52.—**S. AF.**

1. *Distinction where right claimed by grant.*—The rules settled by the *cts.* in case of the interference with ancient lights are not applicable to a case where plff.'s rights are dependent upon a prior conveyance from the

common owner of his lot & the adjoining one, now owned by *defts.*, plff. being entitled to receive such access of light through his windows as the windows afforded at the time of the severance of his lot from that owned by *defts.*—**SIMPSON v. KATON (T.) Co.** (1907), 10 O. W. L. 569; 15 O. L. R. 161.—**CAN.**

**PART VIII. SECT. 4, SUB-SECT. 1.—B.**

**911 i. Whether owner entitled to whole light or only sufficient quantity for ordinary purposes.**—To give a cause of action for obstruction of light, the

*Co. v. The Same* (1866), L. R. 2 Eq. 238; *Lanfranchi v. Mackenzie* (1867), 36 L. J. Ch. 518; *Luscombe v. Steer* (1867), 17 L. T. 229; *Beadel v. Perry* (1868), 19 L. T. 760; *Potts v. Smith* (1868), 18 L. T. 629. **Refd.** *Blakemore v. Glamorganshire Canal Navigation* (1839), 1 My. & Cr. 154; *Ripon v. Hobart* (1834), 3 My. & Cr. 169; *Squire v. Campbell* (1836), 1 My. & Cr. 459; *Arcedeckno v. Kelk* (1858), 32 L. T. O. S. 331; *Clarke v. Clark* (1865), 14 W. R. 115; *Lillywhite v. Trimmer* (1867), 36 L. J. Ch. 525; *Inchbald v. Robinson, Inchbald v. Barrington* (1868), 17 W. R. 272; *Kelk v. Pearson* (1870), 23 L. T. 458; *Dickinson v. Harbottle* (1873), 28 L. T. 186; *Aynsley v. Glover* (1874), L. R. 18 Eq. 544; *Warren v. Brown*, [1900] 2 Q. B. 722. **Generally, Mentd.** *Soltan v. De Held* (1851), 2 Sim. N. S. 133; *Jacomb v. Knight* (1863), 8 L. T. 412; *Martyr v. Lawrence* (1864), 3 New Rep. 689.

**907.** —]—Bill by the lessee & occupier of a house & premises in Henrietta Street, Cavendish Square, alleged that an erection, when completed, would form a screen, consisting of a range of strong upright iron stanchions filled in with iron sashes & glazed with fluted glass, & would extend along the whole of the back fronts of other houses & premises & part of his own, at a distance of thirty feet, & that it would be seriously prejudicial to plff., & greatly interfere with the enjoyment of the light & air which plff. had hitherto had in the occupation of his house. It also alleged, that in the framework of the erection it was intended to introduce slanting panes of glass, called "*louvre*s," the effect of which would be to cause currents of air & an accumulation of soot to the great annoyance of plff., & that unless the glass screenwork was kept clean & free from dust & dirt, it would become offensive, & cause a greater obstruction to the light & air of plff.'s house:—**Held:** motion for an injunction would be refused, on the ground that there was no evidence of any actual obstruction to the light & air by the screen & the evidence only amounted to opinion, that the effect of the erection would be to occasion a material obstruction of light & air, & there might have been evidence of what actually had happened.—**RADCLIFFE v. PORTLAND (DUKE)** (1862), 3 Giff. 702; 7 L. T. 120; 8 Jur. N. S. 1007; 10 W. R. 687; 66 E. R. 501.

**908.** —]—**COLLS v. HOME & COLONIAL STORES, LTD.**, No. 830, *ante*.

**909.** —]—**HIGGINS v. BETTS**, No. 829, *ante*.

**910.** —]—In an action for interference with light & air the owner of the dominant tenement is entitled to the uninterrupted access of a quantity of light measured by what is required for the ordinary purposes of the use of the tenement, & the test is whether the obstruction complained of amounts to a nuisance.—**PAUL v. ROBSON** (1914), 83 L. J. P. C. 304; 111 L. T. 481; 30 T. L. R. 533, P. C.

**B. What Interference amounts to Nuisance.**

**911. Whether owner entitled to whole light or only sufficient quantity for ordinary purposes.**—

To constitute an illegal obstruction, by building, of plff.'s ancient lights, it is not sufficient, that plff. has less light than he had before, but there

diminution of light must be sensible: but plff. is entitled substantially to all the light which he enjoyed before the obstruction, & evidence that enough of light remains to enable plff. to carry on his business is not sufficient to give *defts.* a verdict.—**MANNING v. GRESHAM HOTEL Co.** (1867), L. R. 1 C. L. 115.—**IR.**

**911 ii.** —]—Where premises are already so badly lighted that the smallest deprivation of light would substantially inconvenience the occupiers in their business they are entitled to relief on such deprivation.—

must be such a privation of light as will render the occupation of his house uncomfortable, & prevent him, if in trade, from carrying on his business as beneficially as he had previously done.—**BACK v. STACEY** (1820), 2 C. & P. 465, N. P.; *previous proceedings*, 2 Russ. 121.

*Annotations*:—**Apprvd.** *Dent v. Auction Mart Co., Pilgrim v. The Same, Mercers' Co. v. The Same* (1866), L. R. 2 Eq. 238. **Consd.** *Aynsley v. Glover* (1874), L. R. 18 Eq. 544; *Ecol. Comrs. for England v. Kine* (1880), 14 Ch. D. 213; *Colls v. Home & Colonial Stores*, [1904] A. C. 179. **Expld.** *Higgins v. Betts*, [1905] 2 Ch. 210. **Refd.** *Calcraft v. Thompson* (1867), 15 W. R. 387; *Kelk v. Pearson* (1870), 23 L. T. 458; *City of London Brewery Co. v. Tennant* (1873), 43 L. J. Ch. 457; *Kino v. Rudkin* (1877), 6 Ch. D. 160; *Warren v. Brown*, [1902] 1 K. B. 15; *Kino v. Jolly*, [1905] 1 Ch. 480; *Heath v. Brighton Corp.* (1908), 98 L. T. 718. **Mentd.** *Johnson v. Wyatt* (1863), 2 De G. J. & Sm. 18; *Langmead v. Maple* (1865), 18 C. B. N. S. 255; *Slack v. Leeds Industrial Co-op. Soc.*, [1923] 1 Ch. 431.

**912.** —[.]—That diminution of light & air which the law recognises as the ground of an action against a party who builds near another's premises, is such as really makes them to a sensible degree less fit for the purposes of business or occupation.—**PARKER v. SMITH** (1832), 5 C. & P. 438, N. P.

*Annotations*:—**Consd.** *Colls v. Home & Colonial Stores*, [1904] A. C. 179. **Refd.** *Wells v. Ody* (1836), 7 C. & P. 410; *Kelk v. Pearson* (1871), 6 Ch. App. 809; *Ecol. Comrs. for England v. Kine* (1880), 14 Ch. D. 213; *Kino v. Jolly*, [1905] 1 Ch. 480; *Slack v. Leeds Industrial Co-op. Soc.*, [1923] 1 Ch. 431. **Mentd.** *Johnson v. Wyatt* (1863), 2 De G. J. & Sm. 18; *Langmead v. Maple* (1865), 18 C. B. N. S. 255.

**913.** —[.]—To sustain an action on the case for darkening pltf.'s windows, it is not sufficient that a ray or two of light should be obstructed. The question is, whether, in consequence of the obstruction, pltf. has less light than before, to so considerable a degree as to injure pltf.'s property in point of value.—**PRINGLE v. WERNHAM** (1836), 7 C. & P. 377, N. P.

*Annotations*:—**Dtd.** *Kino v. Jolly* (1904), 74 L. J. Ch. 174. **Mentd.** *Johnson v. Wyatt* (1863), 2 De G. J. & Sm. 18; *Langmead v. Maple* (1865), 18 C. B. N. S. 255.

**914.** —[.]—(1) To support an action for obstructing lights, pltf. must show that there was such a diminution of light & air as makes his premises less fit for occupation.

(2) If the light of pltf.'s windows is obstructed by deft. building on a party wall, half of which belongs to pltf. & half to deft., pltf. may maintain either trespass or case.

(3) The Fire Prevention (Metropolis) Act, 1774 (c. 78), does not protect persons from actions for injuries arising from the collateral consequences of their building, such as obstructing lights.

(4) A man can bring no action for the loss of a look out or a prospect (**PARKE, B.**).—**WELLS v. ODY** (1836), 1 M. & W. 452; 7 C. & P. 410; 5 Dowl. 95; 2 Gale, 12; Tyr. & Gr. 715; 5 L. J. Ex. 199; 150 E. R. 512; *previous proceedings* (1835), 2 Cr. M. & R. 128.

*Annotations*:—**As to** (1) **Consd.** *Colls v. Home & Colonial Stores*, [1904] A. C. 179. **Apprvd.** *Kino v. Jolly*, [1905]

**O'CONNOR v. WALSH** (1906), 42 I. L. T. 20.—**IR.**

**911 iii.** —[.]—The only amount of light for a dwelling-house which can be claimed by prescription or by length of time without an actual grant is such an amount as is reasonably necessary for the convenient & comfortable habitation of the house.—**DELLI & LONDON BANK v. EKM LAL DUTT** (1887), 1 L. R. 14 Cal. 339.—**IND.**

**911 iv.** —[.]—Pltf. complained that defts. intended to build so as to obstruct the passage of light & air through an ancient window in his house, & render a room therein unfit for use, & prayed for a perpetual injunction restraining defts. from so building:—**Held**: as the evidence established that, after

defts.' wall was built, pltf.'s room would not remain substantially as useful to him as before, pltf. was entitled to an injunction.—**KADARSHAI v. RAHMIBHAI** (1889), 1 L. R. 13 Bom. 674.—**IND.**

**911 v.** —[.]—An easement of light to a window only gives a right to have buildings that obstruct it removed so as to allow the access of sufficient light to the window.—**BALA v. MAHARU** (1896), 1 L. R. 20 Bom. 788.—**IND.**

**911 vi.** —[.]—In a suit for an injunction to restrain deft. from obstructing the access of light & air to pltf.'s windows:—**Held**: the questions to be determined were whether there had been a diminution in the quantity of light & air, which had been accus-

1 Ch. 480. **Refd.** *Jolly v. Kino* (1906), 76 L. J. Ch. 1. **As to** (2) **Refd.** *Haine v. Alderson* (1838), 4 Bing. N. C. 702. **As to** (3) **Consd.** *Crofts v. Haldane* (1867), L. R. 2 Q. B. 194; *Adams v. Marylebone B. C.* (1906), 75 L. J. K. B. 995. **Generally.** **Mentd.** *Johnson v. Wyatt* (1863), 2 De G. J. & Sm. 18; *Langmead v. Maple* (1865), 18 C. B. N. S. 255; *Re Metropolitan Building Act, 1855*, *Ex p. McBryde* (1876), 35 L. T. 543.

**915.** —[.]—Injunction granted to restrain the rebuilding of a London house, on a plan slightly varying from the former ground plan, where it appeared, as the result of somewhat conflicting evidence, that the proposed new building would seriously interfere with the enjoyment of light & air by pltf., the occupier of the adjoining house, & when it appeared that pltf. for twenty years previously, though she had obscured the light & air to some extent, had not done so by an obstruction as great as that in respect of which she sought relief.—**ARCEDECKNE v. KELK** (1858), 2 Giff. 683; 32 L. T. O. S. 331; 23 J. P. 147; 5 Jur. N. S. 114; 7 W. R. 194; 66 E. R. 286.

**916.** —[.]—(1) A. & C. occupied adjoining houses, & C., intending to erect a glass room as a photographic studio on a portion of his premises, called on A. & informed him of his intention, pointing out the situation, etc., but this was done after dark on a spring evening. He also said he had a plan of the erections & a contract for their performance. A. made no objection, being, as he alleged, under the impression that the new buildings were to be in a different situation, but never made further inquiries, nor asked to see the plan. C. commenced his preparations eleven days afterwards, & about a week later commenced the actual building. About a week after this A. discovered his mistake as to the position of the new buildings, & four days later wrote to C. to desist, & threatened proceedings in the Ct. of Ch. if compliance were refused. Eight days afterwards, & when the buildings were nearly complete, A. filed a bill against C.:—**Held**: there was no such acquiescence as would deprive A. of his right to relief.

**Seemle**: (2) a stronger case of acquiescence is requisite to debar a pltf. from relief at the hearing of a cause than to disentitle him to an interlocutory injunction.

(3) A pltf. coming to the ct. for an injunction to restrain the erection of new buildings by his neighbour, on the ground of interference with his light & air, must show that his own residence will be rendered substantially less comfortable for purposes of occupation. Though an injunction be refused in such a case, the ct. if it appear that damages have been sustained may, if it think fit, exercise the jurisdiction conferred by Chancery Amendment Act, 1858 (c. 27), & direct an inquiry as to damages.

(4) **Qu.**: whether the ct., in a case of nuisance where pltf. would probably recover damages at law, will grant an injunction if the damages would

tomed to enter the windows of pltf.'s house, during the whole of the prescriptive period, & if so, whether there had been a deprivation of light & air sufficient to render occupation of the house uncomfortable.—**CHOTALAL MOHANLAL LALLUBHAI SUBCHAND** (1905), 1 L. R. 29 Bom. 157.—**IND.**

**911 vii.** —[.]—The extent of a prescriptive right to the passage of light & air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespective of the purpose for which it has been used.—**FRAMJI SHAPURJI v. FRAMJI ENULJI** (1905), 1 L. R. 30 Bom. 319.—**IND.**

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**908.** —[—] **COLLS v. HOME & COLONIAL STORES, LTD.,** No. 830, *ante*.

**909.** —[—] **HIGGINS v. BETTS,** No. 829, *ante*.

**910.** —[—] In an action for interference with light & air the owner of the dominant tenement is entitled to the uninterrupted access of a quantity of light measured by what is required for the ordinary purposes of the use of the tenement, & the test is whether the obstruction complained of amounts to a nuisance.—**PAUL v. ROBSON** (1914), 83 L. J. P. C. 304; 111 L. T. 481; 30 T. L. R. 533, P. C.

## B. What Interference amounts to Nuisance.

**911.** *Whether owner entitled to whole light or only sufficient quantity for ordinary purposes.*—To constitute an illegal obstruction, by building, of ptlf.'s ancient lights, it is not sufficient, that ptlf. has less light than he had before, but there

diminution of light must be sensibly felt; but ptlf. is entitled substantially to all the light which he enjoyed before the obstruction, & evidence that enough of light remains to enable ptlf. to carry on his business is not sufficient to give deft. a verdict.—**MANNING v. GRESHAM HOTEL CO.** (1867), L. R. 1 C. L. 115.—**IR.**

**911 ii.** —[—] Where premises are already so badly lighted that the smallest deprivation of light would substantially inconvenience the occupiers in their business they are entitled to relief on such deprivation.—

must be such a privation of light as will render the occupation of his house uncomfortable, & prevent him, if in trade, from carrying on his business as beneficially as he had previously done.—**BACK v. STACEY** (1826), 2 C. & P. 465, N. P.; *previous proceedings*, 2 Russ. 121.

*Annotations*:—**Apprvd.** *Dent v. Auction Mart Co., Pilgrim v. The Stamp, Mercers' Co. v. The Same* (1866), L. R. 2 Eq. 238. **Consd.** *Aynsley v. Glover* (1874), L. R. 18 Eq. 544; *Ecol. Comrs. for England v. Kine* (1880), 14 Ch. D. 213; *Colls v. Home & Colonial Stores*, [1904] A. C. 179. **Expld.** *Colls v. Home & Colonial Stores*, [1905] 2 Ch. 210. **Refd.** *Calcraft v. Thompson* (1867), 15 W. R. 387; *Kelk v. Pearson* (1870), 23 L. T. 458; *City of London Brewery Co. v. Tennant* (1873), 43 L. J. Ch. 457; *Kine v. Rudkin* (1877), 6 Ch. D. 160; *Warren v. Brown*, [1902] 1 K. B. 15; *Kine v. Jolly*, [1905] 1 Ch. 480; *Heath v. Brighton Corp.* (1908), 98 L. T. 718. **Mentd.** *Johnson v. Wyatt* (1863), 2 D. G. J. & Sm. 18; *Langmead v. Maple* (1865), 18 C. B. N. S. 255; *Slack v. Leeds Industrial Co-op. Soc.*, [1923] 1 Ch. 431.

**912.** —[J]—That diminution of light & air which the law recognises as the ground of an action against a party who builds near another's premises, is such as really makes them to a sensible degree less fit for the purposes of business or occupation.—**PARKER v. SMITH** (1832), 5 C. & P. 438, N. P.

*Annotations*:—**Consd.** *Colls v. Home & Colonial Stores*, [1904] A. C. 179. **Refd.** *Wells v. Ody* (1836), 7 C. & P. 410; *Kelk v. Pearson* (1871), 6 Ch. App. 809; *Ecol. Comrs. for England v. Kine* (1880), 14 Ch. D. 213; *Kine v. Jolly*, [1905] 1 Ch. 480; *Slack v. Leeds Industrial Co-op. Soc.*, [1923] 1 Ch. 431. **Mentd.** *Johnson v. Wyatt* (1863), 2 D. G. J. & Sm. 18; *Langmead v. Maple* (1865), 18 C. B. N. S. 255.

**913.** —[J]—To sustain an action on the case for darkening pltf.'s windows, it is not sufficient that a ray or two of light should be obstructed. The question is, whether, in consequence of the obstruction, pltf. has less light than before, to so considerable a degree as to injure pltf.'s property in point of value.—**PRINGLE v. WERNHAM** (1836), 7 C. & P. 377, N. P.

*Annotations*:—**Dtd.** *Kine v. Jolly* (1904), 74 L. J. Ch. 174. **Mentd.** *Johnson v. Wyatt* (1863), 2 D. G. J. & Sm. 18; *Langmead v. Maple* (1865), 18 C. B. N. S. 255.

**914.** —[J]—(1) To support an action for obstructing lights, pltf. must show that there was such a diminution of light & air as makes his premises less fit for occupation.

(2) If the light of pltf.'s windows is obstructed by deft. building on a party wall, half of which belongs to pltf. & half to deft., pltf. may maintain either trespass or case.

(3) The Fire Prevention (Metropolis) Act, 1774 (c. 78), does not protect persons from actions for injuries arising from the collateral consequences of their building, such as obstructing lights.

(4) A man can bring no action for the loss of a look out or a prospect (**PARKE, B.**).—**WELLS v. ODY** (1836), 1 M. & W. 452; 7 C. & P. 410; 5 Dowl. 95; 2 Gale, 12; Tyr. & Gr. 715; 5 L. J. Ex. 199; 150 E. R. 512; *previous proceedings* (1835), 2 Cr. M. & R. 128.

*Annotations*:—**As to** (1) **Consd.** *Colls v. Home & Colonial Stores*, [1904] A. C. 179. **Apprvd.** *Kine v. Jolly*, [1905]

**O'CONNOR v. WALSH** (1906), 42 I. L. T. 20.—**IR.**

**911 iii.** —[J]—The only amount of light for a dwelling-house which can be claimed by prescription or by length of time without an actual grant is such an amount as is reasonably necessary for the convenient & comfortable habitation of the house.—**DELIH & LONDON BANK v. HEM LAL DUTT** (1887), 1 L. R. 14 Calc. 539.—**IND.**

**911 iv.** —[J]—Pltf. complained that defts. intended to build so as to obstruct the passage of light & air through an ancient window in his house, & render a room therein unfit for use, & prayed for a perpetual injunction restraining defts. from so building:—**Held**: as the evidence established that, after

defts.' wall was built, pltf.'s room would not remain substantially as useful to him as before, pltf. was entitled to an injunction.—**KADARBHAI v. RAHIMBHAI** (1889), 1 L. R. 13 Bom. 674.—**IND.**

**911 v.** —[J]—An easement of light to a window only gives a right to have buildings that obstruct it removed so as to allow the access of sufficient light to the window.—**BALA v. MAHARU** (1906), 1 L. R. 20 Bom. 788.—**IND.**

**911 vi.** —[J]—In a suit for an injunction to restrain deft. from obstructing the access of light & air to pltf.'s windows:—**Held**: the questions to be determined were whether there had been a diminution in the quantity of light & air, which had been accus-

1 Ch. 480. **Refd.** *Jolly v. Kine* (1906), 76 L. J. Ch. 1. **As to** (2) **Refd.** *Raine v. Alderson* (1838), 4 Bing. N. C. 702. **As to** (3) **Consd.** *Crofts v. Haldane* (1867), L. R. 2 Q. B. 184; *Adams v. Marylebone B. C.* (1906), 75 L. J. K. B. 995. **Generally**, **Mentd.** *Johnson v. Wyatt* (1863), 2 D. G. J. & Sm. 18; *Langmead v. Maple* (1865), 18 C. B. N. S. 255; *Re Metropolitan Building Act, 1855*, *Ex p. McBryde* (1876), 35 L. T. 543.

**915.** —[J]—Injunction granted to restrain the rebuilding of a London house, on a plan slightly varying from the former ground plan, where it appeared, as the result of somewhat conflicting evidence, that the proposed new building would seriously interfere with the enjoyment of light & air by pltf., the occupier of the adjoining house, & when it appeared that pltf. for twenty years previously, though she had obscured the light & air to some extent, had not done so by an obstruction as great as that in respect of which she sought relief.—**ARCEDECKNE v. KELK** (1858), 2 Giff. 683; 32 L. T. O. S. 331; 23 J. P. 147; 5 Jur. N. S. 114; 7 W. R. 194; 66 E. R. 286.

**916.** —[J]—(1) A. & C. occupied adjoining houses, & C. intending to erect a glass room as a photographic studio on a portion of his premises, called on A. & informed him of his intention, pointing out the situation, etc., but this was done after dark on a spring evening. He also said he had a plan of the erections & a contract for their performance. A. made no objection, being, as he alleged, under the impression that the new buildings were to be in a different situation, but never made further inquiries, nor asked to see the plan. C. commenced his preparations eleven days afterwards, & about a week later commenced the actual building. About a week after this A. discovered his mistake as to the position of the new buildings, & four days later wrote to C. to desist, & threatened proceedings in the Ct. of Ch. if compliance were refused. Eight days afterwards, & when the buildings were nearly complete, A. filed a bill against C.:—**Held**: there was no such acquiescence as would deprive A. of his right to relief.

*Semble*: (2) a stronger case of acquiescence is requisite to debar a pltf. from relief at the hearing of a cause than to disentitle him to an interlocutory injunction.

(3) A pltf. coming to the ct. for an injunction to restrain the erection of new buildings by his neighbour, on the ground of interference with his light & air, must show that his own residence will be rendered substantially less comfortable for purposes of occupation. Though an injunction be refused in such a case, the ct. if it appear that damages have been sustained may, if it think fit, exercise the jurisdiction conferred by Chancery Amendment Act, 1858 (c. 27), & direct an inquiry as to damages.

(4) *Qu.*: whether the ct., in a case of nuisance where pltf. would probably recover damages at law, will grant an injunction if the damages would

amount to enter the windows of pltf.'s house, during the whole of the prescriptive period, & if so, whether there had been a deprivation of light & air sufficient to render occupation of the house uncomfortable.—**CHOTALAL MOHANLAL v. LALLUBHAI SURCHAND** (1905), 1 L. R. 29 Bom. 157.—**IND.**

**911 vii.** —[J]—The extent of a prescriptive right to the passage of light & air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespective of the purpose for which it has been used.—**FRAMJI SHAPURJI v. FRAMJI EDULJI** (1905), 1 L. R. 30 Bom. 319.—**IND.**

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be trifling & inconsiderable.—*JOHNSON v. WYATT* (1863), 2 De G. J. & Sm. 18; 3 New Rep. 270; 33 L. J. Ch. 394; 9 L. T. 618; 28 J. P. 70; 9 Jur. N. S. 1333; 12 W. R. 234; 46 E. R. 281, L. J.

*Annotations:—As to (2) Reidd. Hogg v. Scott* (1874), L. R. 18 Eq. 444. *As to (3) & (4) Consd. Swaine v. G. N. Ry.* (1864), 4 De G. J. & Sm. 211; *Durrell v. Pritchard* (1865), 1 Ch. App. 244. *Reidd. Langmead v. Maple* (1865), 15 C. B. N. S. 255.

**917.** —[—] (1) It is not in every case in which an action can be maintained for the obstruction of ancient lights, that an injunction will be granted; something more is required than that amount of injury for which damages may be recovered at law.

(2) The foundation of the jurisdiction in equity to interfere by injunction is the existence of an injury to property of such a nature as to render the property in a material degree unsuitable for the purposes to which it is now applied or to lessen considerably the enjoyment of it. Such an injury is considered by the ct. to be incapable of compensation in damages.

(3) *Semble*: in a case where the abridgement of light complained of does not materially interfere with the comfort of the persons complaining, & does not materially diminish the suitability of the premises for the present purpose to which they are applied, the ct. has no jurisdiction to interfere by injunction on the ground of a diminution of light which, having regard to a future possible destination of the property, may materially diminish its value.

(4) A judge sitting in equity is bound to pronounce his judgment according to the evidence; hence to decide a case upon conclusions of fact derived from ocular inspection is a course which a judge in equity cannot, in ordinary cases be recommended to adopt.—*JACKSON v. NEWCASTLE (DUKE)* (1864), 3 De G. J. & Sm. 275; 4 New Rep. 448; 33 L. J. Ch. 698; 10 L. T. 635, 802; 28 J. P. 516; 10 Jur. N. S. 810; 12 W. R. 1066; 46 E. R. 642, L. C.

*Annotations:—As to (1) Reidd. Dent v. Auction Mart Co., Pilgrim v. The Same, Mercers' Co. v. The Same* (1866), L. R. 2 Eq. 238; *Moore v. Hall* (1878), 47 L. J. Q. B. 334. *As to (2) Reidd. Yates v. Jack* (1865), 13 L. T. 17. *Reidd. Clarke v. Clark* (1865), 14 W. R. 115, n.; *Moore v. Hall* (1878), 47 L. J. Q. B. 334. *As to (3) Consd. Calcraft v. Thompson* (1867), 31 J. P. 675. *Obd. Aynsley v. Glover* (1874), L. R. 18 Eq. 544; *Woods v. Conway Corp.*, [1914] 2 Ch. 47. *Reidd. Stokes v. City Offices Co.* (1865), 13 L. T. 81; *Dent v. Auction Mart Co., Pilgrim v. The Same, Mercers' Co. v. The Same* (1866), L. R. 2 Eq. 238; *Moore v. Hall* (1878), 47 L. J. Q. B. 334. *As to (4) Reidd. Heath v. Brighton Corp.* (1908), 98 L. T. 718.

**918.** —[—] (1) Where a house is in a populous town, the ct. will take that fact into consideration in estimating the damage done by obstructing an ancient light.

(2) The ct. will not restrain the erection of a building merely because it deprives an ancient window of some portion of light, but will do so when the obstruction is such as to interfere with the ordinary occupations of life.

(3) A lateral obstruction may be such a nuisance as to be restrained.—*CLARKE v. CLARK* (1865), 1 Ch. App. 16; 35 L. J. Ch. 151; 13 L. T. 482; 30 J. P. 20; 11 Jur. N. S. 914; 14 W. R. 115, L. C.

*Annotations:—As to (1) Consd. Dent v. Auction Mart Co., Pilgrim v. Auction Mart Co., Mercers' Co. v. Auction Mart Co.* (1866), L. R. 2 Eq. 238; *Martin v. Headon* (1866), L. R. 2 Eq. 425; *Warren v. Brown*, [1900] 2 Q. B. 722. *Reidd. Potts v. Smith* (1868), 18 L. T. 629. *As to (2) Apprvd. Durrell v. Pritchard* (1865), 1 Ch. App. 244. *Consd. Dent v. Auction Mart Co., Pilgrim v. Auction Mart Co., Mercers' Co. v. Auction Mart Co.* (1866), L. R. 2 Eq. 238; *Lyon v. Dillimore* (1866), 14 L. T. 183; *Robson v. Whittingham* (1866), 1 Ch. App. 442; *Smith v. Owen* (1866), 35 L. J. Ch. 317. *Distd. Gort v. Clark* (1868), 18 L. T.

343. *Consd. Kelk v. Pearson* (1871), 6 Ch. App. 809; *Warren v. Brown*, [1900] 2 Q. B. 722; *Colls v. Home & Colonial Stores*, [1904] A. C. 179. *Reidd. Lanfranchi v. Mackenzie* (1867), L. R. 4 Eq. 421; *Maguire v. Grattan* (1868), 16 W. R. 1189; *Jolly v. Kine* (1906), 95 L. T. 656. *As to (3) Apprvd. City of London Brewery Co. v. Tonnant* (1873), 9 Ch. App. 212. *Reidd. Dent v. Auction Mart Co., Pilgrim v. Auction Mart Co., Mercers' Co. v. Auction Mart Co.* (1866), L. R. 2 Eq. 238.

**919.** —[—] The ct. will not grant an injunction to restrain the erection of a building on account of its obstructing pltf.'s light, unless pltf. can show that he will sustain substantial damage. If he cannot do this, his ground of application to the ct. fails, & no inquiry will be granted as to damages, & the bill will be altogether dismissed, but without prejudice to an action at law.—*ROBSON v. WHITTINGHAM* (1866), 1 Ch. App. 442; 35 L. J. Ch. 227; 13 L. T. 730; 30 J. P. 179; 12 Jur. N. S. 40; 14 W. R. 201, L. J.

*Annotations:—Consd. Dent v. Auction Mart Co., Pilgrim v. The Same, Mercers' Co. v. The Same* (1866), L. R. 2 Eq. 238; *Dickinson v. Harbottle* (1873), 28 L. T. 186. *Reidd. Martin v. Headon* (1866), L. R. 2 Eq. 425; *Gort v. Clark* (1868), 18 L. T. 343; *Maguire v. Grattan* (1868), 16 W. R. 1189; *Warren v. Brown*, [1900] 2 Q. B. 722; *Colls v. Home & Colonial Stores*, [1904] A. C. 179.

**920.** —[—] (1) The owner of ancient lights is entitled not only to sufficient light for the purpose of his then business, but to all the light which he had enjoyed previously to the interruption sought to be restrained.

(2) Where an injunction was granted to restrain the interruption of an ancient light, the ct. gave deft. leave to apply in order to ascertain whether any building which he might propose to erect would cause such an interruption.

Pltfs. are entitled to an injunction restraining deft. from erecting any building so as to darken, injure, or obstruct any of the ancient lights of pltf. as same were enjoyed previously to the taking down by deft. of his buildings on the opposite side of the street, & also from permitting to remain any buildings already erected, which will cause any such obstruction. Whether the buildings already erected not exactly opposite to pltfs.' messuage will have that effect when the whole of deft.'s buildings are finished, is a matter on which the evidence does not enable me to come to any satisfactory conclusion, & I am therefore obliged to frame the decree in this general form, leaving it to pltfs. to apply by notice in case the terms of the injunction are violated. I shall, however, be willing to introduce a proviso into the order similar to that adopted in *Stoke v. City Offices Company*, No. 1473, *post*, enabling the parties to come before the chief clerk in order to have it ascertained whether any proposed addition to the building will or will not be a violation of the injunction; & it must also in like manner be left open to pltfs. to show, if they can, that the buildings already erected materially interfere with the light heretofore enjoyed by them (LORD CRANWORTH, C.).—*YATES v. JACK* (1866), 1 Ch. App. 295; 35 L. J. Ch. 539; 14 L. T. 151; 30 J. P. 324; 12 Jur. N. S. 305; 14 W. R. 618, L. C.

*Annotations:—As to (1) Consd. Dent v. Auction Mart Co., Pilgrim v. The Same, Mercers' Co. v. The Same* (1866), L. R. 2 Eq. 238; *Martin v. Headon* (1866), L. R. 2 Eq. 425; *Calcraft v. Thompson* (1867), 15 W. R. 387; *Lanfranchi v. Mackenzie* (1867), L. R. 4 Eq. 421; *Gort v. Clark* (1868), 18 L. T. 343; *Young v. Shaper* (1872), 27 L. T. 643; *Aynsley v. Glover* (1874), L. R. 18 Eq. 544. *Apprvd. Hackett v. Balis* (1875), L. R. 20 Eq. 494. *Consd. Colls v. Home & Colonial Stores*, [1904] A. C. 179. *Reidd. Senior v. Pawson* (1866), L. R. 3 Eq. 330; *Kelk v. Pearson* (1870), 23 L. T. 458; *Moore v. Hall* (1878), 3 Q. B. D. 178; *Cooper v. Straker* (1888), 40 Ch. D. 21; *Hickert v. Popham, Radford* (1890), 63 L. T. 379; *Jordeson v. Sutton, Southcoates, & Drypool Gas Co.* (1898), 67 L. J. Ch. 666; *Warren v. Brown*, [1902] 1 K. B. 15; *Amblar v. Gordon*, [1905] 1 K. B. 417; *Wood v. Conway Corp.*, [1914] 2 Ch. 47. *As to (2) Consd. Hackett v. Balis* (1875), L. R. 20 Eq. 494; *Smith v. Baxter*, [1900]



2 Ch. 138. *Reid*. A.-G. v. Colney Hatch Lunatic Asylum (1868). 4 Ch. App. 146; *Itolason v. Levy* (1868), 17 L. T. 841; *Aynsley v. Glover* (1874), 1 R. 18 Eq. 544; *Lawrence v. Horton* (1890), 59 L. J. Ch. 440; *Colls v. Home & Colonial Stores*, [1904] A. C. 179; *Higgins v. Betts*, [1905] 2 Ch. 210.

921. —. —.]—(1) There is no distinction between the right to light & air in regard to town houses & country houses.

(2) Pltf. having proved that one-half of the sky area which had previously been open to him was shut out by deft.'s new building, & that he had been obliged, owing to the diminution of light, to remove his workmen from where they had formerly worked to another portion of his premises:—*Held*: he was entitled to relief, but as part of deft.'s building had been erected, & as no mandatory injunction was prayed, an inquiry was directed as to the amount of damages sustained by pltf.—*MARTIN v. HEADON* (1866), 1 L. R. 2 Eq. 425; 35 L. J. Ch. 602; 14 L. T. 585; 30 J. P. 742; 12 Jur. N. S. 387; 14 W. R. 723.

*Annotations*:—As to (2) *Folld*. *Webb v. Hunt* (1866), 12 Jur. N. S. 558. *Reid*. *Dickinson v. Harbottle* (1873), 28 L. T. 186; *Warren v. Brown*, [1900] 2 Q. B. 722.

922. —. —.]—*W.*, residing near Fenchurch Street, London, had ancient windows looking into an archway & passage passing under part of his house towards the rear, & also a skylight near a cottage belonging to *ll.*, who pulled down the cottage & commenced a building intended to be very lofty, immediately facing the end of the archway passage. On a written notice from *W.* they desisted, but seven months after, when the cts. were not sitting, suddenly recommenced, & carried up the wall to a great height before a bill could be filed or an *interim* order for an injunction obtained, which was done as soon as possible, to restrain raising any buildings so as to obstruct pltf.'s light & air, & the enjoyment of his ancient lights, & for damages. On the evidence at the hearing, & measurement of sky area:—*Held*: pltf. was entitled to damages.—*WEBB v. HUNT* (1866), 12 Jur. N. S. 558; 14 W. R. 725.

923. —. —.]—(1) Prescription Act, 1832 (c. 71), confers, by virtue of twenty years' undisturbed enjoyment, an absolute right to the amount of light passing through ancient windows, & this without reference to the particular purpose for which the premises have been used.

(2) The ct. will not interfere by mandatory injunction, unless the amount of light intercepted is substantial, but will leave the party aggrieved to his remedy at law.—*CALCRAFT v. THOMPSON* (1867), 31 J. P. 675; 15 W. R. 387, L. C.; *previous proceedings* (1866), 35 Beav. 559.

*Annotations*:—As to (1) *Consd.* *Colls v. Home & Colonial Stores*, [1904] A. C. 179. *Reid*. *Cooper v. Straker* (1888), 40 Ch. D. 21; *Warren v. Brown*, [1900] 2 Q. B. 722. As to (2) *Reid*. *Eccl. Comrs. for England v. Kluo* (1880), 14 Ch. D. 213.

924. —. —.]—*KELK v. PEARSON*, No. 842, *ante*.

925. —. —.]—(1) The right conferred or recognised by Prescription Act, 1832 (c. 71), is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it is used.

(2) Mandatory injunction granted on an interlocutory application, deft. against whom it was sought failing to show that the buildings he was erecting would not materially interfere with pltf.'s ancient lights.—*YOUNGE v. SHAPER* (1872), 27 L. T. 643; 21 W. R. 135.

926. —. —.]—*CITY OF LONDON BREWERY CO. v. TENNANT*, No. 475, *ante*.

927. —. —.]—In an action for the obstruction of ancient lights, the judge directed the jury that they were to consider whether there had been a

sensible diminution of light, so as to make pltf.'s premises less available for the purposes of occupation or business, to which they were then, or might thereafter, be made applicable, & that the damages were to be estimated according to the diminution of value of the premises for such purposes:—*Held*: this was a right direction, on the ground that the purposes for which the premises had actually been used while the light had been enjoyed were not the proper measure of the right.—*MOORE v. HALL* (1878), 3 Q. B. D. 178; 47 L. J. Q. B. 334; 38 L. T. 419; 42 J. P. 343; 20 W. R. 401, D. C.

*Annotations*:—*Consd.* *Dalton v. Angus* (1881), 6 App. Cas. 740; A.-G. v. Queen Anne Garden & Mansions Co. (1889), 60 L. T. 759; *Dicker v. Popham*, Radford (1890), 63 L. T. 379; *Warren v. Brown*, [1900] 2 Q. B. 722. *Appl.* *Griffith v. Clay*, [1912] 1 Ch. 291. *Reid*. *Corbett v. Jonas*, [1892] 3 Ch. 137; *Colls v. Home & Colonial Stores*, [1904] A. C. 179; *Slack v. Leeds Industrial Co-op. Soc.*, [1923] 1 Ch. 431.

928. —. —.]—Where a person has no special right to an extraordinary amount of light, he is subject to be deprived of a portion of the light which he may enjoy, & yet have no ground of action so long as the light left to him is such as permits him all the reasonable enjoyment of his premises without interfering with any ordinary & reasonable use to which he desires to put them.—*SIMMONS v. KRUSZINSKI* (1887), 3 T. L. R. 290.

929. —. —.]—In considering the question of the right to relief for interference with ancient lights, there is no rule of law that the owner or tenant of the house is entitled only to so much light as may come up to some imaginary standard or measure as to what the house may ordinarily require for purposes of habitation or business. The question is essentially one of comparison—whether by reason of the deprivation of light the house is substantially less comfortable than it was before, having regard to the ordinary uses by way of habitation or business to which the house has been put or may reasonably be supposed to be capable of being put.

Certain trade premises contained ancient lights to which the flow of light was full & uninterrupted. During the latter part only of the statutory period of twenty years before action, & at the time the action was brought, the premises were used by pltf. for a trade requiring an exceptional quantity & quality of light. Deft. erected a building which substantially interfered with the light coming to pltf.'s windows, & so darkened the premises as to leave an amount of light sufficient only for purposes of ordinary habitation or business, & materially insufficient for the special requirements of pltf.'s present trade:—*Held*: as pltf.'s ancient lights had been substantially interfered with by defts.' building, & the user of pltf.'s premises for the purpose of a special business requiring much light was not unreasonable, pltf. were entitled to damages for the interference.—*WARREN v. BROWN*, [1902] 1 K. B. 15; 71 L. J. K. B. 12; 85 L. T. 444; 50 W. R. 97; 18 T. L. R. 55; 46 Sol. Jo. 50, C. A.

*Annotations*:—*Consd.* *Parker v. Stanley* (1902), 50 W. R. 282; *Colls v. Home & Colonial Stores*, [1904] A. C. 179.

930. —. —.]—*COLLS v. HOME & COLONIAL STORES, LTD.*, No. 830, *ante*.

931. —. —.]—*HIGGINS v. BETTS*, No. 829, *ante*.

932. —. —.]—Appl. built a house near resp.'s house in a London suburb & thereby obstructed its ancient lights. In an action by resp. against applt. *Kekewich, J.*, found as a fact the obstruction amounted to a nuisance, but in the course of his judgment said that the room in question was "still a well-lighted room":—*Held*: there was evidence to justify the finding as to a

**Sect. 4.—Extent of easement: Sub-sect. 1, B.; sub-sects. 2 & 3.]**

nuisance, & there was nothing in the decision inconsistent with the principle laid down in *Colls v. Home & Colonial Stores*, No. 830, *ante*.—*JOLLY v. KINE*, [1907] A. C. 1; 76 L. J. Ch. 1; 95 L. T. 656; 23 T. L. R. 1; 51 Sol. Jo. 11, H. L.; *affy. S. C. sub nom. KINE v. JOLLY*, [1905] 1 Ch. 480, C. A.

**Annotations:—***Consd.* *Paul v. Robson* (1914), 83 L. J. P. C. 304; *Hoare v. McAlpine*, [1923] 1 Ch. 167. *Refd.* *Higgins v. Betts*, [1905] 2 Ch. 210; *Dairs v. Marrable*, [1913] 2 Ch. 421.

**933. —.**—*PAUL v. ROBSON*, No. 910, *ante*.

**934. —.**—*Pltfs.* who were stuff & woollen merchants at Bradford, had enjoyed for more than twenty years free & practically uninterrupted access of an exceptionally good light to their warehouse. *Defts.* proposed to erect a new building 73 feet high & separated from *pltfs.*' warehouse on the south by B. street, 45 feet wide. On this frontage of *pltfs.*' warehouse there were 36 windows, six on the ground floor & on each of the five floors above it. The expert evidence was that, although the direct light to four of the windows on the ground floor & first floor directly opposite to the proposed new building would be intercepted to a very large extent, these rooms would still be well lighted, & no case was made out in respect of the other fourteen windows in B. street alleged to be seriously affected. In a *quia timet* action by *pltfs.* to restrain the erection of the proposed building:—*Held*: inasmuch as the four rooms specially affected would still remain well lighted rooms, the warehouse would possess, on the evidence, an unusually large amount of light for the carrying on of the business having regard to its locality. *Pltfs.*, therefore, had not established an actionable nuisance or the insufficiency of the light which remained, & no injunction would be granted.—*SEMON (CHARLES) & CO. v. BRADFORD CORIN.*, [1922] 2 Ch. 737; 91 L. J. Ch. 602; 127 L. T. 800; 66 Sol. Jo. 648.

— *Dwelling-houses.*—*See* Nos. 911-913, 915-918, 924, 926-928, 930-932, *ante*.

— *Business premises.*—*See* Nos. 911, 912, 914, 919-923, 925-930, 934, *ante*.

**SUB-SECT. 2.—THE FORTY-FIVE DEGREES RULE.**

**935. No fixed rule as to amount of light.]—***COLLS v. HOME & COLONIAL STORES, LTD.*, No. 830, *ante*.

**936. Application of rule.]—**(1) The *ct.* will not in an ordinary case restrain the erection of a building the light of which above an ancient light is not greater than the distance from the light.

(2) Where, pending the litigation, *deft.* had continued the building complained of, a mandatory injunction was granted on motion.—*BEADEL v. PERRY* (1800), L. R. 3 Eq. 465; 15 L. T. 345; 15 W. R. 120; *subsequent proceedings* (1868), 19 L. T. 760.

**937. —.**—*Where* a building was being erected in a somewhat narrow street in the City of London, & had already reached a height which would subtend an angle of 45 degrees at the foot

of the ancient lights of *pltf.*'s houses on the opposite side of the street:—*Held*: *pltf.* was entitled to an injunction restraining the raising the new building to a greater height.—*HACKETT v. BAIRS* (1875), L. R. 20 Eq. 494; 45 L. J. Ch. 13. **Annotations:—***Expld.* *Theod. v. Dobenheim* (1876), 2 Ch. D. 165. *Consd.* *Parker v. First Avenue Hotel Co.* (1883), 24 Ch. D. 282. *Refd.* *Lawrence v. Horton* (1890), 63 L. T. 749.

**938. —.**—*Metropolis Management Amendment Act, 1862 (c. 102).*—An ancient light of *pltf.*, a sculptor, had a north aspect, in a street 31 feet wide. *Defts.*' buildings on the opposite side of the street were, as to part, exactly 31 feet high, & as to the other part, a little less than that height. They claimed to have a statutory right to raise their buildings to a height which would subtend an angle of 45 degrees measured from a base line level with the centre of *pltf.*'s light:—*Held*: the statutory regulation according to the above Act as to the height of buildings in streets was not to be taken as limiting the right by prescription to ancient lights, but such right depended upon the degree & amount of obscuration in each particular case.—*THEOD. v. DEBENHAM* (1876), 2 Ch. D. 165; 24 W. R. 775.

**Annotation:—***Apprvd.* *Colls v. Home & Colonial Stores*, [1904] A. C. 179.

**939. Rule not conclusive—Prima facie evidence against interference.]—***CITY OF LONDON BREWERY CO. v. TENNANT*, No. 475, *ante*.

**940. Not rule or presumption of law—Test to guide court.]—**An ancient church in the City of London was vested in the Ecclesiastical Comrs., upon trust to pull down the building, dispose of the materials, & sell the site. They pulled down the church, & the site was still vacant. *Deft.*, who had become the owner of land formerly part of the glebe of the church, on which some low buildings had stood, commenced the erection of buildings which, if completed, would have materially obstructed the access of light to windows occupying same position as those of the late church. The Ecclesiastical Comrs. commenced an action to restrain the erection of the proposed buildings:—*Held*: (1) the fact of there being no existing windows the access of light to which would be interfered with, was no objection to the granting an injunction if the right to access of light had not been abandoned; (2) the Ecclesiastical Comrs. had power to sell the site, with all the easements which had been enjoyed by the church, so that if the church had ancient lights the purchaser would have the benefit of them; (3) although the freehold of both the church & the glebe had throughout been vested in the rector there was no such manifest impossibility for the church to have a title by prescription or grant to access of light over the glebe as to induce the *ct.* to refuse an *interim* injunction till the trial. *Semble*: such an easement might be effectually created.

(4) The angle of 45 degrees is not taken from the windows, but from the top of one house to the level of the street on the other side.

(5) We must consider whether there is a substantial interference with the light, having regard to the use to which the building in this place will be put (*COTTON, L.J.*).

**PART VIII. SECT. 4, SUB-SECT. 2.**

**939 i. Rule not conclusive—Prima facie evidence against interference.]—**The 45 degrees rule is not a positive rule of law, but is a circumstance which the *ct.* may take into consideration, & is especially valuable when the proof of the obscuration is not definite or satisfactory.—*DELLI & LONDON BANK*

*v. HEN LAL DUTT* (1887), 1 L. R. 14 Cal. 839.—*IND.*

**939 ii. —.**—*In* a suit for an injunction to restrain *deft.* from obstructing the access of light & air to *pltf.*'s windows the lower *ct.* granted an injunction solely on the ground that *deft.*'s new building left *pltf.* with less than 45 degrees of light, & dispensed

with any further evidence:—*Held*: the *ct.* was in error.—*CHOTALAL MOHANLAL v. LALLUBHAI SUBCHAND* (1903), 1 L. R. 29 Bom. 157.—*IND.*

**940 i. Not rule or presumption of law—Test to guide court.]—**There is no greater liberty of obstructing ancient lights in large & populous cities than in the open country; nor is the right



(6) There is no rule of law, no rule of evidence, & no presumption, except of the very slightest kind, that, where the angular height of an erection is less than 45 degrees, the access of light is not substantially interfered with (JAMES, L.J.).—*ECCLESIASTICAL COMRS. FOR ENGLAND v. KINO* (1880), 14 Ch. D. 213; 49 L. J. Ch. 529; 42 L. T. 201; 28 W. R. 544, C. A.

*Annotations:—As to (1) Refd. Scott v. Pape* (1886), 31 Ch. D. 554. *As to (2) Refd. Re Eccl. Comrs. & New City of London Brewery Co.'s Contract*, [1895] 1 Ch. 702; *Griffith v. Clay*, [1912] 2 Ch. 291. *As to (6) Refd. Parker v. First Avenue Hotel Co.* (1883), 24 Ch. D. 282; *Colls v. Home & Colonial Stores*, [1904] A. C. 179. *Generally, Refd. Andrews v. Waite*, [1907] 2 Ch. 500; *Hyman v. Van Den Bergh* (1907), 77 L. J. Ch. 154.

**941.** ———. *J.—COLLS v. HOME & COLONIAL STORES, LTD., No. 830, ante.*

**942.** ———. *Question of fact.*—(1) There is no conclusion of law that a building will not obstruct the light coming to a window if it permits the light to fall on the window at an angle of not less than 45 degrees from the vertical. (2) the question of the amount of obstruction is always a question of fact which depends on the evidence in each case. Therefore, a pltf. whose ancient light is obstructed is entitled to a judgment in general terms, without referring to the angle of incidence of the light, unless there is some special evidence justifying the insertion of such a clause.—*PARKER v. FIRST AVENUE HOTEL CO.* (1883), 24 Ch. D. 282; 49 L. T. 318; 32 W. R. 105, C. A.

*Annotation:—As to (1) Refd. Colls v. Home & Colonial Stores*, [1904] A. C. 179.

#### SUB-SECT. 3.—EXTRAORDINARY USER—USER FOR SPECIAL PURPOSE.

**943. Easement acquired by express grant—Special purpose known to grantor.**—The right to an ancient light depends upon an implied contract; but there may be a right to a light depending upon an express contract; & therefore, defts., who had become the reversioners of the premises, & who were about to diminish their lessee's ancient light, were, upon the principle of ancient light & implied contract, & also express contract, as existing between landlord & tenant, restrained by injunction from obscuring the ancient light.—*HEIZ v. UNION BANK OF LONDON* (1854), 2 Giff. 686; 21 L. T. O. S. 137; 1 Jur. N. S. 127; 3 W. R. 40; 66 E. R. 287; *subsequent proceedings*, 24 L. T. O. S. 186, L. J.

*Annotations:—Apld. Lyon v. Dillmore* (1866), 14 L. T. 183. *Refd. Gooch v. Marshall* (1859), 1 L. T. 210; *Browne v. Flower*, [1911] 1 Ch. 219.

**944. Easement acquired by implied grant—What grant implied.**—On a grant of land with buildings upon it there will only be implied a right to access of light for ordinary purposes which might reasonably be in the contemplation of the parties at the time of the grant, & not to access of light for any special purposes requiring an unusual amount of light.

A lease for eighty years was granted to pltf.'s predecessors in title, who were architects, of certain buildings in the city of London, erected by them in pursuance of a building agreement.

to protection limited by any positive rule of law, as by the circumstance that 45 degrees of elevation are left unobstructed.—*MACKAY v. SCOTTISH WIDOWS' FUND ASSURANCE SOCIETY* (1877), 1 R. 11 Eq. 541.—*IR.*

#### PART VIII. SECT. 4, SUB-SECT. 3.

*m. Prescriptive period not completed—Relief granted.*—A bill was filed by a seed merchant to restrain

defts., who occupied adjacent offices, from erecting a new building then in progress, which he alleged would obstruct the access of light to an ancient window of the room in which he had sifted his seeds for the previous seventeen years.—*Held*: defts. having caused such diminution of light, & notwithstanding certain illumination afforded by them, prevented pltf. from carrying on the delicate operation of sifting seeds in the room, he was

Pltf. brought an action to restrain deft., who was a subsequent lessee of an adjoining building from the same lessors, from obstructing the access of light to pltf.'s building. The obstruction was not sufficient to injuriously affect the light enjoyed by pltf. for ordinary business purposes, but prevented their user of the building for the business of wool-sampling which required a special amount of light.—*Held*: pltf. had no right to an amount of light sufficient for wool-sampling, which was a special purpose not in contemplation at the date of the original agreement.—*CORRETT v. JONAS*, [1892] 3 Ch. 137; 62 L. J. Ch. 43; 67 L. T. 191; 3 R. 25.

**945. Easement acquired by prescription—Whether special user for twenty years necessary.**—Pltf. had been lessee of a dwelling-house in which he had, for nearly eight years, carried on business as a repairer of jewellery & watches.—*Held*: he was entitled to damages against the owner of adjacent premises who was in the process of constructing a building which would occasion such an obstruction of pltf.'s light as to injure him in his business.

Pltf. has been in possession of his house for about seven years, & it is said that, because he has not been in enjoyment of the light for twenty years, he can claim no protection from an injury that may accrue to any speciality in his trade by its diminution. . . . Pltf. has a right to the cl.'s protection (STUART, V.C.).—*LYON v. DILLMORE* (1866), 14 L. T. 183; 14 W. R. 511.

**946.** ———. *J.—*In order to establish the right to the access of an extraordinary amount of light necessary for a particular purpose or business to an ancient window; open, uninterrupted, & known enjoyment of such light in the manner in which it is at present enjoyed & claimed must be shown for a period of twenty years.—*LANFRANCHI v. MACKENZIE* (1867), L. R. 4 Eq. 421; 36 L. J. Ch. 518; 16 L. T. 114; 31 J. P. 627; 15 W. R. 614.

*Annotations:—Fold. Rolason v. Levy* (1868), 17 L. T. 641. *Consd. Moore v. Hall* (1878), 3 Q. B. D. 178. *N.F. Lazarus v. Artistic Photographic Co.*, [1897] 2 Ch. 214. *Overd. Warren v. Brown*, [1902] 1 K. B. 15. *Apprvd. Colls v. Home & Colonial Stores*, [1904] A. C. 179. *Refd. Dalton v. Angus* (1881), 6 App. Cas. 740; *Dicker v. Popham*, [Radford] (1899), 63 L. T. 379; *Corbett v. Jonas*, [1892] 3 Ch. 137; *Ambler v. Gordon*, [1905] 1 K. B. 417.

**947.** ———. *J.—*Pltf. had for fifteen years used an upper room in his house for the special purpose of drying tobacco. There was a free flow of light & air through this room by means of two windows, one at each end of the room, both of them ancient lights. On motion for an injunction to restrain deft. from raising the roof of his house to a height which would occasion some, but not a material, diminution of light to one of these windows.—*Held*: (1) as pltf. had not used this room for the special purpose for twenty years, he could claim no special right on that account; (2) to obtain an injunction he must show a material diminution in the quantity of light & air required for the ordinary purposes of the room.—*DICKINSON v. HARBOTTLE* (1873), 28 L. T. 186.

*Annotation:—As to (1) Overd. Warren v. Brown*, [1902] 1 K. B. 15.

entitled to relief, although he had so used the room for less than twenty years, & sufficient light remained in it for the ordinary purposes of a dwelling-house.—*MACKAY v. SCOTTISH WIDOWS' FUND ASSURANCE SOCIETY* (1877), 1 R. 11 Eq. 541.—*IR.*

*n. Easement acquired by prescription.*—Upon premises situated on one side of a street, their owner erected buildings which, when raised to the

*Sect. 4.—Extent of easement: Sub-sect. 3. Sect. 5: Sub-sects. 1 & 2, A. (a) & (b).]*

**948.** ————.]—*A.-G. v. QUEEN ANNE GARDEN & MANSIONS CO., No. 851, ante.*

**949.** ————.]—A pltf. who has acquired a prescriptive right to the access of light to his ancient windows, but who has only used such light for an extraordinary or special purpose for a period less than twenty years, is nevertheless entitled to a mandatory injunction to prevent any serious interference with the access of light as enjoyed for the special purpose.—*LAZARUS v. ARTISTIC PHOTOGRAPHIC CO., [1897] 2 Ch. 214; 66 L. J. Ch. 522; 76 L. T. 457; 45 W. R. 614; 41 Sol. Jo. 451.*

*Annotation:—Refd. Warren v. Brown, [1900] 2 Q. B. 722.*

**950.** ————.]—*WARREN v. BROWN, No. 920, ante.*

**951.** ————.]—Although less than twenty years have elapsed since an ancient light has been used for a business requiring a special quantity of light, & although such business could not have been carried on but for the enlargement of the ancient light, which enlargement was made within that period:—*Held:* the light, so far as ancient, must not be substantially interfered with, & the ct. would take into consideration the nature of the business.—*PARKER v. STANLEY (W. F.) & Co., Ltd. (1902), 50 W. R. 282.*

**952.** ————.]—(1) A right to a special amount of light necessary for a particular business cannot be acquired by twenty years' enjoyment to the knowledge of the owner of the servient tenement.

(2) In considering the question of the right to relief for interference with ancient lights, it is a question of fact whether the user of the premises is one which requires an ordinary or a special amount of light. It cannot be predicated as a matter of law whether any particular business, e.g., an architect's, is an ordinary business in the sense that it only requires an ordinary amount of light.—*AMBLER v. GORDON, [1905] 1 K. B. 417; 74 L. J. K. B. 185; 92 L. T. 96; 21 T. L. R. 205. Annotation:—Refd. Higgins v. Batts, [1905] 2 Ch. 210.*

**953.** ————.]—**Knowledge of servient owner.**—(1) Where substantial damages, as distinguished from some £5 or £10, will be given at law for interference with light, the ct. will interpose by injunction for the ct. will not allow a man to inflict an injury upon his neighbour, & then purchase him out without any Act of Parliament having been obtained for that purpose.

(2) Nor if a person complaining of interference with his light has offered to withdraw his opposition for a fixed sum, will the ct. gather from that fact alone that the damage is not irreparable, & send the case to a jury to access the exact damage done. Were the ct. to do so, it would be conceding to persons desirous of erecting buildings the existence of an unknown Act of Parliament, & enabling them to force the sale of pltf.'s right, not at his own valuation, but at the estimate of a jury.

(3) It is clear that the right of a person living in a town to protection from interference with his

grave-stone, obstructed an ancient light in an opposite house. That obstruction prevented the owner of this last-named house from using his ancient light in examining colours, etc., for which purpose that light was essential. The ct. granted a mandatory injunction to take down the buildings.—*CARSON v. MCKENZIE (1865), 18 Ir. Jur. 337.—IR.*

**PART VIII. SECT. 5, SUB-SECT. 1.**  
*a. In alteration of servient tenement*

—*Burden of proof.*—Def't's building, which obstructed the access of light & air to pltf.'s window, began in May, & pltf. instituted his suit in July:—*Held:* *prima facie*, pltf. was entitled to the removal of the obstruction, & it was for def't. to show that the right had been lost by acquiescence.—*NANDKISHOR BALGOVAN v. BHAGUBHAI PRANVALABHAI (1884), 1 L. R. 8 Bom. 95.—IND.*

*p. — Parol agreement.*—In an

light is not different from the right of a person living in the country.

(4) The following defences are useless: That pltf's. will still have as much light as many other persons; that they might have made their windows larger; that they had sometimes used Venetian blinds; that a room said to be used for a certain purpose was not a good one for that purpose, & that it had been used for that purpose, *clam*; & that def'ts. would face their buildings with glazed tiles.

(5) The doctrine of the ct. as to interference with air rests on nuisance.

(6) The benefit of sending a case of this kind to a jury is doubtful. The jury can contribute nothing but the view; & their view is likely to be prejudiced, since they see only the existing state of the light, which may be equal to the ordinary state of the light in the neighbourhood.

(7) Interference with lateral light should be restrained; for if it were not, all the neighbours round might obstruct the light, & so in many places almost total darkness might be caused.

(8) Form of order restraining the erection of buildings.—*DENT R. AUCTION MART CO., PILGRIM v. SAME, MERCERS' CO. v. SAME (1866), L. R. 2 Eq. 238; 35 L. J. Ch. 555; 14 L. T. 827; 30 J. P. 601; 12 Jur. N. S. 447; 14 W. R. 709.*

*Annotations:—As to (1) Refd. Warren v. Brown, [1900] 2 Q. B. 722; Cowper v. Laidler, [1903] 2 Ch. 337. As to (2) Refd. Senior v. Pawson (1866), L. R. 3 Eq. 330. As to (3) Refd. Martin v. Hendon (1866), L. R. 2 Eq. 425. Refd. Potts v. Smith (1868), 18 L. T. 629. As to (4) Apprvd. Colls v. Home & Colonial Stores, [1904] A. C. 179. Refd. Martin v. Headon (1866), L. R. 2 Eq. 425. As to (5) Refd. Bryant v. Lefever (1879), 4 C. P. D. 172; Buss v. Gregory (1890), 25 Q. B. D. 481. As to (8) Apprvd. Colls v. Home & Colonial Stores, [1904] A. C. 179. Refd. Beudel v. Perry (1868), 19 L. T. 760. Generally, Consd. Lanfranchi v. Mackenzie (1867), L. R. 4 Eq. 421; Aynsley v. Glover (1874), L. R. 18 Eq. 541. Refd. Calcraft v. Thompson (1867), 15 W. R. 387; Kelk v. Pearson (1870), 23 L. T. 458; City of London Brewery Co. v. Tennant (1873), 43 L. J. Ch. 457; Dickinson v. Harbottle (1873), 28 L. T. 186; Moore v. Hall (1878), 3 Q. B. D. 178; A.-G. v. Queen Anne Garden & Mansions Co. (1889), 60 L. T. 759; Dicker v. Popham, Tadford (1890), 63 L. T. 379. Menid. Luscombe v. Steer (1867), 17 L. T. 229; Pennington v. Brinsop Hall Coal Co. (1877), 5 Ch. D. 769.*

**954.** ————.]—*LANFRANCHI v. MACKENZIE, No. 916, ante.*

**955.** ————.]—*AMBLER v. GORDON, No. 952, ante.*

## SECT. 5.—EXTINGUISHMENT.

### SUB-SECT. 1.—BY ACQUIESCENCE.

*Sec. generally, Part VI., ante.*

**956. In alteration of one servient tenement.—Effect on burden on neighbouring servient tenement.**—An abstraction of light coming over adjoining property, acquiesced in or consented to by the owner of the dominant tenement, does not entirely negative his right to an easement of light over other adjoining property, though it does not give him any further right over that second adjoining property so as to prevent the erection of a building which he could not have prevented had he not consented to the prior abstraction of light

action for obstructing light & air by the erection of a wall upon def't's premises, contiguous to & against pltf.'s premises, def't. relied upon an agreement entered into by former owners of the respective premises, reserving liberty to the then owner of def't's premises to build a wall which would or might obstruct light & air from pltf.'s premises:—*Held:* the agreement, not being in writing, was ineffectual to prevent the easement becoming infeasible after twenty years' user.—

over the first adjoining property.—**BAILEY (W. H.) & SON, LTD. v. HOLBORN & FRASCATI, LTD.**, [1914] 1 Ch. 598; 83 L. J. Ch. 515; 110 L. T. 574; 58 Sol. Jo. 321.

#### SUB-SECT. 2.—BY ALTERATION OF DOMINANT TENEMENT.

##### A. Easements acquired under Prescription Act, 1832, and Similar Acts.

###### (a) In General.

**957. Necessity for intention of abandonment—Building pulled down.**—**ECCLESIASTICAL COMRS. FOR ENGLAND v. KINO**, No. 940, *ante*.

**958.** ————]—**OPPENHEIMER v. ALEXANDER** (1892), 36 Sol. Jo. 769.

**959.** ————]—(1) The mere alteration of a building containing ancient lights without evidence of intention to abandon does not imply an abandonment of a statutory right, under Prescription Act, 1832 (c. 71), to the access & use of light to & for any building which may be substituted for the original building: the intention to abandon the right must be clearly established by evidence.

(2) The discretion given to the ct. by (Chancery Amendment Act, 1858 (c. 27), s. 2, to award damages in substitution for an injunction in the case of a substantial interference with pltf.'s ancient lights, is a discretion to be exercised according to the facts of each particular case. Where pltf. has, at the trial, established his statutory right as against a deft., who has erected a building causing a substantial interference with that right, the ct. will not compel him to accept damages or compensation instead of an injunction, especially where deft. has, during the progress of the action, given an undertaking to pull down if so ordered at the trial.—(**GREENWOOD v. HORNSEY** (1886), 33 Ch. D. 471; 55 L. J. Ch. 917; 55 L. T. 135; 35 W. R. 163.

*Annotations:*—As to (2) **Consd. Martin v. Price**, [1894] 1 Ch. 276. **Refd. Dicker v. Popham, Radford** (1890), 63 L. T. 379; **Cowper v. Laidler**, [1903] 2 Ch. 337.

###### (b) Enlarging Old and Opening New Windows.

**960. Substantial identity of new & old windows—General rule.**—**SCOTT v. PATE**, No. 847, *ante*.

**961.** ————]—**Position of wall unaltered.**—Pltfs. & defts. possessed premises opposite to each other in the city of London; pltfs.' premises, in which were windows which had been used for more than twenty years, having been burnt down, pltfs. rebuilt them, but, in the newly erected building, the windows were placed in different situations, were of different sizes, & altogether occupied more space than those in the old building: some parts of the new windows coincided with some parts of the old ones, but a great portion of the old & new windows did not coincide. It was stated that "defts. could not have obstructed the passage of light to such portions of the windows of pltfs.' new building as were new, without at the same time obstructing the passage of light to such portions of pltfs.' windows as were in the sites of the old

windows, to the extent stated in the declaration":—**Held:** as none of the new windows occupied the same position as any one of the ancient windows did, no right was acquired in respect of any of them against pltfs.—**HUTCHINSON v. COPESTAKE** (1861), 9 C. B. N. S. 863; 31 L. J. C. P. 19; 5 L. T. 178; 8 Jur. N. S. 54; 9 W. R. 896; 142 E. R. 340, Ex. Ch.

*Annotations:*—**Overd. Tapling v. Jones** (1865), 11 H. L. Cas. 290. **Consd. Newson v. Pender** (1884), 27 Ch. D. 43. **Refd. Binckes v. Pash** (1861), 11 C. B. N. S. 224; **Scott v. Pape** (1886), 31 Ch. D. 554; **Wigram v. Fryer** (1887), 56 L. J. Ch. 1098.

**962.** ————]—A party possessed of ancient lights has a right to acquire an increased access of light & air if he can do so without altering the aperture, & this does not create a new easement; the owner of an ancient light is entitled to use it in any manner he pleases, by obstructing, opening or protecting it, or by taking away old widow-frames & substituting new ones of a much less size & thickness, so that he does not extend the aperture itself, & the intrusion upon a neighbour's privacy is not a ground for interference either at law or in equity.—**TURNER v. SPOONER** (1861), 1 Drew. & Sm. 467; 30 L. J. Ch. 801; 4 L. T. 732; 25 J. P. 467; 7 Jur. N. S. 1008; 9 W. R. 681; 62 E. R. 457.

**963.** ————]—B. alleged that in 1864, he had obtained the consent of the A. Co., the owners of an adjoining tenement, to open two windows in a party wall separating the two tenements. B. had previously opened three other windows in the party wall. In 1875 the A. Co. served B. with notice that they intended blocking up all five windows. The three windows in 1875 had been opened up eighteen years. Evidence of consent upon the A. Co.'s part to B.'s opening the two windows was admitted by the judge who said that such consent was fully proved as to the two windows, & that as to the other three after eighteen years a previous consent to open them must be implied. On appeal:—**Held:** the evidence of consent was inadmissible, & as the other three windows were not ancient lights pltf.'s case as to the five windows failed.—**BOUIEKE v. ALEXANDRIA HOTEL CO., LTD.** (1877), 25 W. R. 782, C. A.

**964.** ————]—In 1868 three cottages containing ancient lights were pulled down, & a large warehouse built on their site containing three large windows. There was no evidence on which the ct. could rely as to the position of the windows in the cottages, though it was admitted that small parts of the new windows might occupy portions of space through which light was admitted to the cottages:—**Held:** in the absence of evidence as to the position of the ancient lights, the easement could not be maintained as to the new building.—**FOWLERS v. WALKER** (1881), 51 L. J. Ch. 443, C. A.

*Annotations:*—**Folld. Pendarnes v. Monro**, [1892] 1 Ch. 611. **Refd. Bullers v. Dickinson** (1885), 29 Ch. D. 155; **Scott v. Pape** (1886), 31 Ch. D. 554.

**965.** ————]—**COLEMAN v. KIRKALDY**, [1882] W. N. 103.

**JUDGE v. LOWE** (1873), 1 R. 7 C. L. 291.—**IR.**

**9.** ————]—Pltfs. owned two contiguous buildings, one single-storied & the other of three stories. When the higher building was erected the eastern wall thereof was erected upon the western wall of the lower building. The lot on which the lower building stood was sold to defts., but at the time of sale the common wall was expressly reserved as the sole property of pltfs. The deed of sale provided that "the sellers hereby waive any

right in the matter of lights as at present existing in the eastern wall of their property adjoining," i.e., the wall in question. Defts. thereafter raised their building a storey with the result that the heightening of the roof caused a darkening of pltfs.' lights in the wall:—**Held:** pltfs. could not complain of such darkening as they had waived their right as to existing lights in the eastern wall of their property.—**WHITAKER, PATTERSON & BROOKES, LTD. v. HUGHES & CO.** (1907), F. D. C. 4.—**S. AF.**

#### PART VIII. SECT. 5, SUB-SECT. 2. A. (b).

**960 i. Substantial identity of new & old windows—General rule.**—The title to light acquired under Prescription Act, 1832 (c. 71), by a twenty years' enjoyment is a right to a certain amount of light only, & does not prevent the owner of one of the adjacent tenements from altering the aperture through which that amount of light approaches.—**MAQUIRE v. GRATTAN** (1868), 16 W. R. 1189.—**IR.**

*Sect. 5.—Extinguishment: Sub-sect. 2, A. (b) & (c).]*

**966.** ———. ———.]—Pltfs. being the owners of an ancient building which had numerous windows pulled it down & rebuilt it. A few of the windows in the new house included the space occupied by ancient windows, but were of larger dimensions; several others included some portion of the space occupied by ancient windows; & in some cases, the spaces occupied by ancient windows were entirely built up in the new house. Defts. commenced to build a house on the opposite side of the street, which if completed according to the plans would materially interfere with the light coming to pltfs'. windows. On a motion for an *interim* injunction:—*Held*: pltfs. had shown an intention to preserve, & not to abandon, their ancient lights, & there was a fair question of right to be tried at the hearing, & considering that the balance of convenience was in favour of granting an injunction rather than of allowing defts. to complete their building with an undertaking to pull it down if required to do so, an injunction would be granted till the hearing.—*NEWSON v. PENDER* (1884), 27 Ch. D. 43; 52 L. T. 9; 33 W. R. 243, C. A.

*Annotations:—Consd.* *Scott v. Pape* (1886), 31 Ch. D. 554. *Reid*, *Wigiam v. Fryer* (1887), 56 L. J. Ch. 1098; *Smith v. Baxter*, [1900] 2 Ch. 138.

**967.** ———. ———.]—Where a new building has been erected on the site of an ancient building, in order to entitle the owner of the new building to access of light, it is necessary to show that some defined part of an ancient window admitted access of light through the space occupied by a defined part of an existing window.—*PENDARVES v. MONRO*, [1892] 1 Ch. 611; 61 L. J. Ch. 491; 8 T. L. R. 388.

**968.** ———. ———.]—**Position of wall altered—Building set back.**—(1) A building containing ancient lights was pulled down & replaced by another, in which the front was set back & a dormer window converted into a skylight: *Held*: the right to access of light was not lost.

Any substantial alteration in the plane of the windows destroys the right (*JESSEL, M.R.*).

The right remains where any portion of the light which would have passed over the servient tenement through the old windows passes also through the new windows (*Fry, J.*).

(2) The Ct. of Ch. has jurisdiction to entertain an application for an injunction against the commission or continuance of any wrongful act, to award damages in addition to or in substitution for such injunction (*JESSEL, M.R.*).—*NATIONAL PROVINCIAL PLATE GLASS INSURANCE CO. v. PRUDENTIAL ASSURANCE CO.* (1877), 6 Ch. D. 757; 46 L. J. Ch. 871; 37 L. T. 91; 26 W. R. 20.

*Annotations:—As to (1) Reid.* *Scott v. Pape* (1886), 31 Ch. D. 554. *As to (2) Reid.* *Dicker v. Popham, Radford* (1890), 63 L. T. 379; *Colls v. Home & Colonial Stores*, [1904] A. C. 179.

**969.** ———. ———.]—(1) The implication of a grant of easements of a continuous & apparent character, upon the alienation to different persons of tenements previously in the ownership of the same person, is not prevented by the fact that the dominant tenement at the time of the alienation

is in lease, & consequently, not in the possession of the alienor.

(2) There being a right to the access of light to windows in the walls of certain cottages, the walls of some of the cottages were set back & windows made in the new wall of the same size, & in the same relative positions as the former windows in the former walls:—*Held*: the easement of light was not thereby destroyed.

(3) In the case of another of the cottages the occupier made an addition thereto, & for the purpose of so doing built a new wall with a window in it outside the old wall & window at a different angle, but the old window remained inside the new one, & still continued to receive the light:—*Held*: the right to the access of light to the old window was not destroyed.—*BARNES v. LOACH* (1879), 4 Q. B. D. 494; 48 L. J. Q. B. 756; 41 L. T. 278; 43 J. P. 817; 28 W. R. 32, D. C.

*Annotations:—As to (1) Reid.* *Phillips v. Low*, [1892] 1 Ch. 47; *Milner's Safe Co. v. Great Northern & City Ry.*, [1907] 1 Ch. 208. *As to (2) & (3) Reid.* *Scott v. Pape* (1886), 31 Ch. D. 554.

**970.** ———. ———.]—In rebuilding a house, which had an ancient light in its ground floor front room, the front wall, which originally stood out beyond the general building line four feet at one end & seven feet at the other, was set back into the general building line, & in the new front wall was placed a window the position of which corresponded to a great extent with the position of the ancient light in the old front wall. The new room was about the same frontage breadth as the old, but included little more than half the site of it, viz. a depth of nine feet at one end, & less than four feet at the other:—*Held*: the right to the ancient light had not been lost.—*BULLERS v. DICKINSON* (1885), 29 Ch. D. 155; 54 L. J. Ch. 776; 52 L. T. 400; 33 W. R. 540; 1 T. L. R. 242.

*Annotation:—Reid.* *Scott v. Pape* (1886), 31 Ch. D. 554.

**971.** ———. ———.]—**Building advanced.**—*SCOTT v. PAPE*, No. 847, *ante*.

**972.** ———. ———.]—*ANDREWS v. WAITE*, No. 871, *ante*.

—].—*Compare* Nos. 988, 989, *post*.

**973. Effect of increase of light—Obstructing new window involving obstructing old.**—Pltf., being reversioner of a house which adjoined premises in the occupation of deft. & had ancient windows, rebuilt the house, added an upper story, opened windows in that story, & enlarged the ancient windows & otherwise altered their position, such rebuilding & alterations being within twenty years of the commencement of the action. Deft. subsequently rebuilt his premises, & thereby darkened the windows in both the upper & the lower stories of pltf.'s house. In an action by pltf., as reversioner, for this obstruction:—*Held*: (1) pltf. having, by his alterations, exceeded the limits of his right, & it being, through the nature of such alterations, impossible for deft., in the lawful exercise of his own rights, to obstruct such excess without at the same time obstructing pltf.'s former right, pltf. must be considered as losing his former right, at all events until he restored his house to its original condition; (2) a defence founded upon the fact of such alteration by pltf., & the impossibility of a partial obstruction, was

**973 i. Effect of increase of light—Obstructing new window involving obstructing old.**—Where a person, who has a right to light from a certain window, opens a new window, or enlarges the old one, the owner of an adjoining house has a right to obstruct the new or enlarged opening if he can do so without obstructing the old;

but if he cannot obstruct the new without obstructing the old, he must submit to the burden.—*PROVABURTY DANK v. MOHENDRO LALL BORK* (1881), 1 L. R. 7 Calc. 453.—*IND.*

**r. New window receiving different cones of light.**—Pltf. had two windows in the rear wall of his house. In 1886

he rebuilt his house, & opened new windows, which were of nearly the same size, but were a little higher than the old ones. In 1899 deft. built his house & blocked up these two new windows. Pltf. sued for an injunction:—*Held*: the easement claimed in respect of the new windows, which did not receive the same cones of light

properly raised under a traverse of pltf.'s right to the windows.—**RENSHAW v. BEAN** (1852), 18 Q. B. 112; 21 L. J. Q. B. 219; 19 L. T. O. S. 22; 16 Jur. 814; 118 E. R. 42.

*Annotations*.—*As to* (1) **Consd.** *Wilson v. Townend* (1860), 1 Drew. & Sm. 324. **Apld.** *Hutchinson v. Copestake* (1861), 9 C. B. N. S. 863. **Disid.** *Binckes v. Pash* (1862), 11 C. B. N. S. 324. **Apld.** *Weatherley v. Ross* (1863), 1 Hem. & M. 349. **Overd.** *Tapling v. Jones* (1865), 11 H. L. Cas. 291. **Consd.** *Newson v. Pender* (1884), 27 Ch. D. 43. **Refd.** *Cooper v. Hubbuck* (1860), 30 Beav. 160; *Stroyan v. Knowles*, *Hamer v. Same* (1861), 6 H. & N. 454; *Folkin v. Herbert* (1864), 11 L. T. 173; *Martin v. Headon* (1866), L. R. 2 Eq. 425; *Heath v. Bucknall* (1869), L. R. 8 Eq. 1; *National Provincial Plate Glass Insee. v. Prudential Assco.* (1877), 6 Ch. D. 757.

**974.** ———.]—**DAVIES v. MARSHALL** (No. 1), No. 202, *ante*.

**975.** ———.]—Pltf. was owner of a building two stories high, with a range of windows in each story. Those on the ground floor were ancient unaltered windows, those on the second floor had, within twenty years, been altered, not in number, but in size, by additions on one side & the top of each window. Pltf.'s building was at a distance of ten feet from the edge of his land. After the alteration in pltf.'s windows deft. built a shop close to the edge of his own land, but without any intention of obstructing any of pltf.'s windows. The jury found that the effect of deft.'s building was to obstruct the lower windows, but the question as to the right of pltf. to complain of the obstruction was reserved to the ct. on the above facts & a model of the premises, which was found to be correct:—*Held*: (1) (**ERLE, C.J.**, & **WILLIAMS, J.**) pltf.'s right to the light of the lower windows was not lost by reason of the opening of the upper windows, & if deft. intended to justify his obstruction of the lower windows, on the ground that he had built with the intention of obstructing the upper windows, & could not obstruct the upper without also obstructing the lower, it was necessary for him to have raised that defence & proved it at the trial, & he could not rely on the mere fact that the result of his obstruction was to do that which, if he had so intended it, might have been lawfully done by him; (2) (**BYLES, J.**) the right of the servient owner to block up ancient lights, when new ones are opened, is not absolute, but conditional on the existence of an inability to block up the new without blocking up the old, & as the servient owner in this case had not yet exercised his right of blocking up the new windows, he was liable to the owner of the dominant tenement for blocking up the old; (3) (**KEATING, J.**) the question turned upon whether or not the alteration of the upper windows by the dominant owner was so material as that the right to the easement, as it formerly existed, was thereby gone, & if that were so, & the jury had found that the unprivileged light could not be obstructed, without also obstructing the privileged light, deft. would not be liable for the latter obstruction; but in this case this defence was not established.—**BINCKES v. PASH** (1862), 11 C. B. N. S. 324; 31 L. J. C. P. 121; 6 L. T. 125; 8 Jur. N. S. 360; 10 W. R. 424; 142 E. R. 822.

*Annotation*.—*As to*—(3) **Refd.** *Jones v. Tapling* (1862), 12 C. B. N. S. 826.

**976.** ———.]—Pltf., being owner of a house in which there were ancient lights, rebuilt it, & in so doing, altered the position of some of the ancient windows, & also opened new windows. Deft. proposed to build so as to obstruct both the new & ancient windows:—*Held*: (1) as deft.

could not possibly obstruct the new windows without at the same time obstructing the ancient lights, pltf. was not entitled to an injunction as prayed; (2) pltf., on undertaking to close up the new windows & to restore the ancient lights to their original position, would be entitled to an injunction; but as this was new relief, he would be obliged to pay the costs of the suit.—**WEATHERLEY v. ROSS** (1863), 1 Hem. & M. 349; 1 New Rep. 228; 32 L. J. Ch. 128; 27 J. P. 388; 71 E. R. 152.

**977.** ———.]—**TAPLING v. JONES**, No. 841, *ante*.

**978.** ——— **Increase of burden on servient tenement**—(1) Where A., being entitled to ancient lights overlooking B.'s property, alters & extends them, & afterwards B. builds up & obstructs the ancient lights, the ct. will, at the suit of A., grant an injunction against B., upon the term of A.'s consenting to restore the lights to their former position. (2) An injunction to restrain the obstruction of ancient lights was refused on the ground of pltf.'s delay, the bill being retained, with liberty to proceed at law.—**COOPER v. HUBBUCK** (1860), 30 Beav. 160; 31 L. J. Ch. 123; 25 J. P. 452; 7 Jur. N. S. 457; 9 W. R. 352; 54 E. R. 849.

*Annotations*.—*As to* (1) **N.F.** *Hutchinson v. Copestake* (1861), 9 C. B. N. S. 863. **Consd.** *Jones v. Tapling* (1862), 12 C. B. N. S. 826. **Refd.** *Weatherley v. Ross* (1863), 1 Hem. & M. 349; *Heath v. Bucknall* (1869), L. R. 9 Eq. 1. *As to* (2) **Refd.** *Fulwood v. Fulwood* (1878), 38 L. T. 380.

**979.** ——— **For purposes of extraordinary user.**—**PARKER v. STANLEY (W. F.) & Co., LTD.**, No. 951, *ante*.

———.]—*Compare* Nos. 991–993, *post*.

———.]—**Whether injunction will be granted.**—*See* Nos. 982, 1390, 1408, *post*.

**980.** **Where consent of servient owner requested**—**Dissent must be unambiguous.**—(**COTTEING v. BASSETT**, No. 133, *ante*).

### (c) Reduction of Light.

**981.** **By obscuring part of windows.**—**SMITH v. BAXTER**, No. 466, *ante*.

**982.** **Effect on right of servient owner to obstruct.**—(1) If a pltf. would be entitled to substantial damages at law for an obstruction to his ancient lights, a ct. of equity will interfere by injunction to prevent the obstruction.

(2) A deft. was building a wall so as to obstruct light coming to pltf.'s ancient windows from the north. Pltf. was building upon his own premises in such a way as to obstruct the light coming to the same ancient windows from the south. Pltf. was also about to alter the part of the building which contained the ancient windows in question, but he intended to retain or to restore the ancient windows:—*Held*: the obstruction caused by pltf.'s own new buildings on the south was no reason why an injunction should not be granted to restrain the building by deft. of the wall on the north; (3) an injunction would be accordingly granted on interlocutory motion to restrain till the hearing the further building of deft.'s wall, the order being prefaced with a statement that he intended to retain or to restore the ancient windows in question; (4) the injunction would have been a mandatory one, so as to compel deft. to pull down the part of his wall already built, but for the circumstance that pltf. was not then using the ancient windows in question, & would be able to bring his cause to a hearing before his intended alterations could be completed.—**STRAIGHT**

as were enjoyed through the old ones, was quite distinct from the easement in respect of the old windows; & the ease-

ment respecting them could be acquired only by enjoying it for the required length of time.—**BAI HARI**

**GANGA v. TRICAMLAJ, KEDARESHWAR** (1902), 1 L. R. 26 Bom. 374.—**IND.**



owner of the adjoining land; but if a party relies for his title to such exclusive enjoyment, upon anything short of an acquiescence for twenty years, the *onus* lies upon him of producing such evidence as leads clearly & conclusively to the inference of a licence or covenant.

(3) No man shall be allowed to derogate from his own grant. Where a party granted land to C. who built a house, & the grantor subsequently granted a lease to the tenant of that house, of a portion of land adjoining the house, for the purpose of erecting a chaise-house & stables, which land was described as bounded on the north by the premises in question:—*Held*: in considering the question, no weight was to be attached to the fact, that the original conveyance & the lease proceeded from the same grantor, the lease must be taken to be the only grant; & it would be extending the principle too far, to consider the making of erections by the grantor, or those claiming under him, on the south side of that dwelling-house, as derogating from that grant.—*BLANCHARD v. BRIDGES* (1835), 4 Ad. & El. 176; 1 Har. & W. 630; 5 Nev. & M. K. B. 567; 5 L. J. K. B. 78; 111 E. R. 753.

*Annotations*:—*As to* (1) *Fold*. *Hutchinson v. Copestake* (1861), 9 C. B. N. S. 863. *Consd.* *Jones v. Tapling* (1862), 12 C. B. N. S. 826. *Distd.* *National Provincial Plate Glass Insce. v. Prudential Assee.* (1877), 6 Ch. D. 757; *Scott v. Pape* (1886), 31 Ch. D. 554. *Refd.* *Binckes v. Pash* (1861), 11 C. B. N. S. 324. *As to* (3) *Consd.* *Robinson v. Grave* (1873), 29 L. T. 7. *Generally*, *Mentd.* *Bailey v. Holborn & Frascati*, [1914] 1 Ch. 598.

990. Effect of increase of light.]—*EAST INDIA CO. v. VINCENT*, No. 126, *ante*.

991. — Rights of dominant owner not enlarged.]—*DOUGAL v. WILSON* (1769), cited in 2 Wms. Saund, p. 175 a; 85 E. R. 926.

*Annotation*:—*Mentd.* *Dalton v. Angus* (1881), 6 App. Cas. 740.

992. — Whether servient owner may obstruct ancient lights.]—Where pltf. is entitled to lights by means of blinds fronting a garden of deflt.'s which he takes away, & opens an uninterrupted view into the garden, deflt. cannot justify making an erection to prevent pltf. so

doing, if he thereby renders pltf.'s house more dark than before.—*COTTERELL v. GRIFFITHS* (1801), 4 Esp. 69, N. P.

*Annotations*:—*Apld.* *Arcodeackne v. Kelk* (1858), 32 L. T. O. S. 331. *Refd.* *Garritt v. Sharp* (1835), 3 Ad. & El. 325; *Jones v. Tapling* (1861), 11 C. B. N. S. 283.

993. — — — (1) If an ancient window be raised & enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of light & air to any part of the space occupied by the ancient window, although a greater portion of light & air be admitted through the unobstructed part of the enlarged window than was anciently enjoyed.

(2) Although an action for opening a window to disturb pltf.'s privacy is to be read of in the books, I have never known such an action maintained (*LE BLANC, J.*).—*CHANDLER v. THOMPSON* (1811), 3 Camp. 80, N. P.

*Annotations*:—*As to* (1) *Consd.* *Blanchard v. Bridges* (1835), 4 Ad. & El. 176; *Wilson v. Townsend* (1860), 1 Drew. & Sm. 321; *National Provincial Plate Glass Insce. v. Prudential Assee.* (1877), 6 Ch. D. 757. *Refd.* *Jones v. Tapling* (1862), 12 C. B. N. S. 826.

994. Alteration in manner of user—Whether entitled to more light than necessary for former user.]—If a building after having been used for twenty years as a malt house is converted into a dwelling-house, in its new state it is entitled only to the same degree of light which was necessary to it in its former state, & the owner of the adjoining ground may lawfully erect a wall which prevents the admission of sufficient light for domestic purposes, if what is still admitted would be enough for the making of malt.—*MARTIN v. GOBLE* (1808), 1 Camp. 320, N. P.

*Annotations*:—*Consd.* *Dent v. Auction Mart Co., Pilgrim v. Same, Mercers' Co. v. Same* (1860), L. R. 2 Eq. 238. *Fold.* *Laufranchi v. Mackenzie* (1867), L. R. 4 Eq. 421. *Consd.* *Courtauld v. Leigh* (1869), L. R. 4 Exch. 126; *Aynsley v. Glover* (1874), L. R. 18 Eq. 514. *Distd.* *Moore v. Hall* (1878), 3 Q. B. D. 178. *Consd.* *Colls v. Home & Colonial Stores*, [1904] A. C. 179. *Refd.* *Garritt v. Sharp* (1835), 3 Ad. & El. 325; *Dicker v. Popham, Radford* (1890), 63 L. T. 379; *Warren v. Brown*, [1900] 2 Q. B. 722. *Mentd.* *Dalton v. Angus* (1881), 6 App. Cas. 710.

## Part IX.—Water.

### SECT. 1.—IN GENERAL.

NOTE.—This Title deals only with Easements relating to Water. The cases dealing with natural right to & ownership of Water & rights of riparian owners will be found in the Title Waters & Watercourses.

See, generally, WATERS & WATERCOURSES.

995. Whether easement—Or interest in land—Pot water.]—*WEEKLY v. WILDMAN* (1698), 1 Id. Raym. 405; 91 E. R. 1169.

*Annotations*:—*Consd.* *Race v. Ward* (1855), 4 E. & B. 702. *Refd.* *Ackroyd v. Smith* (1850), 10 C. B. 164; *Hill v. Tupper* (1863), 2 New Rep. 201.

996. — — — Water from well.]—A right to take water from a well by reason of the occupation of a dwelling-house, & for the more convenient occupation thereof, is an interest in land.—*TYLER v. BENNETT* (1836), 5 Ad. & El. 377; 2 Har. & W. 272; 6 Nev. & M. K. B. 826; 111 E. R. 1208.

997. — — — Or profit à prendre—Water from well or spring.]—(1) Water as it issues from a well or

spring is not to be considered as the produce of the soil so as to make the right to take it *in alieno solo* for domestic purposes a *profit à prendre*. Such right is an easement only & may be claimed by custom.

(2) Action for breaking pltf.'s close. Plea: justifying under a custom, from time immemorial, for all the inhabitants of the township in which pltf.'s close was situate to take water from a well or spring in that close & carry the same to their houses, to be used for domestic purposes:—*Held*: the custom as stated in the plea was good.

(3) They [part of the soil like sand, clay or stones or produce of the soil like grass, turves or trees] all come under the category of *profits à prendre*, being part of the soil or the produce of the soil (*LORD CAMPBELL, C.J.*).

(4) The water which they claim a right to take is not the property of pltf.'s close; it is not his property; it is not the subject of property (*LORD CAMPBELL, C.J.*).—*RACE v. WARD* (1855), 4 E. & B. 702; 3 C. L. R. 744; 24 L. J. Q. B. 153; 24 L. T. O. S. 270; 19 J. P. 563; 1 Jur. N. S. 704;

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s. Whether easement—Or interest  
in land—Use of flow of water.]—The  
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right to the use of the flow of water,  
in its natural course, is not an easement,  
but is inseparably connected with, &  
inherent in, the property in the land.

It is parcel of the inheritance & passes  
with it. — *MCCANN v. PUDGEON* (1901),  
40 N. S. R. 356. CAN.



*Sect. 1.—In general. Sect. 2: Sub-sects. 1 & 2, A. & B.]*

3 W. R. 240; 119 E. R. 259; *subsequent proceedings* (1857), 7 E. & R. 384.

*Annotations:—As to (1) Reffd. Broadbent v. Ramsbotham* (1856), 11 Exch. 602; *Constable v. Nicholson* (1863), 32 L. J. C. P. 240; *Murphy v. Ityan* (1868), 16 W. R. 678; *Pearce v. Scotcher* (1882), 46 L. T. 342. *As to (2) Consd. Bower v. Sandford* (1889), 5 T. L. R. 570. *Reffd. Hall v. Nottingham* (1875), 1 Ex. D. 1; *Mercer v. Denne*, [1904] 2 Ch. 534; *Schwann v. Cotton*, [1916] 2 Ch. 120. *As to (3) Reffd. Fitzhardinge v. Purcell*, [1908] 2 Ch. 139. *Generally, Mend. Sultash Corpn. v. Goodman* (1880), 5 C. P. D. 431.

**998. Rights of riparian owners ex jure naturæ.—Distinguished.**—When a riparian owner sells part of his estate, including land on the banks of a natural stream, it is not necessary to make any express provision as to the grant or reservation of the ordinary rights of a riparian proprietor. These rights are not easements to be granted or reserved as appurtenant to what is respectively sold or retained, but are parts of the fee simple & inheritance of the land sold or retained. If it be desired to alter or modify these rights, it can only be done by the grant or reservation of rights in the nature of easements as the case may require. If no such rights are granted or reserved the vendor remains, & the purchaser becomes a riparian owner, & retains or acquires all the ordinary rights of a riparian owner (PARKER, J.).—PORTSMOUTH BOROUGH WATERWORKS CO. v. LONDON, BRIGHTON & SOUTH COAST RY. CO. (1909), 74 J. P. 61; 26 T. L. R. 173.

—[*See WATERS & WATERCOURSES.*]

**Right of eavesdropping.**—*See Part XI., Sect. 3, post.*

**Sewers & drains.**—*See SEWERS & DRAINS.*

**Wreck of the sea.**—*See WATERS & WATERCOURSES.*

## SECT. 2.—RIGHTS RELATING TO WATERCOURSES.

### SUB-SECT. 1.—IN GENERAL.

**999. General rule.—Course natural or artificial.—Application of law of easements.**—(1) The law of easements in respect of watercourses is, generally, the same, whether they are natural or artificial.

(2) Where, through an artificial channel, made for the purpose of draining mines, the drainage water has flowed for twenty years in a pure state, in consequence of the working of the mines having been discontinued, over premises of a person who has used it for that period, the working of the mines cannot be resumed, unless there is a custom to warrant it, so as to foul the water & disturb his enjoyment. *Qu.*: whether in the absence of custom, the practice of all mineral districts is material to show that the enjoyment of such water was not of right, as it must have been known that the mine-owner had made the watercourse for his own convenience, & had ceased to work it with the intention of resuming whenever it suited his interest.—*MAGOR v. CHADWICK* (1840), 11

### PART IX. SECT. 2, SUB-SECT. 2.—A.

**t. What is a natural watercourse.**—[To constitute a natural stream of water, the water must flow between something in the nature of banks, or in a defined channel.—*DAWS v. McDONALD* (1887), 13 V. L. R. 698.—*AUS.*

**a. —.**—[To constitute a watercourse such as creates riparian rights there must be a stream of water flowing in a defined channel or between some-

thing in the nature of banks. The stream may be very small & need only always run, nor need the banks be clearly or sharply defined, but there must be a course, marked on the earth by visible signs, along which water usually flows.—*LYONS v. WINTER* (1899), 25 V. L. R. 464.—*AUS.*

**b. —.**—[That cannot be called a defined channel or watercourse which has no visible banks or margins within which the water can be confined.—

*Ad. & El.* 571; 3 *Per. & Dav.* 367; 9 L. J. Q. B. 159; 4 *Jur.* 482; 113 E. R. 532.

*Annotations:—As to (1) Dbtd. Wood v. Waud* (1849), 3 Exch. 748. *Consd. Gaved v. Martyn* (1865), 19 C. B. N. S. 732. *Reffd. Tobin v. Stowell* (1854), 9 Moo. P. C. C. 71; *Rawstron v. Taylor* (1855), 11 Exch. 389; *Whaley v. Laing* (1857), 26 L. J. Ex. 327; *Stockport Waterworks Co. v. Potter* (1864), 3 H. & C. 300. *As to (2) Reffd. Gaved v. Martyn* (1865), 19 C. B. N. S. 732; *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk* (1878), 4 App. Cas. 121. *Generally, Reffd. Greatrex v. Hayward* (1853), 22 L. J. Ex. 137; *Sampson v. Hoddinott* (1857), 1 C. B. N. S. 590; *N. E. Ry. v. Killot* (1860), 1 John. & H. 145; *Mason v. Shrewsbury & Hereford Rly.* (1871), 25 L. T. 239.

**Rights ex jure naturæ.**—*See WATERS & WATERCOURSES.*

### SUB-SECT. 2.—NATURAL WATERCOURSES.

#### A. In General.

**1000. Subterranean water.**—The owner of land through which water flows in a subterranean course has no right or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first mentioned owner, & lays his well dry.

*Qu.*: if the well had been ancient, whether there would have been any difference.—*ACTON v. BRUNDELL* (1843), 12 M. & W. 324; 13 L. J. Ex. 289; 1 L. T. O. S. 207; 152 E. R. 1223, Ex. Ch.

*Annotations:—Apld. Smith v. Kenrick* (1849), 7 C. B. 515. *Distd. Humphries v. Brogden* (1850), 12 Q. B. 739. *Expld. Dickinson v. Grand Junction Canal Co.* (1852), 7 Exch. 282. *Consd. Chasemore v. Richards* (1859), 7 H. L. Cas. 349; *New River Co. v. Johnson* (1860), 2 E. & E. 435; *Ballard v. Tomlinson* (1885), 29 Ch. D. 115. *Apld. Bower v. Sandford* (1889), 5 T. L. R. 570. *Consd. Jordonson v. Sutton, Southcoates & Drypool Gas Co.*, [1899] 2 Ch. 217. *Reffd. South Shields Waterworks Co. v. Cookson* (1845), 15 L. J. Ex. 315; *Wood v. Waud* (1849), 3 Exch. 748; *Baird v. Williamson* (1863), 15 C. B. N. S. 376; *R. v. Metropolitan Board of Works* (1863), 3 B. & S. 710; *Grand Junction Canal Co. v. Shugar* (1871), 6 Ch. App. 483; *Ballaacorkish Silver, Lead & Copper Mining Co. v. Harrison* (1873), L. R. 5 P. C. 49; *West Cumberland Iron & Steel Co. v. Kenyon* (1879), 40 L. T. 703; *Bradford Corpn. v. Pickles*, [1895] 1 Ch. 145; *Bradford Corpn. v. Ferrand*, [1902] 2 Ch. 655. *Mend. Fay v. Prentice* (1845), 1 C. B. 828; *Broadbent v. Ramsbotham* (1856), 25 L. J. Ex. 115; *Williamson v. Baird* (1863), 10 Jur. N. S. 152; *Re Trufort, Trafalgar v. Blanc* (1887), 36 Ch. D. 600; *Salt Union v. Brunner, Mond*, [1906] 2 K. B. 822.

**1001. Stream.—Distinguished from percolating water.**—Water percolating discontinuously through or along strata cannot be described as a stream.

A lessor demised by lease a distillery, cottages, thirteen & a half acres of land, with two ponds, "together with right to the water in the said ponds & in the streams leading thereto." The lease also contained the usual warrantice clause. The lessor sunk a tank on ground outside but adjoining the demised subjects, & drew off from marshy ground percolating water which would have found its way eventually into one of the ponds.—*Held*: water percolating through the ground towards the pond was not water in any stream leading to the pond.—*M'NAB v. ROBERTSON*, [1897] A. C. 129; 66 L. J. P. C. 27; 75 L. T. 666; 61 J. P. 468, II. L.

**1002. What is a natural watercourse.—No con-**

*WILLIAMS v. RICHARDS* (1893), 23 O. R. 651.—*CAN.*

**c. —.**—[A watercourse consists of bed, banks & water & while the flow of the water need not be continuous or constant, the bed & banks must be defined & distinct enough to form a channel or course that can be seen as a permanent landmark on the ground.—*WILTON v. MURRAY* (1897), 13 Man. L. R. 35.—*CAN.*

**d. —.**—[To constitute a water-



**stant flow**—Public Health Act, 1875 (c. 55), s. 17.]—(1) An agricultural ditch or channel constructed by a landowner on his land for the purpose of carrying off surface water but in which there is no constant flow of water is not a "natural stream or watercourse" within the above Act.

(2) The grant of a right of "passage & running water" through a drain or watercourse does not entitle the grantee to discharge sewage effluent into such drain or watercourse.—*PHILLIMORE v. WATFORD RURAL COUNCIL*, [1913] 2 Ch. 434; 82 L. J. Ch. 514; 109 L. T. 816; 77 J. P. 453; 57 Sol. Jo. 741; 11 L. G. R. 980.

— **Distinguished from sewers.**—*See* SEWERS & DRAINS; WATERS & WATERCOURSES.

### B. Acquisition of Easement.

**1003. By grant.**—Every owner of land on the banks of a river has *prima facie* an equal right to use the water & cannot acquire a right to throw the water back on the proprietor above or to divert it from the proprietor below without a grant or 20 years' enjoyment which is evidence of a grant.—*WRIGHT v. HOWARD* (1823), 1 Sim. & St. 190; 57 E. R. 77; *sub nom.* *WRIGHT v. HOWARD*, *HOWARD v. WRIGHT*, 1 L. J. O. S. Ch. 94.

*Annotations*:—*Apprvd.* *Mason v. Hill* (1832), 3 B. & Ad. 304; *Acton v. Blundell* (1843), 12 M. & W. 324. *Consd.* *Embrey v. Owen* (1851), 6 Exch. 353. *Expld.* *Ennor v. Burwell* (1860), 2 Giff. 410. *Refd.* *Mason v. Hill* (1833), 5 B. & Ad. 1; *Sampson v. Hoddinott* (1857), 1 C. B. N. S. 590; *Chasmore v. Richards* (1859), 7 H. L. Cas. 349; *Wills & Borks Canal Navigation Co. v. Swindon Water Works Co.* (1873), 9 Ch. App. 453, n. *Mentd.* *Walker v. Jeffreys* (1842), 1 Haro. 341; *Bower v. Cooper* (1843), 2 Haro. 408; *Macbride v. Weekes* (1856), 22 Beav. 533.

**1004.** ———.]—The privilege of washing away sand, stone & rubble, dislodged in the necessary working a tin mine, & of having the same sent down a natural stream running through pltf.'s land, may be the subject of a grant, & be pleaded as a prescriptive right, under Prescription Act, 1832 (c. 71), to a declaration charging defts. with throwing such stone, sand & rubble into the stream, & thereby filling up its bed within pltf.'s land, & causing the water to flow over it. Such privilege may also be well pleaded as a local custom.—*CARLYON v. LOVERING* (1857), 1 H. & N. 784; 26 L. J. Ex. 251; 28 L. T. O. S. 358; 5 W. R. 347; 156 E. R. 1417.

*Annotations*:—*Refd.* *Rogers v. Taylor* (1857), 26 L. J. Ex. 203. *Mentd.* *Gaved v. Martyn* (1865), 19 C. B. N. S. 732; *O'Brien v. Enright* (1867), 15 W. R. 637.

course, in which rights may be acquired by user, the flow of water must possess that unity of character by which the flow on one person's land can be identified with that on his neighbour's land. Water which squanders itself over an indefinite surface is not a subject-matter for the acquisition of a right by user.—*BRISCOE v. DROUGHT* (1860), 11 L. C. L. R. 250.—*IR.*

### PART IX. SECT. 2, SUB-SECT. 2.—B.

**1003 i. By grant.**—No person, unless by grant or prescription, is entitled to deprive another of the beneficial use of water which would naturally descend to him.—*COLUMBIA RIVER LUMBER CO. v. YUILL* (1892), 2 B. C. R. 237; 1 M. M. Cas. 64.—*CAN.*

**1003 ii.** ———.]—Under Gold Mining Ordinance, 1867, unless the owner of a hill claim has obtained a grant of water he has no right to intercept water higher up a stream that flows through or past his claim, & so interfere with another owner of a lower hill claim in the exercise of the latter's rights under a water grant. A grant of such water right need not be in writing.—*JENNY LIND CO. v. BRADLEY-NICHOLSON CO.* (1883), 1 B. C. R. pt. 11, 185; 1 M. M. Cas. 9.—*CAN.*

**1003 iii.** ———.]—The law of Guernsey does not allow of the constitution of a servitude or easement except by express grant; but this rule does not apply to the natural right of the proprietor of higher land to have the water which naturally falls on his land discharged to the contiguous lower land of another proprietor.—*GIBBONS v. LKN-FESTREY* (1915), 84 L. J. P. C. 158.—*CHANNEL ISLANDS.*

**1007 i. By prescription.**—*Presumption of lost grant.*—A proprietor of land on a stream has a right to the water flowing past him in its natural course, undiminished in quantity & quality; & nothing short of a grant or twenty years' use, which presumes a grant, of water, in a particular way & for a special purpose, can entitle some one proprietor on a stream, in violation of this right of all, injuriously to divert or pen back the water from or upon proprietors living above or below him on the stream.—*McLAREN v. COOK* (1845), 3 U. C. R. 299.—*CAN.*

*e.* ———.]—*Whether twenty years next before action necessary.*—To an action for penning back water, a plea of prescription:—*Held*: bad, for claiming the right by user for twenty years before action brought, instead of next

**1005.** ———.]—*DALTON v. ANGUS*, No. 4, *ante*.

**1006.** ———.]—*Reservation out of—Must not be derogatory to grant.*—*STANBURY v. PLYMOUTH DOCKS WATERWORKS CO.* (1887), 3 T. L. R. 320, C. A.

—[*See, generally*, Part III., Sect. 1, *ante*.

**1007. By prescription.**—*Presumption of lost grant.*—*BEALEY v. SHAW*, No. 335, *ante*.

**1008.** ———.]—If an act immemorially done in the land of A., at each repetition produces an effect on the land of B., which, under the ordinary state & disposition of B.'s land occasions no perceptible injury, there is no ground to presume a grant from the ancestors of B. to the ancestors of A. of the right of doing that act. But if the effect produced on the land of B. by the act done in the land of A. had at all times occasioned a perceptible injury to B.'s property, there would have been sufficient ground to presume a grant from the ancestors of B. to the ancestors of A. of the right to so such act. A. has immemorially had, for watering his lands, a channel through his own field, in a porous soil, through the banks of which channel, when filled, the water percolates & thence passes through the contiguous soil of B. below the surface, without producing visible injury. B. builds a new house in his land, below the level of his soil, in the current of the percolating water. A. cannot now justify filling his channel, if the percolating water thereby injures the house of B.—*COOPER v. BARBER* (1810), 3 Taunt. 99; 128 E. R. 40.

*Annotations*:—*Consd.* *Acton v. Blundell* (1843), 12 M. & W. 321. *Mentd.* *O'Brien v. Enright* (1867), 15 W. R. 637.

**1009.** ———.]—*WRIGHT v. HOWARD*, No. 1003, *ante*.

**1010.** ———.]—This water [irrigating a mill meadow] has been used for the convenience of the mill meadow for upwards of thirty years, & the owner of the meadow has constantly repaired the hatch. This water having been used, as stated, there is a legal presumption of a grant to use this hatch from Lord Northesk, whose property adjoins, so as to make this a water meadow (*per Cur.*).—*SCOTT v. HANSON* (1826), as reported in 5 L. J. O. S. Ch. 67; *affd.* (1829), 1 Russ. & M. 128, L. C.

*Annotations*:—*Mentd.* *Higgins v. Samels* (1862), 2 John. & H. 460; *Smith v. Land & House Property Corp.* (1884), 28 Ch. D. 7; *Re Fawcett & Holmes' Contract* (1889), 42 Ch. D. 150.

before.—*HALEY v. ENNIN* (1853), 10 U. C. R. 404.—*CAN.*

*f.* ———.]—*HOLME v. TURNER* (1856), 5 C. P. 116.—*CAN.*

*g.* ———.]—Where a right to interfere with the natural course of a stream is attempted to be set up by prescription, the exercise of such right to the full extent claimed must be shown throughout the period for which the right is claimed.—*HUNT v. HEPFELER* (1857), 6 C. P. 269.—*CAN.*

*h.* ———.]—Action for throwing the water back upon pltf.'s mill by the erection of a dam lower down the stream for the use of deft.'s mill. Plea, that deft. & the occupiers of his mill had had, & actually enjoyed as of right & without interruption for the full period of twenty years next before the commencement of the suit, a right of erecting & continuing a mill dam & divers boards on his deft.'s premises, in all of the height of eight feet:—*Held*: sufficient, without alleging more particularly that deft. exercised the right.—*SMITH v. WALL-BUDGE* (1857), 6 C. P. 324.—*CAN.*

*k.* ———.]—Where a proprietor, for the purpose of improving the value of a water power, has built a dam over

*Sect. 2.—Rights relating to watercourses: Sub-sect. 2, B. & C.]*

**1011.** ——— **Question for jury.**—Action for obstruction of a watercourse to which pltf. alleged themselves to be entitled by reason of their possession of a mill. An agreement for such watercourse made twenty-eight years before with those under whom pltf. claimed being given in evidence by defts., it should nevertheless be left to the jury to presume whether a grant has not been executed.—*DEWHIRST v. WRIGLEY* (1834), Coop. Pr. Cas. 329; 47 E. R. 529; *subsequent proceedings* (1837), Coop. Pr. Cas. 319, L. C.

**1012.** ———.—Every proprietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the rights of the proprietors above or below him on the stream, & may begin to exercise that right whenever he will. By usage, he may acquire a right to use the water in a manner not justified by his natural right; but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, & so render the tenement above a servient tenement.

Pltf. had immemorially enjoyed the benefit of irrigating certain meadows with the water of the Yeo, subject to the right of the occupier of a mill to detain the water for the use of his mill; & although the natural flow of the river was prevented by the exercise of the miller's right, the water came down at such times that pltf. was enabled to irrigate his meadows effectually. But, of late, deft. had, for the purpose of irrigating his own adjacent land, from time to time diverted the water after it had passed the mill, & before it reached pltf.'s meadows; & although it did not appear that the quantity of water which ultimately reached pltf.'s meadows was thereby sensibly diminished, yet the effect was that the water was detained by the process of irrigation, & did not arrive till so late in the day that pltf. was deprived of the power to use it fully:—*Held*: this detention of the water by deft. was a use of it which was in its character necessarily injurious to the natural rights of pltf. as a riparian proprietor, & a ground of action.

In such a case it is not necessary to show actual damage to pltf.'s reversionary interest, it is

enough to show an obstruction of his right, & such obstruction of his right being shown, the law will infer damage.

The right of the riparian proprietor is limited to natural streams, & does not attach in the case of artificial cuts or drains.—*SAMPSON v. HODDINOTT* (1857), 1 C. B. N. S. 590; 26 L. J. C. P. 148; 28 L. T. O. S. 304; 21 J. P. 375; 3 Jur. N. S. 243; 5 W. R. 230; 140 E. R. 242; *affd.* 3 C. B. N. S. 596, Ex. Ch.

*Annotations*:—*Distd.* *Kensit v. G. E. Ry.* (1883), 23 Ch. D. 566. *Consd.* *Sharp v. Wilson, Rotheray* (1905), 93 L. T. 155. *Reid.* *Stockport Waterworks Co. v. Potter* (1864), 3 H. & C. 300; *Crossley v. Lightowler* (1866), L. R. 3 Eq. 279; *Kensit v. G. E. Ry.* (1884), 27 Ch. D. 122; *McCartney v. Londonderry & Lough Swilly Rly.*, [1904] A. C. 301. *Mentd.* *Roberts v. Richards* (1881), 50 L. J. Ch. 297; *Simpson v. Godmanchester Corpn.*, [1896] 1 Ch. 214.

**1013.** ———.—*J.*—*MASON v. SIREWSBURY & HEREFORD RY. CO.*, No. 28, *ante*.

**1014.** ———.—*Prescription Act, 1832* (c. 71).—*CARLYON v. LOVERING*, No. 1004, *ante*.

**1015.** ———.—(1) Pltf. & deft. were in possession for terms of years respectively, of two contiguous tracts of mining property. Pltf. alleged that the direction of the natural flow of the rain-water falling on deft.'s land was into his, pltf.'s, close. Upon deft.'s land was a reservoir, to the use of the water of which pltf. claimed a right, through a trench leading from the reservoir across deft.'s land into pltf.'s close:—*Held*: pltf., in order to establish his right to the flow of water from the reservoir, must show uninterrupted enjoyment of the same for twenty years; & also, under Prescription Act, 1832 (c. 71), s. 4, there was not an interruption for one year before the filing of the bill.

(2) Deft. had further cut trenches in the land he occupied, & by permission, in neighbouring lands, whereby the water in certain surface springs, not flowing in any definite channels, was drained into deft.'s reservoir, & prevented from flowing into pltf.'s close:—*Held*: pltf. was entitled to this water, inasmuch as it did not flow in any defined channels; & an occupant is not entitled to interrupt the natural flow of the water from "surface springs."—*ENNOR v. BARWELL* (1860), 2 Giff. 410; 3 L. T. 170; 25 J. P. 54; 6 Jur. N. S. 1233; 66 E. R. 171; *on appeal* (1861), 4 L. T. 597, L. J.

*Annotation*:—As to (2) *Reid.* *Bennett v. Griffiths* (1861), 3 E. & E. 467.

**1016.** ———.—*J.*—The owner of a tenement adjoining a natural stream has no right to divert the water to a place outside the tenement, &

a watercourse running through his property & has not constructed any mill or manufactory in connection with the dam, he cannot acquire by prescription a right to maintain the dam in question.—*JONES v. FISHER* (1890), 17 S. C. R. 515.—*CAN.*

**L.** ———.—An easement to pen back the water of a stream & to cause flooding to riparian owners can be acquired by user of the stream in this manner, continuously or at regularly recurring intervals for a period of twenty years, but the extent of the right acquired must be measured strictly by the extent of the user.—*CARDWELL v. BRECKENBRIDGE* (1913), 24 O. W. R. 569; 4 O. W. N. 1295; 11 D. L. R. 461.—*CAN.*

**m.** ———.—*By riparian owner.*—On what conditions.—A prescriptive title to the uninterrupted use of the water of a river will not be obtained by a riparian owner who has made no use of the water different from that to which he was entitled as a riparian owner.—*BROWN v. BATHURST ELECTRIC & WATER POWER CO.* (1907), 4 E. L. R. 28; 3 N. B. Eq. Rep. 513.—*CAN.*

**n.** ———.—*Whether definite channel necessary.*—Pltf. claimed a prescriptive right to the flow of the surface drainage water from the land of deft. on to his land:—*Held*: such easement can be acquired only where the water flows in a definite channel.—*KENA MAHOMED v. BOHATOO SIRCAR* (1863), Marsh. 506.—*IND.*

**o.** ———.—*J.*—The fact that water flows over the surface of the servient tenement without a definite channel for its carriage, cannot prevent the acquisition of an easement.—*MUNSHI MISSEER v. BHIMRAJ RAM* (1913), 1 L. R. 40 Calc. 458.—*IND.*

**p.** ———.—*J.*—No claim can be made either as a natural right or as an easement by prescription, to water which does not flow in a definite course, but which should be regarded as surface water or surface drainage.—*ADINARAYANA v. RAMUDU* (1914), 1 L. R. 37 Mad. 301.—*IND.*

**q.** ———.—*J.*—After a long enjoyment of a watercourse running to a house & garden through the ground of another, it shall be presumed that the

owner of the house has a right to the watercourse, & an injunction will be granted unless the party can show a special licence or an agreement to restrain it in point of time.—*WILSON v. STEWART* (1748), 2 How. E. F. 532.—*IR.*

**r.** ———.—*J.*—A stream of water rose in deft.'s land, then ran along the public road & through two gulleys in the road into pltf.'s field. Deft., three years before, sank the water table on the road, & constructed a new gully, & blocked up the old gulleys whereby the water was diverted from pltf. into his own land. Pltf. never acquiesced in this:—*Held*: over twenty years' user having been proved, pltf. had a right to the flow of the stream from the public road through the two gulleys.—*CALLAGHAN v. CALLAGHAN* (1897), 31 L. L. T. 418.—*IR.*

**s.** ———.—*J.*—The right to a stream is not to be regarded as a mere right of servitude, but as a right of common property, & is to be regulated by the law applicable to property of that description; & so where a stream or the united water of two streams, has

there consume it for purposes unconnected with the tenement.

A natural stream was crossed by a railway line & flowed down to a mill. The railway co. claimed the right to insert a pipe into the stream at the crossing, which was the only place where their land adjoined the stream, & to carry the water along their line to a distant tank, & there to consume it in working their locomotive engines along the whole of their railway. If the pipe was used to its full capacity it might not have substantially injured the mill:—*Held*: the railway co. were not entitled to carry out their proposal, which was not for purposes connected with the land where it crossed the stream, & the millowner would be justified in stopping up the proposed pipe.

It is plain that if the railway co. are not entitled to retain & use their pipe as intended but are nevertheless allowed to do so without interruption for twenty years they will be infringing the millowner's rights all that time & will, at the end of twenty years, gain a prescriptive right to continue such use for ever (LORD LINDLEY).

*Sandwich (Earl) v. Great Northern Ry. Co.*, No. 1021, *post*, *overd.*—*McCartney v. Londonderry & Lough Swilly Ry. Co.*, [1904] A. C. 301; 73 L. J. P. C. 73; 91 L. T. 105; 53 W. R. 385, H. L. *Annotation*:—*Fold*, *Stollmeyer v. Trinidad Lake Petroleum Co.*, [1918] A. C. 485.

1017. —.—*DALTON v. ANGUS*, No. 4, *ante*.

1018. —.—*By the general law applicable to running streams every proprietor has a right to the ordinary use of water flowing past his land, also rights may be acquired by prescription which interfere with the natural rights of other proprietors; but the ownership of an artificial dam, although it may give a right to maintain the dam, does not turn the running stream into a pond so as to give the owner of the dam an exclusive right to use the whole of the running water.*—*WHITE (JOHN) & SONS v. WHITE*, [1906] A. C. 72; 75 L. J. P. C. 14; 94 L. T. 65, H. L.

*Annotation*:—*Reid*, *Portsmouth Borough Waterworks Co. v. L. B. & S. C. Ry.* (1909), 74 J. P. 61.

1019. —.—*Must be limited & defined by user.*—*User unlimited & unnecessary.*—The relators & plffs., a statutory navigation co., claimed to restrain defts. from taking water from a river forming part of their navigation. Defts. did not admit that the river was vested in the plffs., & claimed a prescriptive right to take from the river superfluous water not required for the pur-

poses of the navigation. The user proved was that defts. took as much water as they required without regard to the needs of the navigation:—*Held*: the prescription must be limited & defined by the user, & the user being unlimited & not confined to water not needed for the discharge of the statutory duties of plff. co., the prescription was for a right which plffs. could not grant & which could not be obtained against them by prescription.—*A.-G. v. GREAT NORTHERN RY. CO.*, [1909] 1 Ch. 775; 78 L. J. Ch. 577; 99 L. T. 60, n.; 73 J. P. 41, C. A.

—.—*See, generally*, Part III., Sect. 3, *ante*.

1020. *By custom.*—*For inhabitants as such.*—*WEEKLY v. WILDMAN* (1698), 1 *Ld. Raym.* 405; 91 E. R. 1169.

*Annotations*:—*Consd.* *Race v. Ward* (1855), 1 E. & B. 702. *Reid*, *Hill v. Tupper* (1863), 2 New Rep. 201. *Mentd.* *Ackroyd v. Smith* (1850), 10 C. B. 161.

1021. —.—*For workers in tin mine.*—*CARLYON v. LOVERING*, No. 1004, *ante*.

—.—*See, further*, *CUSTOM & USAGES*, Vol. XVII., p. 23, No. 244-246.

### C. Nature and Extent of Right.

1022. *To abstract water.*—*BEALEY v. SHAW*, No. 335, *ante*.

1023. —.—*Water returned.*—*DAKIN v. CORNISH* (1845), cited in 6 *Exch. at p.* 360; 155 E. R. 582. *Annotation*:—*Reid*, *Embrey v. Owen* (1851), 5 *Exch.* 353.

1024. —.—*By railway company.*—*Purposes unconnected with tenement.*—A railway co. whose line crossed a stream in the immediate neighbourhood of one of their stations, took water for supplying their engines & for the general purposes of the station. On bill filed by a millowner lower down the stream, it appeared that the abstraction of water did no damage in wet weather, & never shortened the working of the mill for more than a few minutes a day:—*Held*: the co., as riparian owners, were entitled to take a reasonable quantity of water for their purposes, & in this case the quantity taken was reasonable. *SANDWICH (EARL) v. GREAT NORTHERN RY. CO.* (1878), 10 Ch. D. 707; 49 L. J. Ch. 225; 43 J. P. 429; 27 W. R. 610.

*Annotations*:—*Overd.* *McCartney v. Londonderry & Lough Swilly Ry.*, [1901] A. C. 301. *Reid*, *Bully v. Clark, Son, & Morland* (1902), 86 L. T. 399.

1025. —.—*McCartney v. LONDONDERRY & LOUGH SWILLY RY. CO.*, No. 1016, *ante*.

flowed in one continuous course from time immemorial, partly in a natural & partly in an artificial channel, a lower heritor who has used the water so sent down on his property for the purpose of machinery, or otherwise, acquires a prescriptive right to it & is entitled to insist on its continuance.—*MACKENZIE v. WOODROP* (1854), 16 *Dunl. (Cl. of Sess.)* 381; 26 *Sc. Jur.* 180.—*SCOT*.

t. —.—*The user for the purposes of irrigation for a period of thirty years & upwards by lower proprietors of the water of a stream which has been allowed to flow down to them free & unobstructed, does not per se confer on them a prescriptive right against the upper proprietor to prevent him from making any use of the water, but the parties are thrown back on their ordinary rights as riparian proprietors. A negative servitude cannot be acquired by prescription, unless there has intervened some act by which the person claiming it has asserted it, & the opposing party has yielded to that assertion.*—*JORDAAN v. WINKELMAN* (1879), *Buch.* 79.—*S. AF.*

a. —.—*In order for a lower*

riparian proprietor to acquire prescriptive rights to the exclusive use of the water of a perennial stream, as against an upper riparian proprietor, it is necessary for the former by adverse acts for thirty years to assert his exclusive right, & for the latter to continuously yield to such assertion during that period.—*KOHLER v. BAARTMAN* (1895), 12 S. C. 205.—*S. AF.*

b. —.—*Where a dam on deft.'s land was used only in the dry season of the year & the owner of plff.'s land each year for a period upwards of thirty years had entered deft.'s land, rebuilt the dam & appropriated the whole of the water collected therein for use on plff.'s land:—Held: such acts constituted sufficient adverse user to entitle plff.'s land to the use of all the water flowing into the dam.*—*DE KLERK v. NIEHAUS* (1898), 14 S. C. 302; 15 S. C. 1.—*S. AF.*

c. *By estoppel.*—Where a riparian owner of lands on a lower level had been permitted by plffs. for a number of years, to take water power necessary to operate his mill through a flume he had constructed along the river bank partly upon plffs.' land connecting with the plffs.' mill-race, subject to

the contribution of half the expense of keeping their mill-race & dam in repair, & these facts had been recognised in deeds & written agreements to which plffs. & their *anteurs* had been parties, plffs. could no longer claim exclusive rights to the enjoyment of such river improvements or require the demolition of the flume notwithstanding that they were absolute owners of the strip of land upon which the mill-race & a portion of the flume had been constructed.—*LAFRANCE v. LAFONTAINE* (1899), 30 S. C. R. 20.—*CAN.*

### PART IX. SECT. 2, SUB-SECT. 2.—C.

1023 i. *To abstract water.*—*Water returned.*—A riparian proprietor who has a prescriptive right to take, in a particular way, water from a river, & to return such water to the river in a polluted condition, is not entitled to take the water in any other way or place, nor use even his common law right of taking it in such a way as to add to the pollution of the stream.—*M'INTYRE BROTHERS v. M'GAVIN*, [1893] A. C. 264; 20 R. (Cl. of Sess.) 49; 30 *Sc. L. R.* 941; 1 S. L. T. 110.—*SCOT*.

d. *To divert water.*—*For purposes*

*Sect. 2.—Rights relating to watercourses: Sub-sect. 2, B. & C.]*

**1011.** ———. [*Question for jury.*]—Action for obstruction of a watercourse to which pltf. alleged themselves to be entitled by reason of their possession of a mill. An agreement for such watercourse made twenty-eight years before with those under whom pltf. claimed being given in evidence by defts., it should nevertheless be left to the jury to presume whether a grant has not been executed.—*DEWHIRST v. WRIGLEY* (1834), Coop. Pr. Cas. 329; 47 E. R. 529; *subsequent proceedings* (1837), Coop. Pr. Cas. 319, L. C.

**1012.** ———. [*Every proprietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the rights of the proprietors above or below him on the stream, & may begin to exercise that right whenever he will. By usage, he may acquire a right to use the water in a manner not justified by his natural right; but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, & so render the tenement above a servient tenement.*]

Pltf. had immemorially enjoyed the benefit of irrigating certain meadows with the water of the Yeo, subject to the right of the occupier of a mill to detain the water for the use of his mill; & although the natural flow of the river was prevented by the exercise of the miller's right, the water came down at such times that pltf. was enabled to irrigate his meadows effectually. But, of late, deft. had, for the purpose of irrigating his own adjacent land, from time to time diverted the water after it had passed the mill, & before it reached pltf.'s meadows; & although it did not appear that the quantity of water which ultimately reached pltf.'s meadows was thereby sensibly diminished, yet the effect was that the water was detained by the process of irrigation, & did not arrive till so late in the day that pltf. was deprived of the power to use it fully:—*Held*: this detention of the water by deft. was a use of it which was in its character necessarily injurious to the natural rights of pltf. as a riparian proprietor, & a ground of action.

In such a case it is not necessary to show actual damage to pltf.'s reversionary interest, it is

enough to show an obstruction of his right, & such obstruction of his right being shown, the law will infer damage.

The right of the riparian proprietor is limited to natural streams, & does not attach in the case of artificial cuts or drains.—*SAMPSON v. HODDINOTT* (1857), 1 C. B. N. S. 590; 26 L. J. C. P. 148; 28 L. T. O. S. 304; 21 J. P. 375; 3 Jur. N. S. 243; 5 W. R. 230; 140 E. R. 242; *affd.* 3 C. B. N. S. 596, Ex. Ch.

*Annotations*:—*Distd.* *Kensit v. G. E. Ry.* (1883), 23 Ch. D. 566. *Consd.* *Sharp v. Wilson, Itoheray* (1905), 93 L. T. 155. *Refd.* *Stockport Waterworks Co. v. Potter* (1864), 3 H. & C. 300; *Crossley v. Lightowler* (1866), L. R. 3 Eq. 279; *Kensit v. G. E. Ry.* (1884), 27 Ch. D. 122; *McCartney v. Londonderry & Lough Swilly Ry.*, [1904] A. C. 301. *Mentd.* *Roberts v. Richards* (1881), 50 L. J. Ch. 297; *Simpson v. Godmanchester Corp.*, [1896] 1 Ch. 214.

**1013.** ———. [*MASON v. SHIREWSBURY & Hereford Ry. Co., No. 28, ante.*]

**1014.** ———. [*Prescription Act, 1832 (c. 71).*]—*CARLYON v. LOVERING*, No. 1004, *ante*.

**1015.** ———. [*(1) Pltf. & deft. were in possession for terms of years respectively, of two contiguous tracts of mining property. Pltf. alleged that the direction of the natural flow of the rain-water falling on deft.'s land was into his, pltf.'s, close. Upon deft.'s land was a reservoir, to the use of the water of which pltf. claimed a right, through a trench leading from the reservoir across deft.'s land into pltf.'s close:—Held: pltf., in order to establish his right to the flow of water from the reservoir, must show uninterrupted enjoyment of the same for twenty years; & also, under Prescription Act, 1832 (c. 71), s. 4, there was not an interruption for one year before the filing of the bill.*]

(2) Deft. had further cut trenches in the land he occupied, & by permission, in neighbouring lands, whereby the water in certain surface springs, not flowing in any definite channels, was drained into deft.'s reservoir, & prevented from flowing into pltf.'s close:—*Held*: pltf. was entitled to this water, inasmuch as it did not flow in any defined channels; & an occupant is not entitled to interrupt the natural flow of the water from "surface springs."—*ENNOR v. BARWELL* (1860), 2 Giff. 410; 3 L. T. 170; 25 J. P. 54; 6 Jur. N. S. 1233; 66 E. R. 171; *on appeal* (1861), 4 L. T. 597, L. J.J.

*Annotation*:—*As to (2) Refd.* *Bennett v. Griffiths* (1861), 3 E. & E. 467.

**1016.** ———. [*The owner of a tenement adjoining a natural stream has no right to divert the water to a place outside the tenement, &*

a watercourse running through his property & has not constructed any mill or manufactory in connection with the dam, he cannot acquire by prescription a right to maintain the dam in question.—*JONES v. FISHER* (1890), 17 S. C. R. 515.—*CAN.*

**1.** ———. [*An easement to pen back the water of a stream & to cause flooding to riparian owners can be acquired by user of the stream in this manner continuously or at regularly recurring intervals for a period of twenty years, but the extent of the right acquired must be measured strictly by the extent of the user.*—*CARDWELL v. BRUCKENBRIDGE* (1913), 24 O. W. R. 569; 4 O. W. N. 129; 11 D. L. R. 401.—*CAN.*

**m.** ———. [*By riparian owner—On what conditions.*]—A prescriptive title to the uninterrupted use of the water of a river will not be obtained by a riparian owner who has made no use of the water different from that to which he was entitled as a riparian owner.—*BROWN v. BATHURST ELECTRIC & WATER POWER Co.* (1907), 4 E. L. R. 28; 3 N. B. Eq. Rep. 543.—*CAN.*

**n.** ———. [*Whether definite channel necessary.*]—Pltf. claimed a prescriptive right to the flow of the surface drainage water from the land of deft. on to his land:—*Held*: such easement can be acquired only where the water flows in a definite channel.—*KENA MAHOMED v. BOHATTOO SIRCAR* (1863), Marsh. 506.—*IND.*

**o.** ———. [*The fact that water flows over the surface of the servient tenement without a definite channel for its carriage, cannot prevent the acquisition of an easement.*—*MUNSHI MISSEER v. BHIMRAJ RAM* (1913), 1 L. R. 40 Calc. 453.—*IND.*

**p.** ———. [*No claim can be made either as a natural right or as an easement by prescription, to water which does not flow in a definite course, but which should be regarded as surface water or surface drainage.*—*ADINARAYANA v. RAMUDU* (1914), 1 L. R. 37 Mad. 304.—*IND.*

**q.** ———. [*After a long enjoyment of a watercourse running to a house & garden through the ground of another, it shall be presumed that the*

owner of the house has a right to the watercourse, & an injunction will be granted unless the party can show a special licence or an agreement to restrain it in point of time.—*WILSON v. STEWART* (1748), 2 How. E. F. 532.—*IR.*

**r.** ———. [*A stream of water rose in deft.'s land, then ran along the public road & through two gulleys in the road into pltf.'s field. Deft., three years before, sank the water table on the road, & constructed a new gully, & blocked up the old gulleys whereby the water was diverted from pltf. into his own land. Pltf. never acquiesced in this:—Held: over twenty years' user having been proved, pltf. had a right to the flow of the stream from the public road through the two gulleys.*—*CALLAGHAN v. CALLAGHAN* (1897), 31 L. J. T. 418.—*IR.*

**s.** ———. [*The right to a stream is not to be regarded as a mere right of servitude, but as a right of common property, & is to be regulated by the law applicable to property of that description; & so where a stream or the united water of two streams, has*

there consume it for purposes unconnected with the tenement.

A natural stream was crossed by a railway line & flowed down to a mill. The railway co. claimed the right to insert a pipe into the stream at the crossing, which was the only place where their land adjoined the stream, & to carry the water along their line to a distant tank, & there to consume it in working their locomotive engines along the whole of their railway. If the pipe was used to its full capacity it might not have substantially injured the mill:—*Held*: the railway co. were not entitled to carry out their proposal, which was not for purposes connected with the land where it crossed the stream, & the millowner would be justified in stopping up the proposed pipe.

It is plain that if the railway co. are not entitled to retain & use their pipe as intended but are nevertheless allowed to do so without interruption for twenty years they will be infringing the millowner's rights all that time & will, at the end of twenty years, gain a prescriptive right to continue such use for ever (LORD LINDLEY).

*Sandwich (Earl) v. Great Northern Ry. Co.*, No. 1021, *post*, overd.—*MCCARTNEY v. LONDONDERRY & LOUGH SWILLY RY. CO.*, [1904] A. C. 301; 73 L. J. P. C. 73; 91 L. T. 105; 53 W. R. 385, H. L. *Annotation*:—*Föld. Stollmeyer v. Trinidad Lake Petroleum Co.*, [1918] A. C. 485.

1017. —.— *DALTON v. ANGUS*, No. 4, *ante*.

1018. —.— *By the general law applicable to running streams every proprietor has a right to the ordinary use of water flowing past his land, also rights may be acquired by prescription which interfere with the natural rights of other proprietors; but the ownership of an artificial dam, although it may give a right to maintain the dam, does not turn the running stream into a pond so as to give the owner of the dam an exclusive right to use the whole of the running water.*—*WHITE (JOHN) & SONS v. WHITE*, [1906] A. C. 72; 75 L. J. P. C. 14; 94 L. T. 65, H. L. *Annotation*:—*Reid. Portsmouth Borough Waterworks Co. v. L. B. & S. C. Ry.* (1909), 74 J. P. 61.

1019. —.— *Must be limited & defined by user.—User unlimited & unnecessary.*—The relators & plffs., a statutory navigation co., claimed to restrain defts. from taking water from a river forming part of their navigation. Defts. did not admit that the river was vested in the plffs., & claimed a prescriptive right to take from the river superfluous water not required for the pur-

poses of the navigation. The user proved was that defts. took as much water as they required without regard to the needs of the navigation:—*Held*: the prescription must be limited & defined by the user, & the user being unlimited & not confined to water not needed for the discharge of the statutory duties of plff. co., the prescription was for a right which plffs. could not grant & which could not be obtained against them by prescription.—*A.-G. v. GREAT NORTHERN RY. CO.*, [1909] 1 Ch. 775; 78 L. J. Ch. 577; 99 L. T. 69, n.; 73 J. P. 41, C. A.

—.— *See, generally*, Part III., Sect. 3, *ante*.

1020. *By custom.—For inhabitants as such.*—*WEEKLY v. WILDMAN* (1698), 1 Ld. Raym. 405; 91 E. R. 1169.

*Annotations*:—*Consd. Race v. Ward* (1855), 4 E. & B. 702. *Reid. Hill v. Tupper* (1863), 2 New Rep. 201. *Mentd. Ackroyd v. Smith* (1850), 10 C. B. 161.

1021. —.— *For workers in tin mine.*—*CARLTON v. LOVERING*, No. 1004, *ante*.

—.— *See, further*, CUSTOM & USAGES, Vol. XVII., p. 23, No. 244-246.

### C. Nature and Extent of Right.

1022. *To abstract water.*—*BEALEY v. SHAW*, No. 335, *ante*.

1023. —.— *Water returned.*—*DAKIN v. CORNISH* (1845), cited in 6 Exch. at p. 300; 155 E. R. 582. *Annotation*:—*Reid. Embrey v. Owen* (1851), 5 Exch. 353.

1024. —.— *By railway company.—Purposes unconnected with tenement.*—A railway co. whose line crossed a stream in the immediate neighbourhood of one of their stations, took water for supplying their engines & for the general purposes of the station. On bill filed by a millowner lower down the stream, it appeared that the abstraction of water did no damage in wet weather, & never shortened the working of the mill for more than a few minutes a day:—*Held*: the co., as riparian owners, were entitled to take a reasonable quantity of water for their purposes, & in this case the quantity taken was reasonable.—*SANDWICH (EARL) v. GREAT NORTHERN RY. CO.* (1878), 10 Ch. D. 707; 49 L. J. Ch. 225; 43 J. P. 429; 27 W. R. 616.

*Annotations*:—*Overd. McCartney v. Londonderry & Lough Swilly Ry.*, [1901] A. C. 301. *Reid. Bally v. Clark, Son, & Morland* (1902), 86 L. T. 309.

1025. —.— *See*—*MCCARTNEY v. LONDONDERRY & LOUGH SWILLY RY. CO.*, No. 1016, *ante*.

flowed in one continuous course from time immemorial, partly in a natural & partly in an artificial channel, a lower heritor who has used the water so sent down on his property for the purpose of machinery, or otherwise, acquires a prescriptive right to it & is entitled to insist on its continuance.—*MACKENZIE v. WOODROSE* (1834), 16 Dunl. (Ct. of Sess.) 381; 26 Sc. Jur. 180.—*SCOT*.

t. —.— *The user for the purposes of irrigation for a period of thirty years & upwards by lower proprietors of the water of a stream which has been allowed to flow down to them free & unobstructed, does not per se confer on them a prescriptive right against the upper proprietor to prevent him from making any use of the water, but the parties are thrown back on their ordinary rights as riparian proprietors. A negative servitude cannot be acquired by prescription, unless there has intervened some act by which the person claiming it has asserted it, & the opposing party has yielded to that assertion.*—*JORDAAN v. WINKELMAN* (1879), Buch. 79.—*S. AF*.

a. —.— *In order for a lower*

riparian proprietor to acquire prescriptive rights to the exclusive use of the water of a perennial stream, as against an upper riparian proprietor, it is necessary for the former by adverse acts for thirty years to assert his exclusive right, & for the latter to continuously yield to such assertion during that period.—*KOHLER v. BAARMAN* (1895), 12 S. C. 205.—*S. AF*.

b. —.— *Where a dam on deft.'s land was used only in the dry season of the year & the owner of plff.'s land each year for a period upwards of thirty years had entered deft.'s land, rebuilt the dam & appropriated the whole of the water collected therein for use on plff.'s land:—Held: such acts constituted sufficient adverse user to entitle plff.'s land to the use of all the water flowing into the dam.*—*DE KLERK v. NIEHAUS* (1898), 14 S. C. 302; 15 S. C. 1.—*S. AF*.

c. *By estoppel.*—Where a riparian owner of lands on a lower level had been permitted by plffs., for a number of years, to take water power necessary to operate his mill through a flume he had constructed along the river bank partly upon plffs.' land connecting with the plffs.' mill-race, subject to

the contribution of half the expense of keeping their mill-race & dam in repair, & these facts had been recognised in deeds & written agreements to which plffs. & their *ancurs* had been parties, plffs. could no longer claim exclusive rights to the enjoyment of such river improvements or require the demolition of the flume notwithstanding that they were absolute owners of the strip of land upon which the mill-race & a portion of the flume had been constructed.—*LAFRANCE v. LAFONTAINE* (1899), 30 S. C. R. 20.—*CAN*.

### PART IX. SECT. 2, SUB-SECT. 2.—C.

1023 l. *To abstract water.—Water returned.*—A riparian proprietor who has a prescriptive right to take, in a particular way, water from a river, & to return such water to the river in a polluted condition, is not entitled to take the water in any other way or place, nor use even his common law right of taking it in such a way as to add to the pollution of the stream.—*MINTYKE BROTHERS v. MCGAVIN*, [1893] A. C. 268; 20 Ir. (Ct. of Sess.) 49; 30 Sc. L. R. 941; 1 S. L. T. 110.—*SCOT*.

d. *To direct water.—For purposes*

*Sect. 2.—Rights relating to watercourses: Sub-sect. 2, C.: sub-sect. 3, A.]*

**1026. — Water percolating through bank—Injury to lower riparian owner.**—A riparian proprietor abstracted water from a stream by pipes & syphons to supply his fish ponds, & thereby interfered with the flow of the water to the lower riparian proprietor's mill. The higher riparian proprietor made a claim that, prior to his use of the pipes & syphons to convey water from the stream to his fish ponds, he had obtained the same amount of water by percolation through the banks of the stream, & therefore he had a right to such water under Prescription Act. The lower riparian proprietor claimed a right of way by prescription to repair the bank of the stream where it ran through the higher riparian proprietor's property. The gate by which he entered the higher riparian proprietor's property had always been kept locked & the key kept by the higher riparian proprietor or his servants; but this key had always been asked for as a matter of right when it was required, & had never been refused:—*Held*: (1) the lower riparian proprietor had such a right as mentioned in *Beeston v. Weate*, No. 330, *ante*, to keep the bank in repair on the higher riparian proprietor's property, & for that purpose to have access to his premises. Such a right was from time immemorial, & the fact of the gate being kept locked did not affect such right; (2) the higher riparian proprietor could not justify abstracting water by pipes & syphons on the ground that if the bank had not been made watertight he would have been entitled to the same amount of water by percolation. Such a claim was not sustainable under the Prescription Act as a watercourse or otherwise. Injunction must be granted to restrain the abstraction of water from the stream by such pipes & syphons, & they must be taken up & removed; but the order must state that a riparian proprietor was not entitled to restrain absolutely another riparian proprietor from taking any water from the stream for legitimate purposes.—*ROBERTS v. FELLOWES* (1906), 94 L. T. 279.

**1027. — Surplus water.**—*A.-G. v. GREAT NORTHERN RY. CO.*, No. 1019, *ante*.

**1028. — Where no right to continuous flow.**—Pltfs. were the owners in fee of an ancient tannery situated on either bank of a mill stream, & defts. were occupiers of an ancient corn mill further down the stream. The channel of the stream was an artificial one, constructed several centuries ago, & passing through the lands of various proprietors before reaching the tannery & the mill. The owners or occupiers of the mill were also in possession of & exercised the sole control over a weir & sluice gates built across the river E. at the point where the mill stream commenced, & they regulated the flow of the water into the mill stream & cleansed the bed & banks from the weir to the tannery. In Nov. 1907, defts. cut off the water supply & entering on the bed of the stream, within pltfs.' premises, removed therefrom certain pipes by means of which pltfs. had been in the habit of obtaining water for their tannery. In an action by pltfs. for an injunction to restrain the interference with their right to abstract water, & for trespass & damages:—*Held*: upon the facts & having regard to the conduct of the parties, & especially to the notorious & constant user of the water by pltfs. & their

predecessors for nearly 250 years, pltfs. were the owners of the bed of the stream so far as it ran through their land; & the ct. was bound to infer that the mill stream was originally constructed for the mutual benefit of the tanner & the miller, & pltfs. were entitled, under a reservation made or agreement entered into when the channel was constructed, to a right to use the water for all reasonable purposes, not causing any sensible or material injury to the miller. *Semble*: where water flows through an artificial channel past the lands of several proprietors to serve the purposes of a proprietor lower down, the proper grant to presume, in the absence of all evidence as to the conditions upon which the channel was originally made would be the grant of an easement or right to the running of water; & *prima facie*, every proprietor of land on the banks of such a channel would be entitled to the moiety of the bed of the channel adjoining his land.

If a riparian owner has no right to have the flow of water continued, he cannot claim as an easement the right to abstract water if & when it is flowing in the stream.—*WHITMORES (EDENBRIDGE), LTD. v. STANFORD*, [1909] 1 Ch. 427; 78 L. J. Ch. 144; 99 L. T. 924; 25 T. L. R. 169; 53 Sol. Jo. 134.

**1029. To divert water.**—*WRIGHT v. HOWARD*, No. 1003, *ante*.

**1030. — Irregular flow.**—The owner of land has an unqualified right to drain it for agricultural purposes, in order to get rid of mere surface water the supply of the water being casual & its flow following no regular or definite course; & a neighbouring proprietor cannot complain that he is thereby deprived of such water which otherwise would have come to his land.—*RAWSTON v. TAYLOR* (1855), 11 Exch. 369; 25 L. J. Ex. 33; 150 E. R. 873.

*Annotations*:—*Folld.* Broadbent v. Ramsbotham (1856), 11 Exch. 602. *Conad.* Chasemore v. Richards (1859), 7 H. L. Cas. 349. *Reid.* Ennor v. Barwell (1860), 2 Giff. 410; Grand Junction Canal v. Shugar (1871), 24 L. T. 402; Bradford Corp'n. v. Pickles, [1894] 3 Ch. 53; Bradford Corp'n. v. Ferrand, [1902] 2 Ch. 655.

**1031. —**—A landowner has a right to appropriate surface water which flows over his own land in no definite channel, although the water is thereby prevented from reaching a watercourse which it previously supplied.—*BROADBENT v. RAMSBOTHAM* (1856), 11 Exch. 602; 25 L. J. Ex. 115; 26 L. T. O. S. 244; 20 J. P. 486; 4 W. R. 290; 156 E. R. 971.

*Annotations*:—*Distd.* Beeston v. Weate (1856), 20 J. P. 452. *Ap'd.* Chasemore v. Richards (1859), 7 H. L. Cas. 349. *Distd.* Bunting v. Hicks (1894), 70 L. T. 455. *Reid.* Ennor v. Barwell (1860), 2 Giff. 410; R. v. Metropolitan Board of Works (1863), 3 B. & S. 710.

**1032. — For exclusive use.**—A stream was divided at a spot E., by stones placed there before living memory. Part of the water flowed to a farmyard, where it entered a trough used for watering cattle. The overflow of water from the trough found a way, not through any definite channel, but by percolation, into a river, which also received the main part of the stream. In 1847 W., who bought the land between E. & the river, together with a mill on the bank of that river, made a reservoir to collect the overflow at the trough, & conducted the water from the reservoir to the mill through a tunnel or covered drain. In 1867 W. conveyed to pltf. the mill, together with the right to all waters, reserving to himself a supply of water for domestic & other purposes. Defts., owners of land on the banks of

*unconnected with tenement.*—Owner of a tenement adjoining a natural stream has no right to divert the water to a

place outside the tenement, & there consume it for purposes unconnected with the tenement.—*WATSON v. JACK-*

*SON* (1914), 30 O. L. R. 517; 31 O. L. R. 481; 19 D. L. R. 733; 6 O. W. N. 509.—*CAN.*



**1043** *l. Rights of riparian owners—*  
*Woods v. similar to rights in natural*  
*watercourse*, 111, 617. *See* *under*  
*a deed from T. to T.* it made in 185,  
granting a certain piece of land situate  
on the west bank of a river "with an  
equal right to or privilege of the water  
from the dam conveyed through the  
canal to the premises, he, it, being at  
all times at an equal expense in alter-  
ing, repairing, & amending the dam,  
with the others who participate in the  
benefit thereof," together with all  
houses, mills, etc., thereon erected.

**Sect. 2.—Rights relating to watercourses: Sub-sect. 3, A., B., C. & D. (a) & (b).]**

natural stream; & therefore, in an action by one riparian proprietor against another for the pollution & diversion of a watercourse, it is a misdirection to tell the jury, that, if the stream were artificial & made by the hand of man, pltf. could have no cause of action.—**SUTCLIFFE v. BOOTH** (1863), 32 L. J. Q. B. 136; 27 J. P. 613; 9 Jur. N. S. 1037.

**Annotations:—Consd.** *Mason v. Shrewsbury & Hereford Ry.* (1871), 25 L. T. 239; *Jameshur Pershad Narain Singh v. Koonj Behari Pattuk* (1878), 4 App. Cas. 121. **Apld.** *Roberts v. Richards* (1881), 50 L. J. Ch. 297. **Fold.** *Baily v. Clark, Son & Morland*, [1902] 1 Ch. 649. **Refd.** *It. v. Darlington Local Health Board* (1864), 5 B. & S. 515; *Nuttall v. Bracewell* (1866), L. R. 2 Exch. 1; *Hoiker v. Poritt* (1873), L. R. 8 Exch. 107.

**1044.** ———. ]—**NUTTALL v. BRACEWELL**, No. 121, *ante*.

**1045.** ———. ]—Pltf. & deft. were owners in fee of contiguous properties situate upon the slope of a hill. For upwards of seventy years pltf. & his predecessors in title had used for domestic & farming purposes at their own farmhouse the water flowing from a spring rising in their own land. The course of the water was from the spring at A. to a boundary of pltf.'s property at B., thence through deft.'s land by a banked-up channel to C., where it again entered pltf.'s land, & whence it flowed through a covered channel to his farmhouse. Deft.'s only user of the water had been by watering a few cattle depastured between the points B. & C., & pltf. & his predecessors had been in the habit of entering upon deft.'s land, & repairing the embankment between those points. In 1879 deft. inserted a pipe into the watercourse between the points B. & C., whereby he carried almost the whole of the water down through his own land to two houses recently erected by himself. Pltf.'s water supply at his farmhouse was thereby cut off, & he claimed an injunction, on the grounds that he had a prescriptive right to exclusive enjoyment, & that the embanked channel was constructed for the sole benefit of himself & his predecessors:—**Held:** in the absence of proof of the date at which the embanked channel was made, & the existence from time immemorial of a watercourse from the spring to pltf.'s farmhouse being an admitted fact, the watercourse must be considered to have been so made as to give all rights of riparian proprietors to deft. & his predecessors in title, & consequently deft. was within his rights in taking the water for the ordinary domestic use of his houses.—**ROBERTS v. RICHARDS** (1881), 50 L. J. Ch.

It was admitted that T. then owned lot 3, which included the river & the banks on either side, & that he built the dam & made the canal in question before 1845. By this dam the water of the river was turned into the canal, at the foot of which pltf.'s mill was situate. Defts. had a factory, also on the canal, above pltf.'s mill, & they diverted the water from the canal, to the injury of pltf.'s mill:—**Held:** pltf. having his land on the canal, had as appurtenant to his mill the rights of a riparian proprietor; the law applicable to natural streams was applicable also to the canal, which was a natural flow of water, though in an artificial channel; & a verdict for pltf. was sustained.—**DIAMOND v. REDDICK** (1875), 36 U. C. R. 391.—**CAN.**

**1043 ii.** ———. ]—About the end of the eighteenth century an artificial channel or water-race was built across a lot subsequently acquired by pltf., for the purpose of carrying water

from a stream above pltf.'s land to a mill below, the water being diverted into the channel by means of a dam. The channel & the banks on either side of it never formed part of pltf.'s land, having been excepted therefrom, so that their land was not contiguous to the water. Defts. diverted the water, & pltf. were thereby deprived of the use of the same for watering their cattle:—**Held:** pltf. were not riparian proprietors & could not claim any right by prescription to the use of the water.—**BUCHANAN v. INGERSOLL WATERWORKS CO.** (1899), 30 O. R. 456.—**CAN.**

**1043 iii.** ———. ]—Riparian rights identical with those attaching to natural streams may be acquired by prescription in artificial watercourses of a permanent character. These rights depend upon the character of the watercourse & the purposes for which it was constructed. If the watercourse be of a permanent nature, & constructed for lasting purposes &

297; 44 L. T. 271; on appeal, 51 L. J. Ch. 944, C. A.

**Annotation:—Refd.** *Baily v. Clark, Son, & Morland*, [1902] 1 Ch. 649.

**1046.** ———. ]—In the case of an artificial watercourse, the origin of which is unknown, the proper inference from the user of the water & from other circumstances may be that the channel was originally constructed upon the condition that all the riparian proprietors should have the same rights, including a right to use the water for manufacturing purposes, as they would have had if the stream had been a natural one.

You must take into account first, the character of the watercourse, whether it is temporary or permanent; secondly, the circumstances under which it was presumably created; & thirdly, the mode in which it has been in fact used & enjoyed (**STIRLING, L.J.**).—**BAILY & CO. v. CLARK, SON & MORLAND**, [1902] 1 Ch. 649; 71 L. J. Ch. 390; 86 L. T. 309; 50 W. R. 511; 18 T. L. R. 304 & 46 Sol. Jo. 316, C. A.

**Annotation:—Apld.** *Whitmores (Edenbridge) v. Stanford*, [1909] 1 Ch. 427.

**1047.** ———. ]—**Founded on different principles.**

—The right to the water of a river flowing in a natural channel through a man's land, & the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is *primâ facie* entitled to the unimpeded flow of the water in its natural course, & to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin.—**RAMESHUR PERSHAD NARAIN SINGH v. KOONJ BEHARI PATTUK** (1878), 4 App. Cas. 121, P. C.

**Annotations:—Consd.** *Burrows v. Lang*, [1901] 2 Ch. 502. **Apld.** *Baily v. Clark, Son & Morland*, [1902] 1 Ch. 649. **Refd.** *Kensit v. G. E. Ry.* (1881), 27 Ch. D. 122.

**1048. No proof of artificial origin—Presumption of natural origin.** ]—**ROBERTS v. RICHARDS**, No. 1045, *ante*.

**B. Rights created by Grant.**

*See, generally, Part III., Sect. 1, ante.*

**1049. Who may grant—Tenant from year to year of servient tenement.** ]—By a lease made in 1880 the lessors demised to the lessee a dwelling-house, together with "all water & watercourses, liberties, privileges, easements, & appurtenances

for the general benefit of those in its vicinity, & not merely with the temporary & private object of benefitting the property of those by whom it was constructed, riparian rights may be acquired in its water just as in a natural stream.—**BLACKBURN v. SOMERS** (1879), 5 L. R. IR. 1.—**IR.**

**g. Right must rest in grant express or implied.** ]—The right to water flowing to a man's land through an artificial watercourse, constructed on a neighbour's land, must rest on some grant or arrangement proved or presumed, from or with the owner of the land from which the water is artificially brought, or on some other legal origin. Such right may be presumed from the time, manner, & circumstances in which the easement has been enjoyed.—**RAMESHUR PERSHAD NARAIN SINGH v. KOONJ BEHARI PATTUK** (1879), L. L. R. 4 Calc. 633; L. R. 6 Ind. App. 33.—**IND.**



thereto belonging or in anywise appertaining or usually held & occupied therewith, or reputed to belong or be appurtenant thereto," for the residue of a term of 99 years from 1840, except the last ten days of the term. At the date of the lease, & for eighteen years previously, the dwelling-house had received a water supply from iron pipes which conducted water from a reservoir held by the same lessors as lessees on a yearly tenancy. In 1885 the representatives of the lessors, who then held the yearly tenancy of the reservoir, became undertakers for the supply of water in the district under statutory powers. In 1902, by another Act, the undertaking including the yearly tenancy of the reservoir, was transferred to defts. who threatened to cut off the supply of water if pltf. did not pay for the supply:—*Held*: under the lease of 1880, a right to water flowing through the pipes passed to the lessee, & the fact that the lessors were only yearly tenants of the reservoir made no difference; the successors of the lessors in the water undertaking were bound so long as they continued to be yearly tenants of the reservoir.

—*KEY v. NEATH RURAL DISTRICT COUNCIL* (1906), 95 L. T. 771; 71 J. P. 57; 4 L. G. R. 1174, C. A. Form of grant.]—*See* Part III., Sect. 1, sub-sect. 5, *ante*.

**1050. Construction of grant—Dependent on terms—Water drained through another's land. Whether use of drain exclusive.**—*LEE v. STEVENSON*, No. 43, *ante*.

—*Effect of general words.*—*See* Part III., Sect. 1, sub-sect. 6, B., *ante*.

—*Effect of Conveyancing Act, 1881 (c. 41), s. 6.*—*See* Part III., Sect. 1, sub-sect. 6, C., *ante*.

#### C. Rights arising by Implication of Law.

*See, generally*, Part III., Sect. 2, *ante*.

#### D. Rights arising by Prescription.

##### (a) Who may Prescribe.

*See, generally*, Part III., Sect. 3, sub-sect. 2, *ante*, & Prescription Act, 1832 (c. 71).

**1051. Under law of Stannaries—Licencee of owner of soil.**—*GAVED v. MARTYN*, No. 1056, *post*.

**1052. —Occupants of land for time being.**—A mine had from before the time of living memory been worked by tin-bonders, according to the custom of Cornwall, which enables any person to mark out a piece of waste ground, the owner of which does not choose to work the mines under it, & work them without the consent of the owner, yielding to the owner a share of the proceeds. The bonders had from before the time of living memory used for the purpose of their works the water of an artificial watercourse arising in the

land of another person. The bonders abandoned the mine in 1856, since which the owners had been in possession. A bill by the owners to restrain the diversion of the watercourse by the owner of the land in which it rose was dismissed on the ground that there was no privity of estate between the owner & the bonders, & that the owner, therefore, could not claim an easement by prescription on the ground of their enjoyment of it:—*Held*: an injunction ought to be granted, for it ought to be presumed that a right to use the waters had been acquired by arrangement with the owner of the mine as well as with the bonders.—*IVIMEY v. STOCKER* (1866), 1 Ch. App. 396; 35 L. J. Ch. 467; 14 L. T. 427; 12 Jur. N. S. 410; 14 W. R. 743, L. C. & L. JJ.

##### (b) How Prescriptive Right Established.

*See, generally*, Part III., Sect. 3, *ante*, & Prescription Act, 1832 (c. 71).

**1053. Whether purpose of watercourse must be permanent or temporary.**—*ARKWRIGHT v. GELL*, No. 363, *ante*.

**1054. —If grantor to be bound.**—(1) A riparian proprietor has a right to the natural stream of water flowing through the land in its natural state; & if the water be polluted by a proprietor higher up the stream, so as to occasion damage in law, though not in fact, to the first mentioned proprietor, it gives him a good cause of action against the upper proprietor, unless the latter have gained a right by long enjoyment or grant.

(2) No action will lie for an injury by the diversion of an artificial watercourse, where, from the nature of the case, it is obvious that the enjoyment of it depends upon temporary circumstances & is not of a permanent character, & where the interruption is by a person who stands in the nature of a grantor. Where water has flowed in an artificial & covered watercourse for more than sixty years from a colliery into an immemorial & natural stream, upon whose banks pltf.'s mills are situated, pltf., in such case, has no right for diversion of the water of such artificial watercourse against a party through whose land it passes, but who does not claim under or who is unauthorised by the colliery owners. The case, however, would be different if the water were polluted; & the abstraction of water to the amount of 5 per cent. or its detention so as to occasion sensible inconvenience, will support an action for such injury.

The general proposition, that, under all circumstances, the right to watercourses, arising from enjoyment, is the same whether they be natural or artificial, cannot possibly be sustained. The

#### PART IX. SECT. 2, SUB-SECT. 3.—D. (b).

**1053.1. Whether purpose of watercourse must be permanent or temporary.**—Prior to 1894, H. & P. were tenants of adjoining farms on the same estate. In 1861 the predecessor of H., for the better drainage of his holding, constructed a drain through his lands to a neighbouring river, & at the same time a weir was constructed on the course of this drain, & a "carry" or conduit, by which some of the water was led in a different direction along H.'s side of the boundary between the two farms to the public road, & thence along that road, which ran through P.'s holding, supplying a tank on P.'s holding with water, & ultimately finding its way to the river at a point lower down its course. In 1896 H. altered the drainage of his lands &

removed the "carry" so that it no longer supplied P.'s tank. P. entered on H.'s land & restored it. H. sued for damages for trespass, obstruction of the watercourse, & for flooding the lands. P. justified under an alleged lost grant & by prescription. At the trial the jury found a lost grant, but found there was no flow of water as of right prior to the drainage operations in 1861, & the judge directed a verdict for deft. —*Held*: the drain was merely an artificial drain, not of a permanent character, but open to alteration or removal at H.'s pleasure, & P.'s enjoyment must be regarded as permissive only.—*HANNA v. POLLOCK*, [1898] 2 I. R. 532; [1900] 2 I. R. 601.—*IR*.

**h. Whether exercisable against Crown.**—A deft., having for more than twenty years next before the action

penned back water upon the land above him, by means of a dam erected on his own land, is protected by C. S. U. C., c. 88, 10 & 11 Viet., c. 5, although the land flooded belonged to the Crown during the greater part of that period.—*BOWLEY v. WOODLEY* (1852), 8 U. C. R. 318.—*CAN*.

**k. —**—Resp.'s predecessor in title applied in 1820 to the proper authority for leave to enter upon & cut up Crown land for the purpose of diverting the water of two springs on to his own land, & obtained permission, subject to the condition, "that by this diversion no injury is done to the properties or lands of others, or to the public roads, or anything else; otherwise, in that case, this favourable decision shall immediately cease." The diversion was made, & after a user for the period of prescription,

**Sect. 2.—Rights relating to watercourses: Sub-sect. 3, D. (b) & (c).]**

right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, & upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments, clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, & presumably of a temporary character, & liable to variation. The flow of water for twenty years from the caves of a house could not give a right to the neighbour to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof. The flow of water from a drain, for the purposes of agricultural improvements, for twenty years, could not give a right to the neighbour so as to preclude the proprietor from altering the level of his drains for the greater improvement of the land. The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy the use of the stream as a matter of right (POLLOCK, C.B.).—WOOD v. WAUD (1849), 3 Exch. 748; 18 L. J. Ex. 305; 13 L. T. O. S. 212; 13 Jur. 472; 154 E. R. 1047.

**Annotations:—**As to (1) **Consd.** Nixon v. Tynemouth Union R. & A. (1888), 52 J. P. 504. **Appl.** Sharp v. Wilson, Rotheray (1905), 93 L. T. 155. **Refd.** Embrey v. Owen (1851), 6 Exch. 353; Dickinson v. Grand Junction Canal Co. (1852), 7 Exch. 282; Sampson v. Hoddinott (1857), 1 C. B. N. S. 590; Whaley v. Laing (1857), 26 L. J. Ex. 327; Chasemore v. Richards (1859), 7 H. L. Cas. 349; Kensit v. G. E. Ry. (1883), 23 Ch. D. 566; Ormerod v. Todmorden Mill Co. (1883), 11 Q. B. D. 155. **As to** (2) **Appl.** Greatrex v. Hayward (1853), 8 Exch. 291. **Distd.** Beeston v. Weate (1856), 5 E. & B. 986. **Appl.** Wardle v. Brocklehurst (1859), 1 E. & E. 1058. **Consd.** Gaved v. Martyn (1865), 19 C. B. N. S. 732. **Appl.** Mason v. Shrewsbury & Hereford Ry. (1871), L. R. 6 Q. B. 578. **Apprvd.** Rameshur Pershad Narain Singh v. Koonj Behari Pattuk (1878), 4 App. Cas. 121. **Consd.** Chamber Colliery Co. v. Hopwood (1886), 32 Ch. D. 549. The law is explained in *Wood v. Waud* which has been followed ever since both by the *cts.* of common law & by the *Ct.* of Chancery (BOWEN, L.J.); Bunting v. Hicks (1894), 70 L. T. 455. **Appl.** Baily v. Clark, Son & Morland, [1902] 1 Ch. 649. **Consd.** Schumann v. Cotton, [1916] 2 Ch. 459. **Refd.** Rawstron v. Taylor (1855), 11 Exch. 369; Broadbent v. Ramsotham (1856), 11 Exch. 602; Burrows v. Lang, [1901] 2 Ch. 502; Whitmores (Edenbridge) v. Stanfield, [1909] 1 Ch. 427. **Generally, Refd.** Wood v. Sutcliffe (1851), 21 L. J. Ch. 253.

**1055.** ———. ] The flow of water from a drain made for the purposes of agricultural improvements for twenty years, does not give a right to the neighbour, so as to preclude the proprietor from altering the level of his drain for the improvement of his land.

The right of the party to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse, &

the circumstances under which it was created. This watercourse is clearly of a temporary nature only, & is dependent upon the mode which deft. may adopt in draining his land (PARKE, B.).—GREATREX v. HAYWARD (1853), 8 Exch. 201; 22 L. J. Ex. 137; 155 E. R. 1357.

**Annotations:—****Distd.** Beeston v. Weate (1856), 5 E. & B. 986. **Consd.** Gaved v. Martyn (1865), 19 C. B. N. S. 732; Rameshur Pershad Narain Singh v. Koonj Behari Pattuk (1878), 4 App. Cas. 121. **Appl.** Burrows v. Lang, [1901] 2 Ch. 502. **Refd.** Rawstron v. Taylor (1855), 11 Exch. 369; Baily v. Clark, Son & Morland, [1902] 1 Ch. 649.

**1056.** ———. ] **Application to claim under Prescription Act, 1832 (c. 71).—**(1) A right to the flow of water along an artificial cut over the soil of another cannot be acquired under the above Act, unless the circumstances under which the cut was made show that it was intended to be of a permanent character.

(2) One who by lease or by licence from the owner of the soil has the right of digging & working clay, or minerals, thereunder, has such an interest in the soil as will entitle him to claim under Prescription Act, 1832 (c. 71), a right to the flow of water over the surface, by a twenty years' user.

The rights of tin-borders according to the customary law of Cornwall to the use of water within their tin-bounds, for the purpose of streaming their tin, will not prevent the acquisition by another of a prescriptive right under the above Act, to the enjoyment of the water by a twenty years' user; nor will this right be affected by an agreement with the tin-borders for a money payment to abstain from fouling the water by streaming their tin therein.—GAVED v. MARTYN (1865), 19 C. B. N. S. 732; 34 L. J. C. P. 353; 13 L. T. 74; 11 Jur. N. S. 1017; 14 W. R. 62; 144 E. R. 974.

**Annotations:—**As to (1) **Refd.** Mason v. Shrewsbury & Hereford Ry. (1871), 25 L. T. 239. **As to** (2) **Distd.** Ivimey v. Stocker (1866), 1 Ch. App. 396. **Generally, Mentd.** Lyell v. Hothfield, [1914] 3 K. B. 911.

**1057.** ———. ]—BURROWS v. LANG, No. 189, *ante*.

**1058.** ———. ]—BAILY & CO. v. CLARK, SON & MORLAND, No. 1016, *ante*.

**1059.** Temporary purpose—Evidence of—Notice of probable discontinuance.]—ARKWRIGHT v. GELL, No. 363, *ante*.

**1060.** ———. ] What amounts to—No intention of enjoyment as of right.]—WOOD v. WAUD, No. 1051, *ante*.

**1061.** ———. ]—Agricultural purpose.]—GREATREX v. HAYWARD, No. 1055, *ante*.

**1062.** ———. ]—BEESTON v. WEATE, No. 330, *ante*.

**1063.** ———. ]—BURROWS v. LANG, No. 189, *ante*.

**1064.** Evidence in support—Long user—Uninterrupted.]—After a long enjoyment of a water-

resp. applied in 1855 to have "the same privilege extended to him under the like conditions," which was granted subject to the condition that the privilege might be revoked at any time by the Govt., & that private & public interests were to be respected:—**Held:** the circumstances in which the original diversion was made in 1820 were not such as to prevent a prescriptive title beginning to run against the Govt., & after the prescriptive right had been acquired the subsequent act of resp. could not undo it, as it did not amount to a surrender nor estop him from claiming the right as against a grantee of the Govt.—FRENCH HOKK COMBR. v. HUO (1885), 54 L. T. 92.—S. AF.

**1. Tessor of right not owner of and.]—**Pltfs. & their predecessors in

title had for many years, under a lease from B., a supply of water by pipes passing through the land of deft. B. did not in fact own the land, & had no right to make the lease. There was no evidence that the lease was made with the knowledge & consent of H., the predecessor in title of deft., the owner of the servient tenement:—**Held:** pltfs.' right to the easement could not be supported on the presumption of a lost grant & a continuous uninterrupted user for over 20 years referable to that title.—LOGGIE v. MONTGOMERY (1903), 3 E. L. R. 336; 38 N. B. R. 112.—CAN.

**m. Seasons of drought—How far prescriptive right affected.]—**An easement which is not a customary right need not be reasonable. An easement

may be established of the right to cause river water to flow across the servient tenement on to the dominant tenement for the purpose of irrigation, by means of embankments erected on the dominant tenement. In establishing such easements, it is immaterial whether the exercise of the right is continuous, provided it has been exercised for the statutory period, during seasons of drought, when it could be taken advantage of.—BUDHU MANDAL v. MALIAT MANDAL (1903), 1 L. R. 30 Calc. 1077.—IND.

**n. Enjoyment while stream of no use—Cannot create prescriptive right.]—**Prior to 1849 pltf.'s predecessors had enjoyed a right to take water from a natural stream flowing near their building. In 1849 deft. railway co.,

course running to a house & garden, through the ground of another, it shall be presumed the owner of the house has a right to the watercourse, unless the other party can show a special licence, or an agreement to restrain it in point of time. A long quiet enjoyment is the best evidence of a right.—*FINCH v. RESBRIDGER* (1700), 2 Vern. 390; 23 E. R. 850.

1065. ———— As of right.]—*ARKWRIGHT v. GELL*, No. 363, *ante*.

1066. ———— Two hundred & fifty years.]—*WHITMORES (EDENBRIDGE), LTD. v. STANFORD*, No. 1028, *ante*.

1067. ———— & abandonment of original purpose of watercourse.]—*MAGOR v. CHADWICK*, No. 990, *ante*.

1068. ————]—The highway authority of a rural district had, for a time beyond living memory, maintained a pipe running through a bank which divided the highway from deft.'s land adjoining, & had discharged through the pipe & on to deft.'s land, water which collected on the highway. There was no defined channel on deft.'s land into which the water so discharged could flow. Deft. having stopped up the pipe, an injunction was claimed to restrain him from continuing the obstruction. On appeal from the refusal of the injunction:—*Held*: the fact that the pipe was not connected with a defined channel into which the water conveyed by it could flow did not prevent its being a drain within Highway Act, 1835 (c. 50), s. 67; & in view of the length of time during which the drain had been used, a legal origin ought to be presumed for the right claimed, of passing water through the drain on to deft.'s land.—*A.-G. v. COPELAND*, [1902] 1 K. B. 690; 71 L. J. K. B. 472; 86 L. T. 486; 66 J. P. 420; 50 W. R. 490; 18 T. L. R. 394, C. A.

*Annotation*:—*Reid*. *Thomas v. Gower R. C.*, [1922] 2 K. B. 76.

1069. ———— Act tortious & actionable—Unless sustained by existence of easement.]—*BREESTON v. WEATE*, No. 330, *ante*.

1070. ———— Right to flow of pure water.—Not by right to abstract water.—To non-riparian tenement.]—(1) A riparian proprietor cannot keep the land abutting on a river, the possession of which gives him his water rights, & at the same time, by granting a part of that land which does not abut on the river, transfer those rights, or any of them, & thus create a right in gross by assigning a portion of his rights appurtenant. The rights which a riparian proprietor has with respect to the water are entirely derived from the possession of land abutting on the river. If he grants away any portion of his land so abutting, the grantee becomes a riparian proprietor & has similar rights; but if he gives away a portion of his estate not abutting on the river, then the grantee of the land would have no water rights by virtue merely of his occupation, nor can he have them by express grant, except as against the grantor, so as to sue other

persons in his own name for an infringement of them.

(2) The dominant & servient tenements have no apparent connection with one another. The abstraction of the water from the stream took place at a spot situated in other land than that called the dominant tenement & in no sort of way affected the enjoyment of the water at what is now called the servient tenement (*POLLOCK, C. B.*).—*STOCKPORT WATERWORKS CO. v. POTTER* (1864), 3 II. & C. 300; 4 New Rep. 441; 10 L. T. 748; 10 Jur. N. S. 1005; 159 E. R. 545.

*Annotations*:—As to (1) *Distd.* *Nuttall v. Bracewell* (1866), L. R. 2 Exch. 1. *Consd.* *Holker v. Porritt* (1875), L. R. 10 Exch. 59. *Apprvd.* *Ormerod v. Todmorden Mill Co.* (1883), 11 Q. B. D. 155. *Distd.* *Kensit v. G. E. Ry.* (1884), 27 Ch. D. 122. *Consd.* *McCartney v. Londonderry & Lough Swilly Rly.*, [1904] A. C. 307.

#### (c) Nature and Extent of User.

*See, generally*, Part III., Sect. 3, *ante*.

1071. For purposes of dominant tenement only.]—The Metropolis Management Act, 1855 (c. 120), vested in plffs. an open sewer, called the Stamford Brook. The Metropolis Management Amendment Act, 1862 (c. 102), s. 61, enacted that no person should make or branch any sewer or drain, or make any opening into any sewer vested in the plffs., without their previous consent in writing; provided that any person might, with such consent, at his own expense, make or branch any drain into any such sewer in such manner as plffs. should direct. After the passing of the Act of 1855, plffs. allowed four old cottages belonging to defts. on land just outside the Metropolitan area & bounded by the Stamford Brook, to continue to drain through an eighteen-inch brick drain into Stamford Brook. They subsequently, at the request of defts., who paid half the cost, covered in the brook & converted it into a main sewer. When they did this, they made a drain-eye in the newly covered-in sewer as a communication for the eighteen-inch drain. Defts. afterwards built other cottages on the same land, & claimed the right to use the eighteen-inch drain for the purpose of draining the new cottages through the communication into the sewer:—*Held*: as defts. had not proved any prescriptive right to use the eighteen-inch drain for the sewage of the new cottages, nor obtained the written consent of plffs. for that purpose under sect. 61 of the Act of 1862, they were not entitled to use the eighteen-inch drain for any other purposes than those for which they used it when the brook was covered in. Therefore, plffs. were entitled to an injunction to restrain defts. from permitting their additional cottages, or any building other than the four old cottages, to drain into the Stamford Brook.

If a man has an artificial drain or sewer by which he drains anything, either water or sewage, into his neighbour's land, he cannot use that drain so as to drain another close or another house (*JAMES, L.J.*).—*METROPOLITAN BOARD OF WORKS v.*

In constructing a line, interfered with or tapped the subterranean sources of this stream which ceased to flow, the water which had supplied it finding its way to the surface of a cutting on the line. The co. conveyed this water away in a new artificial channel. The water of this new stream was in 1898 used, but in this year the co. used the water for their own purposes, & plff. who had been taking water since 1849 for domestic purposes brought an action for disturbance of prescriptive rights. The jury found that the stream was substituted for the old, & that the co. had not con-

structed the channel until they required the water for their own purposes:—*Held*: this new artificial watercourse being made for the co.'s benefit on their land, no enjoyment of the water thereof, while the water was of no use to the co., could create a prescriptive right in plff.—*M'Evoy v. GREAT NORTHERN RY. CO.*, [1900] 2 I. R. 325.—*IR.*

#### PART IX. SECT. 2, SUB-SECT. 3. — D. (c).

c. *Excessive user*—*Effect of.*]—A right acquired by twenty years' un-

interrupted user to pen back a stream in certain quantities for a mill, will be strictly confined to the right as actually exercised; & any subsequent excess beyond the twenty years' enjoyment, if injurious to others, will render the party liable to an action.—*M'NAB v. ADAMSON* (1849), 6 U. C. R. 160.—*CAN.*

*Held*: plff. had acquired by twenty years' enjoyment, a right to the use of water flowing through his land,

**Sect. 2.—Rights relating to watercourses: Sub-sect. 3, D. (c); sub-sect. 4.]**

LONDON & NORTH WESTERN RY. CO. (1881), 17 Ch. D. 246; 50 L. J. Ch. 409; 44 L. T. 270; 29 W. R. 693, C. A.

**Annotations:—***Fold.* A.-G. v. Acton L. B. (1882), 22 Ch. D. 221. *Refd.* Islington Vestry v. Hornsey U. C., [1900] 1 Ch. 695; L. C. C. v. Acton U. D. C. (1900), 17 T. L. R. 157.

**1072. — Right to discharge sewage.]—A.-G. v. ACTON LOCAL BOARD, No. 41, ante.**

**1073. —**—[In an action by a landowner against a corp., the urban sanitary authority for the borough of D., for an injunction to restrain them from discharging or allowing to be discharged sewage upon his lands from the sewers vested in them so as to cause a nuisance, defts. set up a prescriptive right based on the presumption of a lost grant by pltf.'s predecessors in title to trustees for the benefit of the inhabitants of the borough to drain all sewage from any tenements built or to be built within the borough, & to discharge the same on pltf.'s lands. This claim of right failed. It was proved, however, that there were a number of houses in the borough in respect of which prescriptive rights had been acquired to pass sewage into & along the sewers, & that there were other houses the connections of which with the sewers had been made with the consent or by the acquiescence of defts. :—*Held*: an injunction could not be granted so as to interfere with the prescriptive rights that had been acquired, nor to oblige defts. to stop up the connections of the other houses which they had sanctioned; but an injunction must be granted to restrain defts. from authorising or directing any sewage to flow or be discharged on to pltf.'s lands from sewers vested in them as the sanitary authority. —*BROWN v. DUNSTABLE CORPN.*, [1899] 2 Ch. 378; 68 L. J. Ch. 498; 80 L. T. 650; 63 J. P. 519; 47 W. R. 538; 15 T. L. R. 386; 43 Sol. Jo. 508.

**Annotations:—***Apld.* East Barnet Valley U. C. v. Stallard, [1900] 2 Ch. 555. *Refd.* Eastwood v. Honley U. C., [1900] 1 Ch. 781; St. Mary, Islington Vestry v. Hornsey U. C. (1900), 69 L. J. Ch. 321; Southall Norwood U. D. C. v. Middlesex County Council (1901), 83 L. T. 742; West Riding of Yorkshire Rivers Board v. Gaunt (1902), 19

though in a defined artificial channel, which was originally made for the benefit of all the persons by or through whose land the water was by means of it caused to flow. —*POWELL v. BUTLER* (1871), 1 R. 5 C. L. 309.—*IR.*

**PART IX. SECT. 2, SUB-SECT. 4.**

**1074 i. Right to pollute.—No general right—Right to flow of pure water.]—**A riparian owner is entitled to have an undiminished flow of water in its natural state, subject only to reasonable use by other proprietors. Neither at common law nor by 37 Vict. No. 13, s. 15, is a deft. justified in fouling the water. —*LOMAX v. JARVIS* (1885), 6 N. S. W. L. R. 237.—*AUS.*

**1074 ii. —**—[Pltf. declared that he was entitled to the water of a stream for working his mill, & complained that deft., owning a mill higher up, had unlawfully deposited saw-dust, etc., in the stream, which was carried down & choked up pltf.'s mill pond & races. Deft. denied pltf.'s right to the water, which pltf. sufficiently proved, but, there being no appreciable damage, the jury found a general verdict for deft. :—*Held*: the right being established, the deposit of saw-dust, etc., was an injury to it, for which pltf. was entitled to a verdict. —*MITCHELL v. BARRY* (1867), 26 U. C. R. 416.—*CAN.*

**1074 iii. —**—[Injunction granted restraining deft. co. from

allowing polluted water to flow from their mining plant into a river so as to affect the fishing rights of a riparian owner on the ground that a riparian owner on a natural stream has a right to the full flow of the water in its natural state without any diminution or pollution. —*NEPISQUIT REAL ESTATE & FISHING CO. v. CANADIAN IRON CORPN.* (1913), 13 E. L. R. 458; 14 D. L. R. 752.—*CAN.*

**1074 iv. —**—[An upper proprietor is not entitled to throw impurities, & especially artificial impurities, into the stream, so as to pollute the water as it passes through the estate of a lower proprietor. A lower proprietor is entitled to complain of such pollution as renders the waters unfit for primary purposes; but it will be a good defence against such complaint, that the stream has been for time immemorial devoted to secondary purposes, such as manufacturing, so as to supersede & abrogate the primary purposes. —*BUCELEUCH, ETC. (DUKE) v. COWAN, ETC.* (1866), 5 Macph. (Ct. of Sess.) 214; 39 Sc. Jur. 152.—*SCOT.*

**1074 v. —**—[The comrs. under a private Act for supplying a town with water for domestic use obtained by purchase from the proprietors of a loch, the right to take water therefrom. In a petition for interdict presented by the comrs. against one of the proprietors

T. L. R. 140; *Faber v. Gosworth U. D. C.* (1903), 88 L. J. 549; *Harrington v. Derby Corp.*, [1905] 1 Ch. 205; *Waltham Holy Cross U. D. C. v. Leo Conservancy Board* (1910), 103 L. T. 192.

**SUB-SECT. 4.—POLLUTION OF WATER.**

*See, generally,* NUISANCE; PUBLIC HEALTH; SEWERS & DRAINS; WATER SUPPLY; WATERS & WATERCOURSES.

**1074. Right to pollute—No general right—Right to flow of pure water.]—***WOOD v. WAUD*, No. 1051, ante.

**1075. —**—[To discharge refuse from tan pits.]—A lease contained a reservation "of the free running of water & soil from lands contiguous to the premises demised through the sewers & watercourses within the premises":—*Held*: this reservation did not give a right to discharge the refuse from tan pits made after the demise through a watercourse within the demised premises. —*CHADWICK v. MARSDEN* (1867), L. R. 2 Exch. 285; 36 L. J. Ex. 177; 16 L. T. 606; 31 J. P. 535; 15 W. R. 964.

**1076. —**—[To discharge sewage effluent.]—*PHILLIMORE v. WATFORD RURAL COUNCIL*, No. 1002, ante.

**1077. —**—[Pollution without right—May involve loss of easement—Right to discharge pure water.]—Where a party who is entitled to a limited right, exercises it in excess, so as to cause a nuisance or create a right of action entire in its nature, as where a window or a drain is enlarged or applied to other purposes than originally authorised, as the entire nuisance may be abated, an action for an obstruction of the original right of easement cannot be maintained, until its exercise has been reduced within its original limits; & if an action is brought for the obstruction, in which the right is declared upon according to its enlarged exercise, & the declaration is not supported by the proof, on a traverse of the right as laid, an amendment will not be allowed, as the effect would be to evade, & not to determine, the question really in controversy between the parties. Thus, where the declaration was for obstructing a drain, over which

of the loch:—*Held*: he was not entitled to wash sheep in the loch which had been dipped some months previously in a fluid containing deleterious ingredients, although it was not proved that the pollution would be to such an extent as would have any perceptible effect upon the quality of the loch's water. —*DUMFRIES WATERWORKS COMRS. v. M'CULLOCH* (1874), 1 R. (Ct. of Sess.) 975; 11 Sc. L. R. 563.—*SCOT.*

**1074 vi. —**—[A local authority empowered to enforce Rivers Pollution Prevention Act, 1876 (c. 75), brought an action against an oil co. averring that defenders were discharging into a river polluting liquids & were thereby committing an offence against sect. 4 of the Act & praying for decree ordaining the defenders to abstain from causing such pollution. Defenders whose works were entirely constructed after the passing of the Act founding on sects. 6 & 10 of the Act pleaded that they were entitled to *absolutor* in respect that they were using every reasonably practicable & available means of rendering the pollution harmless. The ct. repelled this plea as irrelevant, defender's works having been entirely constructed after the passing of the Act. —*MIDLOTHIAN COUNTY COUNCIL v. PUMPHREY OIL CO. & OAKBANK OIL CO.* (1903), 6 F. (Ct. of Sess.) 387; 41 Sc. L. R. 181; 11 S. L. T. 557.—*SCOT.*

q. . . . . Not if injurious to public health.] There can be no prescriptive right to pollute a stream by the discharge of sewage in such manner & to such an extent as to be injurious to public health.--BLACKBURN v. SOMERS (1879), 5 L. R. 11, 1.—JR.

**1097 H. ---.] ---** A heritor on the banks of a stream into which water pumped from mineral workings had been in use to be discharged from an artificial mine or level for upwards of forty years in 1881 presented a petition to the sheriff against superior heritors who had for more than forty years taken off, with consent of the mineral tenant, a supply of water from an orifice in this level, & who had recently with the mineral tenant's consent enlarged this orifice & withdrawn a larger



**BROWN v. BEST** (1747), 1 Wils. 174; 95 E. R. 7.

*Annotations*.—**Reff.** Wood v. Waud (1849), 3 Exch. 748; Dickinson v. Grand Junction Canal Co. (1852), 21 L. J. Ex. 241; Chasemore v. Richards (1859), 7 H. L. Cas. 349; Rhodes v. Alrodale Drainage Comrs. (1876), 1 C. P. D. 380.

**1098.**—**Not to another's detriment.**—**DUNCOMBE v. RANDALL** (1630), Het. 32; 124 E. R. 320. *Annotation*.—**Reff.** Brown v. Best (1747), 1 Wils. 174.

**1099.**—**Flow to dominant tenement diminished.**—A landowner granted to a co. all the watercourses, dams, & reservoirs upon certain lands of his, which watercourses, dams, & reservoirs were laid down upon the annexed plan, which was to be taken as part of the deed, & were hereon coloured blue, & also the several streams & springs of water flowing into or feeding the said watercourses, dams, & reservoirs, with right for the co. solely to take & use the water from the said springs or streams of water, watercourses, dams, & reservoirs, with powers to cleanse & repair, & with all such other powers as should be requisite for enabling the co. to enjoy the premises thereby granted. The grantor was to be at liberty to use the waste or overflow water from the dams or reservoirs of the co., but was not to exercise this power if the co. resolved that its exercise would be injurious to them. The property coloured blue on the plan consisted of an artificial watercourse, partly covered & partly open, the dimensions of various parts of which were specified on the plan, & in some cases it was noted on the plan that they might be enlarged to a certain extent. Several springs & streams feeding the watercourse were marked on the plan. The watercourse, it appeared, was large enough to carry off all the water which flowed into it except after heavy rain, but at one point of its course underground there was a contraction of the channel which after heavy rain backed up the water & caused a considerable overflow over a weir, of which overflow the grantor for many years had the benefit. The grantees having occasion for more water proceeded to remove the above obstruction, so as to allow the whole of the water which came into the watercourse during heavy

rains to run down into their reservoir:—**Held**: the grant was a grant of the artificial channel, of the definite springs & streams on the land, & of such other water as should find its way into & run down the channel as it stood, & not a grant of all the water on the land, & that the grantees had no right to alter the levels of or enlarge the channel so as to enable it to carry off all the water that ran into it in times of heavy rain.—**TAYLOR v. ST. HELENS (CORPN.)** (1877), 6 Ch. D. 264; 46 L. J. Ch. 857; 37 L. T. 253; 25 W. R. 885, C. A.

**1100.**—**Watercourse rendered useless by extraneous agency—Enjoyment to be "as at present enjoyed but no further."**—A conveyance of land was made, subject to the reservation to the grantor & his assigns & the owners & occupiers for the time being of land of the grantor, of joint ownership & right to use a drain "as at present enjoyed by him or them, but no further or otherwise," & also subject to a right of entry for the purpose of repairing the drain. These rights became vested in defts. A local board of health having altered the level of a sewer into which the drain emptied, the drain became useless unless deepened. Defts. therefore entered on the land, & relaid the drain two feet deeper than before:—**Held**: the limitation was intended to affect the use to which the drain might be put, & not to limit the power to keep it in an efficient state, & whether the deed created a tenancy in common or only an easement, defts. had not exceeded the powers reserved by it.—**FINLINSON v. PORTER** (1875), L. R. 10 Q. B. 188; 44 L. J. Q. B. 56; 32 L. T. 391; 39 J. P. 661; 23 W. R. 315, D. C.

**1101.** **Effect of alteration—Will not defeat easement—Servient tenement not injured.**—**HALL v. SWIFT**, No. 525, ante.

#### SUB-SECT. 6.—REPAIR AND CLEANSING OF WATERCOURSES.

**1102.** **Right to repair—Incident to ownership of easement—Entry on land.**—**BROWN v. NICHOLS**, No. 160, ante.

quantity of water than formerly to the pursuer's prejudice, who had erected a dye work on the stream in 1865 praying to have defenders ordained to restore the watercourse to its former state:—**Held**: as the supply of water in the level was artificial & not natural defender's operations were lawful & pursuer had no legal right or interest entitling him to prevent them.—**HIGGIE v. NAIRN** (1882), 9 L. (Cl. of Sess.) 704; 19 Sc. L. R. 473.—**SCOT.**

**1097 III.**—**Deft., being the owner of a dominant tenement in favour of which there existed a servitude of aqueduct upon the land of plff., to lead water out of a particular dam fed by a spruit, constructed another dam 120 feet higher up across the bed of the spruit.**—**Held**: deft. had no right to alter the site of the dam without the consent of plff. as owner of the servient tenement.—**VAN HERBEEK v. COETZEE** (1914), App. D. 167.—**S. AF.**

**1098 I.**—**Not to another's detriment.**—Where defts. in 1871, without authority, diverted a watercourse on certain land & afterwards made compensation therefor to the then owner of the land, plff.'s predecessor in title:—**Held**: the equitable easement thereby created in favour of defts. was not valid against the registered deed of the plff., a bona fide purchaser for value without actual notice, defts. having shown no prescriptive right to divert the watercourse, & the diversion being wrongful as against plff.—**TOLTON v.**

**CANADIAN PACIFIC RY. Co.** (1892), 22 O. R. 204.—**CAN.**

**1098 II.**—**Plff. & deft., who were owners of adjoining premises used for purposes of trade, were entitled to a supply of water from G. river & to have the waste water carried away by separate channels.**—Improvements were made by the Comrs. of Public Works, in the course of which a tailrace was formed from plff.'s premises by clearing the natural bed of the G. river which formed the channel by which waste water from these premises had been formerly discharged, & three waste sluices were constructed for the purpose of keeping the water at a proper level & of preventing premises, including plff.'s, from being flooded. Deft. constructed a pier projecting across the channel through which the water was discharged from waste sluices into the tailrace & which it was alleged would throw back the water across the tailrace to plff.'s injury:—**Held**: plff. Irrespective of proof to actual damage was entitled to an injunction restraining deft. from continuing an obstruction in *alieu fluminis*.—**PALMER v. PERSE** (1877), 11 L. R. Eq. 616.—**IR.**

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**1099 I.**—**Flow to dominant tenement diminished.**—Where defts., who were riparian proprietors, with the

object of forming a water co. erected a weir in *alieu* which had a sensibly injurious effect upon the flow to & past plff.'s premises & could not be used for the purpose it was erected without a continuance of the injury:—**Held**: the erection of the weir was illegal & plffs. were entitled to a perpetual injunction.—**BELFAST ROPEWORKS Co. v. BOVD** (1887), 21 L. R. Ir. 560.—**IR.**

**1099 II.**—**A servient owner may alter an aqueduct & intake provided he do not thereby diminish the rights of the dominant owner.** Where a servient owner had altered the furrow & intake, & had thereby diminished the solidity of the watercourse, with the result that the escape of water through the soil was increased:—**Held**: he was liable for damages suffered by the dominant owner in consequence of such escape.—**STREYN v. ZERMAN** (1903), 20 S. C. 221.—**S. AF.**

#### PART IX. SECT. 2, SUB-SECT. 6.

**1102 I.** **Right to repair—Incident to ownership of easement—Entry on land.**—Deft., & those under whom he claimed, had the right to overflow the adjoining lands to an extent not exceeding ten acres, for supplying their mill, which right had been exercised to a certain extent for twenty years or more. In trespass for entering the adjoining close:—**Held**: having the right to overflow a part of plff.'s close, deft. had, as incident to that right,



*Secl. 2.—Rights relating to watercourses: Sub-sect. 6.]*

**1103.** ————.]—ANON. (1469), No. 481, *ante*.

**1104.** ————.]—POMFRET v. RICHOTT, No. 482, *ante*.

**1105.** ————.]—Grant to one his heirs & assigns, in consideration of a sum of money, of a liberty for him, his heirs & assigns, to carry up a sough (or a drain for a colliery) from the bottom of a piece of land of the grantor to an adjoining piece of land of the grantee, & also liberty for him, his heirs & assigns, to make two little sough pits in the said land of the grantor, in a certain place there, for the more easy & safe carrying up the tail of the sough, one of them to be covered from the top of the intended sough to the surface of the ground, as soon as conveniently may be done, after the making thereof, & the other to be kept open for examining the sough as long as is necessary for that purpose & no longer:—*Held*: the grant of the sough is a continuing grant, & the right of opening the sough pit, occasionally, for the necessary repair of the sough, is incident thereto by virtue of the grant.—HODGSON v. FIELD (1806), 7 East, 613; 3 Smith, K. B. 538; 103 E. R. 238.

*Annotation:—Reld. Cardigan v. Arncliffe (1823), 2 B. & C. 197.*

**1106.** ————.]—In case by a reversioner for widening a channel or watercourse in a close in the occupation of his tenant, *deft.* pleaded a prescriptive right, enjoyed for twenty years & upwards, as of right & without interruption, by the occupiers of a certain close, to a watercourse, & also a right to enter for the purpose of cleansing & scouring the same, when necessary, as appurtenant to the said close. The replication traversed the right to the watercourse, & the right to enter for the purpose of cleansing & scouring:—*Held*: the right to the watercourse, & the right to scour & cleanse, constituted one entire right, & consequently that such right was properly put in issue in its entirety.—PRETER v. DANIEL (1848), 5 C. B. 568; 17 L. J. C. P. 177; 12 Jur. 604; 130 E. R. 1001.

**1107.** ————.]—GOODHART v. HYETT, No. 483, *ante*.

**1108.** ————.]—THURROCK, GRAYS & TILBURY JOINT SEWERAGE BOARD v. GOLDSMITH (E. J. & W.), LTD., No. 485, *ante*.

**1109.** ————.]—Interference with—Injunction to restrain.]—SANDGATE LOCAL BOARD v. LENNY (1883), 25 Ch. D. 183, n.

*Annotation:—Distd. Goodhart v. Hyett (1883), 25 Ch. D. 182.*

**1110.** ————.]—GOODHART v. HYETT, No. 483, *ante*.

**1111.** ————.]—THURROCK, GRAYS & TILBURY JOINT SEWERAGE BOARD v. GOLDSMITH (E. J. & W.), LTD., No. 485, *ante*.

**1112.** ————.]—Extent of right—Widening stream.]

authority to enter & repair breaches in the natural state of the soil of the dam.—RITTAN v. WINANS (1856), 5 C. P. 379.—CAN.

**1102 II.** ————.]—R. Co. had a mill on one side of B. Ry. & a grinding factory on the other. To bring water from the mill to the factory a pipe had been laid beneath the railway line, & brick reservoirs at each side to preserve the proper level of the water. Servants of the co., having entered on the railway premises to repair the pipe & reservoirs without having first obtained the permission of the railway co., were convicted of an unlawful entry upon a railway. It was proved

that the repairs were necessary:—*Held*: as the pipes & reservoir belonged to R. Co. & were kept in repair by them, they, as owners of the dominant tenement, had a right to enter on the premises of the railway co., the owners of the servient tenement, to effect any necessary repairs, & the entry, being in the exercise of a right, could not be called unlawful.—R. v. VASMALE (1898), 1 L. R. 22 Bom. 525.—IND.

**1102 III.** ————.]—The registered proprietors of a parcel of land granted permission to *deft.* corpn. by letter to use the land "for any purpose" for which they might require it, but no instrument was executed in

—Lands, partly adjoining a river, were demised for 990 years, by indenture, in which the lessor granted to the lessee liberty to cut a goit or sluice out of the said river, at a proper & convenient distance above a certain weir, in the most convenient line through certain closes of the lessor, into a close, intended for a mill dam, part of the demised lands; & from time to time, & at any time to turn the water of the river through the goit; & liberty from time to time & at all times during the term, to view, examine, carry & lay down materials, & repair & amend the goit or sluice & other works specified, when so made as aforesaid, or any of them, when & as often as need or occasion should be, making reasonable satisfaction to the lessor, his heirs & assigns, for all damage to be done or occasioned thereby to the grass or herbage of the lessor, etc.; & the lessee covenanted that he, his exors., etc., would make reasonable satisfaction to the lessor, his heirs & assigns, for all damages to be occasioned to the lands of the lessor by the lessee, his exors., etc., in exercise of any of the liberties, privileges & powers by the indenture granted, except for the term of two years next ensuing the commencement of the rent, during which time no trespass or damage should be charged or paid for. In an action of trespass against the lessee for widening a goit on the lessor's soil to the extent of nine additional feet, *deft.* pleaded that the goit was made in due exercise of the liberty above mentioned, but that, the same not having been made of a sufficient width, & completed to a small & insufficient width only, viz. nine feet, so that, without widening it as after mentioned, *deft.* could not enjoy the demised tenements as he was entitled by the indenture to do, he, in further due exercise, etc., cut down the sides of the goit & widened it, justifying the alleged trespasses. Replication that, before the expiration of two years, etc., the lessee, in due exercise of the liberty, etc., made & completed a goit, being the goit in the plea mentioned, of the width therein mentioned; & the same remained & was used by the lessee continually from the last mentioned day until *deft.*, under colour of the indenture, committed the alleged trespasses. On demurrer to the replication:—*Held*: the privilege given to *deft.* by the deed was to make a goit once only, & after having completed a goit, he could not justify entering *pltf.*'s land again & widening the goit from nine feet to eighteen, for the power to make a goit was exhausted, & the widening was not a repairing or amending within the meaning of the deed.—BOSTOCK v. SIDEBOTTOM (1852), 18 Q. B. 813; 19 L. T. O. S. 316; 10 Jur. 1013; 118 E. R. 306; *affd. sub nom. SIDEBOTTOM v. BOSTOCK*, 18 Q. B. 829, Ex. Ch.; *subsequent proceedings* (1852), 20 L. T. O. S. 73.

**1113.** ————.]—Whether implied under Conveyancing Act, 1881 (c. 41), s. 6.]—LONG v. GOWLETT, No. 196, *ante*.

favour of *defts.* purporting to create any easement over the land. The purpose for which *defts.* required to use the land to lay water pipes in it leading water from their reservoir; & this was done. The proprietors subsequently transferred the land to *pltf.* After the land was so transferred *defts.* entered upon it for the purpose of repairing the water pipes:—*Held*: *defts.* had the right to enter upon the land for the purpose of repairing the pipes.—BARBER v. PIERCE CORPN. (1909), 28 N. Z. L. R. 609.—N.Z.

**r.** ————.]—Extent of right—Not to take materials from servient tenement.]—

**1114. Obligation to repair—By grantor—No action for non-repair.]—**POMFRET v. MICROFT, 60. 482, *ante*.

**1115. — Artificial watercourse—Prevention of damage to servient tenement.]—**In case by a reversioner for an injury to the reversion [by failure to repair a watercourse], it is no answer that the jury complained of was caused by the wrongful act of the tenant for which he might be liable to action.—EGREMONT v. PULMAN (1829), Mood. M. 404, N. P.

*Annotation:—*Expld. Bell v. Twentyman (1841), 1 Q. B. 766.

**1116. — — — — —.]—**If the owner of land in which is a house construct on the other part of the land a sewer, & let the house & afterwards, by reason of the original faulty construction of the sewer, the continued user of it by the owner in such a faulty state, the house is injured, the owner is liable to his lessee for keeping & continuing the sewer so constructed.—ALSTON v. ANT (1854), 3 E. & B. 128; 2 C. L. R. 933; L. J. Q. B. 163; 22 L. T. O. S. 221; 18 Jur. 2; 2 W. R. 161; 118 E. R. 1089.

*Annotation:—*Reid. Hargroves, Aronson v. Hartop (1905), 74 L. J. K. B. 233.

**1117. — — — — —.]—**Deft. occupied a house under which was an old drain, which after receiving the sewage of such house, ran under & received the sewage of several other houses, then turned back & came again under deft.'s house, & ran from it under the cellar of pltf.'s house, which adjoined that of deft., & from thence it went away to a public sewer. The drain got out of repair by reason of age & wear & tear, & the consequence was that water & sewage escaped & came into pltf.'s cellar, & injured his goods there. Deft. did not know that the drain turned back, & ran through his premises under those of pltf., nor was the defective state of the drain attributable to any negligence of deft.:—*Held*: deft. was liable for the damage pltf. had so sustained, as it was deft.'s duty to keep the sewage from passing from his own premises to those of pltf. otherwise than along the old drain through which only pltf., as the occupier of the servient tenement, was bound to receive it.—HUMPHRIES v. COUSINS (1877), 2 C. P. D. 239; 46 L. J. Q. B. 438; 36 L. T. 180; 41 J. P. 280; 25 W. R. 371, D. C.

*Annotations:—*Apld. Firth v. Bowling Iron Co. (1878), 3 C. P. D. 254; Gill v. Edouin (1894), 71 L. T. 762; Holland v. Lazarus (1897), 68 L. J. Q. B. 285. *Reid*. Edwards v. Birmingham Canal Navigations (1923), 40 T. L. R. 88.

**1118. — — — — — Servient owner entitled to use of water.]—**Where the owner of land on the bank of a river, for the purpose of bringing water from the river to a mill which he erected made a watercourse with a shuttle at the head of it to control the flow of the water from the river into the watercourse & afterwards conveyed away a portion of the land adjoining & his successor in title subsequently granted to the owner of the adjoining land so conveyed a right to use the water for the purposes of a mill belonging to him:—*Held*: the existence of that right did not affect the obligation of the owner of the watercourse towards the owner of the adjoining land to keep the shuttle in repair so as to prevent flood water from the river getting into the watercourse & overflowing on to his land.—BUCKLEY (R. H.) & SONS, LTD. v. BUCKLEY (N.) & SONS, [1898] 2 Q. B. 608; 67 L. J. Q. B. 953, C. A.

*Annotation:—*Distd. Whitmores (Edenbridge) v. Stanford, [1909] 1 C. 427.

**1119. — Under covenant.]—**The owners in fee of the G. estate by deed of 1808, confirmed by private Act of Parliament, granted to deft. corp., for the purposes of the supply authorised by their Acts a perpetual easement of taking & using surface water from a specified watershed area on pltf.'s estate. The water was conducted by streams & channels, partly natural & partly artificial, to ponds or reservoirs existing on the estate, from which there were streams & channels also partly natural & partly artificial for taking off the overflow from the ponds, the corp. covenanting "at all times to maintain & keep all their works now made & hereafter to be made" on the G. estate in good & sufficient repair & condition, & not to do or occasion any avoidable damage or injury to the estate. Water having escaped & overflowed from the ponds & streams & done damage to the estate:—*Held*: the covenant covered works not made by the corp. & was not confined to artificial watercourses but extended to works existing on the estate at the date of the covenant, including every natural & artificial constituent utilised for the services of the corp.'s water system.—EVAN-THOMAS v. NEATH CORPN. (1912), 76 J. P. 397.

**1120. Right to cleanse.]—**BROWN v. BEST, No. 1097, *ante*.

**1121. — Whether implied under Conveyancing Act, 1881 (c. 41), s. 6.]—**LONG v. GOWLETT, No. 196, *ante*.

**1122. Obligation to cleanse.]—**Declaration in case, alleging that pltf. was reversioner of a house, garden, & premises, then occupied by his tenant, J.; that deft. was possessed & in the occupation of a close near to the house etc.; & that before & at the time etc. there was a watercourse in the close, & deft., by reason of his possession of the close, ought to have scoured & kept open the watercourse so often as was necessary, to prevent the water from being obstructed, & from running out of the watercourse unto, into, & under the said house etc. Breach, that deft., during the tenant's occupation, wrongfully permitted the watercourse to be obstructed for want of proper cleansing, inasmuch that the water was penned back, & ran into & damaged the said house, to the injury of pltf.'s reversion. Plea, that a wall, parcel of pltf.'s said premises, was situate near to the said watercourse & to deft.'s close; & by reason of the said wall being, through the neglect of J., the tenant, in that behalf, ruinous, etc., part of the said wall, near to the said watercourse, before & at the times etc., fell down, & by means thereof, rubbish etc., being part of the materials, fell into the watercourse, & the same was thereby choked up as in the declaration etc., & the water for a short time unavoidably was penned back etc., & ran out, as in the declaration mentioned. Averment, that deft., in a short & reasonable time after he had notice that the watercourse was so choked up etc., & before action brought, cleansed out the same, so that the water flowed as it ought to do. On general demurrer:—*Held*: the alleged default of the tenant was no answer, the plea not showing that the owners & occupiers of the estate for the time being were bound to repair the wall which fell, & deft. could not excuse himself by averring that he repaired as soon as he had notice of the injury, for he became liable at the time when the injury occurred. So if he had alleged that he repaired as soon as possible after the

A servitude of *aqueductus* does not give the owner of the dominant tenement the right to take materials from

the servient tenement for the purpose of repairing & maintaining the aqueduct & of enabling him to better enjoy

his servitude.—STEYN v. ZEEHAN (1903), 20 S. C. 221.—S. AF.

**Sect. 2.—Rights relating to watercourses : Sub-sects. 6 & 7. Sects. 3 & 4. Part X. Sect. 1: Sub-sect. 1, A. (a).]**

**injury.**—*BELL v. TWENTYMAN* (1841), 1 Q. B. 766; 1 Gal. & Dav. 223; 10 L. J. Q. B. 278; 6 Jur. 366; 113 E. R. 1524.

**Annotations:—***Refd.* Carstairs v. Taylor (1871), L. R. 6 Exch. 217; *Humphries v. Cousins* (1877), 2 C. P. D. 239; *Goodhart v. Hyett* (1883), 25 Ch. D. 182. *Mentd.* Taylor v. Stoddall (1845), 5 L. T. O. S. 214.

**1123. Right of way to repair.]**—By an enclosure Act, all ways over W. field were to be extinguished as soon as deft. should have made a new carriage road across it; provided that nothing contained in the Act should deprive pltf. of the right of ingress & egress to & from a certain watercourse there, for the purpose of opening certain hatches, & cleansing the watercourse:—*Held*: pltf.'s right of way to the hatches, along the side of the stream, was not extinguished by deft.'s having made a more circuitous track to the hatches, at some little distance from the side of the stream.—*ADEANE v. MORTLOCK* (1839), 5 Bing. N. C. 236; 1 Arn. 488; 7 Scott, 189; 8 L. J. C. P. 138; 3 Jur. 105; 132 E. R. 1095.

**1124. —.]**—*ROBERTS v. FELLOWES*, No. 1026, *ante*.

#### SUB-SECT. 7.—ANCILLARY RIGHTS.

**1125. Right of way—Drawing water from pool—Artificial course from pool stopped—Right to carry off water with carts.]**—J. was seized of two contiguous acres of land, A. & B. In A. there was a pool, & on B. he built a house, & laid pipes to convey water from the pool to the house. A. & B. having been separately alienated:—*Held*: the alienee of B. had no right of way over A. to fetch water from the pool with carts & horses for the use of the house, when the pipes were stopped.—*HALL v. NEWLAND* (1673), 1 Freem. K. B. 140; 80 E. R. 102.

**1126. — Drawing water from pump.]**—*JOHNSON v. WOOD* (1843), 2 L. T. O. S. 187.

**1127. — Drawing water from well.]**—*RACE v. WARD*, No. 1138, *post*.

**1128. —.]**—*BOWER v. SANDFORD* (1880), 5 T. L. R. 570.

**Annotation:—***Refd.* Bradford Corpn. v. Pickles, [1894] 3 Ch. 53.

**1129. — To open hatches.]**—*ADEANE v. MORTLOCK*, No. 1123, *ante*.

#### PART IX. SECT. 2, SUB-SECT. 7.

**a. Right of way — Drawing water from springs.]**—Pltf. claimed through deft.'s predecessor in title the right to use two springs, C. & E., under conveyances in 1841 & 1843 of lands north of the springs. One conveyance granted the sole & perpetual right to spring C. together with the right to use a road from the southern boundary of the land granted to the spring; the other granted the sole & perpetual use of & right to the water of spring E. without indicating the manner in which the water was to be approached or its enjoyment had. Deft. was the owner of the land to the south upon which the springs were situated. The water had been carried from the springs by means of pipes through deft.'s land to pltf.'s land, from 1861 to 1882 or 1883, when deft. tore up the pipes, insisting that the then owner of pltf.'s land had no right to maintain them, & thereupon an arrangement was made under which the pipes were again put down with the addition of certain troughs for the convenience of deft.'s cattle:—*Held*: pltf. had a right of access to

spring C. by the road mentioned, & to spring E. by a convenient road to be laid out, but had no right to the easement of conveying the water by pipes through deft.'s land.—*McKAY v. BRUCE* (1891), 20 O. R. 709.—*CAN*.

#### PART IX. SECT. 3.

**1133 i. Drawing water from well or spring.]**—A. & B. were tenants of the same landlord. A. held under a yearly tenancy, created on the determination in 1889 of a lease of 1851, which excepted to the lessor "all waters & watercourses in or adjoining the demised premises," with liberty to the lessor to turn & dispose of such waters & watercourses. There was an enclosed well on A.'s land, out of which some four or five families admittedly regularly took water, B.'s family being amongst the number. To an action of trespass brought by A. B. in his defence relied on a claim of right, founded on lost grant or alternatively upon a demise, to take water from the well on A.'s land, & counterclaimed for interference by A. with the exercise of the right claimed:—*Held*: on the

— To remove wreck of the sea.]—*See* **WATERS & WATERCOURSES.**

**Right to alter watercourse.]**—*See* Nos. 1098–1100, *ante*.

**Right to repair watercourse.]**—*See* Nos. 1102–1108, *ante*.

#### SECT. 3.—RIGHTS RELATING TO POOLS, SPRINGS AND WATERS.

**1130. Right to draw pot-water.]**—*WEEKLY v. WILDMAN* (1698), 1 Ld. Raym. 405; 91 E. R. 1169.

**Annotations:—***Consd.* Race v. Ward (1855), 4 E. & B. 702. *Refd.* Ackroyd v. Smith (1850), 10 C. B. 164; Hill v. Tupper (1863), 2 New Rep. 201.

**1131. Washing & watering cattle at a pond.]**—The privilege of washing & watering cattle at a pond & of taking & using the water for culinary & other domestic purposes is not a *profit à prendre* but a mere easement.

A *profit à prendre* must be something taken out of the soil (*PATTESON, J.*).—*MANNING v. WASDALE* (1836), 5 Ad. & El. 758; 2 Har. & W. 431; 1 Nev. & P. K. B. 172; 6 L. J. K. B. 59; 111 E. R. 1353.

**Annotations:—***Consd.* Franks v. Quinsee (1839), 2 Will. Woll. & H. 58; Race v. Ward (1855), 4 E. & B. 702.

**1132. Drawing water from pond.]**—*MANNING v. WASDALE*, No. 1131, *ante*.

**1133. Drawing water from well or spring.]**—*RACE v. WARD*, No. 1138, *post*.

**1134. —.]**—A well situated on private ground, the water of which has been used for domestic purposes gratuitously by the inhabitants in the vicinity for the prescriptive period, is a public well within Public Health (Scotland) Act, 1867 (c. 101), s. 89; & the local authority can enter on the land & do all acts to the well for continuing & maintaining it, which the inhabitants might have done before, & this, notwithstanding that there may be a co. with a vested right to supply the inhabitants with water.—*SMITH v. ARCHIBALD* (1880), 5 App. Cas. 489, H. L.

**Annotations:—***Refd.* A.-G. v. Tonkin (1902), 18 T. L. R. 29. *Mentd.* Knuckey v. Redruth R. C. (1904), 73 L. J. K. B. 265.

**1135. —.]** *BOWER v. SANDFORD* (1880), 5 T. L. R. 570.

**Annotation:—***Refd.* Bradford Corpn. v. Pickles, [1894] 3 Ch. 53.

**1136. Right to flow of surface spring—Flowing in undefined channel.]**—*ENNOR v. BARWELL*, No. 1015, *ante*.

true construction of the lease of 1851 the well, together with the waters therein, were excepted to the landlord, the user of the well by deft. was lawful under the permission of the landlord.—*WHELAN v. LEONARD*, [1917] 2 I. R. 323, 330, 333.—*IR*.

**1133 ii. —.]**—Where S. had obtained from B.'s predecessor in title a duly registered servitude of half the water in a certain fountain on B.'s ground:—*Held*: B. was not entitled to divert underground water from the fountain by sinking a well close to the fountain & pumping water therefrom, & thereby diminishing the flow of water in the fountain to the prejudice of S.—*SNIJMAN v. BOSHOFF* (1905), O. R. C. 1.—*S. AF*.

**t. Pondage.]**—*JARDINE v. SIMON* (1876), (1825–1897), N. B. Dig. 315.—*CAN*.

**a. Skating on lake.]**—Injunction granted to the proprietrix of a lake against villagers trespassing on its surface when in ice, & skating & playing the game of curling thereon.—*HARVEY v. LINDSAY* (1853), 1 W. R. 535.—*SCOT*

## SECT. 4.—EXTINGUISHMENT OF RIGHTS.

See, generally, Part VI., *ante*.

1137. Interruption in accustomed course—Continued to period within twenty years.]—*HALL v. SWIFT*, No. 525, *ante*.

1138. By Inclosure Acts—Right to water not mentioned therein.]—Action for breaking a close. Plea that, by custom, the inhabitants of a township had a right to take water for domestic purposes from a well in the close; that plff. choked it up, & justifying the acts complained of as done by inhabitants of the township to clear out the well. Issue thereon. On the trial it appeared that the inhabitants had, from time immemorial, taken the water from the well. About fifty years before the action the *locus in quo* was inclosed under a special inclosure Act, incorporating 41 Geo. 3 (c. 109). Neither in the special Act, nor in the award of the comrs., was any mention made of this well, or of any access to it. Verdict for defts., with leave to move:—*Held*: the right to take water from the well was not extinguished by

the inclosure; & whether the ancient right of access to the well for that purpose was or was not extinguished, & *semble*: it was not extinguished, the inhabitants might in other modes legally get access to the well, so that the fifty years' enjoyment *de facto* since the inclosure might have a legal origin; & the verdict for defts. stood.

In looking at the extinguishing clause (sect. 14) I find mention of rights of common—& other rights which I take to mean rights to take the produce of the earth; . . . but [the right to the well] is neither directly nor indirectly extinguished (*CROMPTON, J.*).—*RACE v. WARD* (1857), 7 E. & B. 384; 20 L. J. Q. B. 133; 28 L. T. O. S. 288; 21 J. P. 678; 3 Jur. N. S. 512; 5 W. R. 288; 110 K. R. 1289.

*Annotations*:—*Expld.* Broadbent v. Iiamsbotham (1856), 11 Exch. 602. *Consd.* Bower v. Sandford (1889), 5 T. L. R. 570. *Refd.* Constable v. Nicholson (1863), 32 L. J. C. P. 240; Schwann v. Cotton & Hayles (1916), 85 L. J. Ch. 689. *Mentd.* Murphy v. Ryan (1868), 16 W. R. 678; Hall v. Nottingham (1875), 1 Ex. D. 1; Saltash Corpn. v. Goodman (1881), 29 W. R. 639; Pearce v. Scotcher (1882), 46 L. T. 342; Mercer v. Denno, [1904] 2 Ch. 534; Fitzhardinge v. Purcell, [1908] 2 Ch. 139.

## Part X.—Support.

NOTE.—For cases relating to support & subsidence in mines & the severance of mines from the surface, see MINES.

## SECT. 1.—NATURAL RIGHT OF SUPPORT.

## SUB-SECT. 1.—EXTENT OF RIGHT.

## A. Support of Land.

## (a) In General.

1139. Ordinary rights of property—Not an easement.]—*ROWBOTHAM v. WILSON*, No. 8, *ante*.

1140. —. —. —. —. —. —. (1) The right of a person to the support of the land immediately around his house is not in the nature of an easement, but is the ordinary right of enjoyment of property. (2) Until that is interfered with he has no legal ground of complaint, although, in fact, something may have been done which, without his knowledge, has occasioned results that will afterwards affect his property.

A. was the owner of certain houses standing on land which was surrounded by the lands of B., C. & D. E. was the owner of mines running underneath the lands of all these persons. He worked the mines in such a manner, without actual negligence, that the lands of B., C. & D. sank in; & after more than six years' interval their sinking

occasioned an injury to the houses of A.:—*Held*: a right of action accrued to A. when this injury actually occurred; (3) his right was not barred by Stat. Limitations.—*BACKHOUSE v. BONOMI* (1861), 9 H. L. Cas. 503; 34 L. J. Q. B. 181; 4 L. T. 754; 7 Jur. N. S. 800; 9 W. R. 760; 11 E. R. 825, H. L.; *affg.* S. C. *sub nom.* BONOMI v. BACKHOUSE (1859), E. B. & E. 646, Ex. Ch.

*Annotations*:—*As to* (1) *Consd.* Birmingham Corpn. v. Allen (1877), 6 Ch. D. 284; Dalton v. Angus (1881), 6 App. Cas. 740. *Apld.* Davies v. Powell Duffryn Steam Coal Co. (1920), 36 T. L. R. 358. *Refd.* Hunt v. Peako (1860), John. 705; Lamb v. Walker (1878), 3 Q. B. D. 389; Bell v. Love (1883), 10 Q. B. D. 547; Aynsley v. Bedlington Coal Co. (1918), 87 L. J. K. B. 1031. *As to* (2) *Apld.* Smith v. Thackeray (1866), L. R. 1 C. P. 564. *Consd.* Lamb v. Walker (1878), 3 Q. B. D. 389; Dalton v. Angus (1881), 6 App. Cas. 740. *Apld.* Darley Main Colliery Co. v. Mitchell (1886), 11 App. Cas. 127. *Consd.* West Leigh Colliery Co. v. Tunncliffe & Hampson, [1908] A. C. 27. *Refd.* Rowbotham v. Wilson (1860), 8 H. L. Cas. 348; Whitehouse v. Fellowes (1861), 10 C. B. N. S. 765; Croft v. L. & N. W. Ry. (1863), 3 B. & S. 436; Fletcher v. Rylands (1865), 3 H. & C. 774; Mason v. Shrewsbury & Hereford Ry. (1871), 25 L. T. 239; Eadon v. Jeffcock (1872), L. R. 7 Exch. 379; Spoor v. Green (1874), L. R. 9 Exch. 99; Bower v. Peate (1876), 1 Q. B. D. 321; Crumble v. Wallsend L. B. (1891), 60 L. J. Q. B. 392;

## PART IX. SECT. 4.

b. *By repurchase*.]—The owner of a mill property, with the right to use all the water of the stream on which the mill was, sold a portion of the land, & by a separate instrument bound himself to permit his vendee to use a certain quantity of the water to drive machinery to be erected on such portion. Afterwards, finding that the quantity of water which the vendee withdrew from the stream impaired the effective working of his mill, he repurchased the lot & easement, receiving a conveyance thereof, & giving back a mtge. to secure part of the purchase money, & afterwards, the purchase money having been satisfied, procured his vendee to make a deed direct to K., who had purchased the lot & easement, with notice of all the facts. On a bill filed by a person who had obtained title to the mill & premises under a mtge. executed by the owner before the repurchase of the lot & easement:—*Held*: neither the

original owner nor K. was entitled to use the water, the easement having become extinguished on its repurchase, & the whole water having passed to the mtgee.—*GOODERHAM v. ROUTLEDGE* (1864), 10 Gr. 398.—*CAN.*

c. *Not by putting in box drain & filling up watercourse*.]—A person's right to have a slough on his land drained through a natural watercourse which runs from his land into another's is not lost by putting in a box drain & filling up the watercourse; & if the box drain gets blocked up he has the right to reopen the original watercourse.—*PARRY v. REID* (1920), 2 W. W. R. 45; 52 D. L. R. 491; 13 Sask. L. R. 219.—*CAN.*

## PART X. SECT. 1, SUB-SECT. 1.—A. (a).

1139 i. *Ordinary right of property—Not an easement*.]—The right is more properly described as a right of property than an easement, & it has been applied not only to lateral but to sub-

jacent support.—*CLELAND v. BERBERICK* (1915), 9 O. W. N. 108; 36 O. L. R. 357.—*CAN.*

1139 ii. —. —. —. —. —. —. The right of support, either lateral or subjacent, is neither a right of property in the support nor an easement or servitude in respect to the adjoining or subjacent land, but merely a right in the landowner to have his land remain in its natural state unaffected by any act done in the adjoining or subjacent land.—*BYRNE v. JUDG* (1908), 27 N. Z. L. R. 1106.—*N.Z.*

d. *Mining land—Common law right—Unaffected by statute*.]—There is nothing in Goldfields Act, 1866, rendering the common-law right of lateral support inapplicable to lands held for mining purposes.—*GREAT EXTENDED SLUICING CO. v. HALEK, Mac.* 896.—*N.Z.*

e. —. —. —. —. —. —. It was made a gift to railway co. of a portion of his lands required for formation of a tramway but reserved to himself his

**Sect. 1.—Natural right of support: Sub-sect. 1, A.**  
(a), (b) & (c).]

*A.-G. v. Conduit Colliery Co.*, [1895] 1 Q. B. 301; *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q. B. 165; *Hall v. Norfolk*, [1900] 2 Ch. 493; *Edinburgh & District Water Trustees v. Clippens Oil Co.* (1902), 87 L. T. 275; *Harrington v. Derby Corp.*, [1905] 1 Ch. 205; *Hague v. Doncaster It. D. C.* (1908), 73 J. P. 69. *As to (3) Consd.* *Whitehouse v. Follows* (1861), 10 C. B. N. S. 765; *Ecol. Comrs. for England v. N. E. Ry.* (1877), 4 Ch. D. 845. *Refd.* *Rowbotham v. Wilson* (1860), 8 H. L. Cas. 348; *Spoor v. Green* (1874), L. R. 9 Exch. 99; *Lamb v. Walker* (1878), 3 Q. B. D. 389; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127; *Hall v. Norfolk*, [1900] 2 Ch. 493; *West Leigh Colliery Co. v. Tunncliffe & Hampson*, [1906] 2 Ch. 22. *Generally, Mentd.* *Todd v. Flight* (1860), 9 C. B. N. S. 377; *Metropolitan Board of Works v. Met. Ry.* (1868), L. R. 3 C. P. 612; *Colley v. L. & N. W. Ry.* (1880), 49 L. J. Q. B. 575; *Bean v. Wade* (1885), Cab. & Kl. 519; *Nash v. Rochford R. Co.*, [1917] 1 K. B. 384.

**1141.** ———.]—The right to the support of the surface of land is not an easement, but a legal right, & an owner of land can, by apt words, convey the right to let down the surface in working minerals, so as to deprive persons entitled to the surface of the common law right of support.—*DAVIES v. POWELL DUFFRYN STEAM COAL CO., LTD.* (No. 2) (1921), 91 L. J. Ch. 40; 125 L. T. 432; 37 T. L. R. 607; 65 Sol. Jo. 567, C. A.

**1142.** — — —.]—*Passing with property.*—*DALTON v. ANGUS*, No. 4, ante.

(b) *By Adjacent Soil or Minerals.*

**1143. General rule—Support in natural state.**—]

(1) The possessor of a house which is not ancient, cannot maintain an action against the owner of adjoining land, for digging away that land, so that the house falls in; & where a declaration stated that A. was lawfully possessed of a dwelling-house, adjoining to a dwelling-house of B., & that B. dug into the soil & foundation of the last-mentioned house so negligently, & so near to pltf.'s house that the wall of the latter house gave way, on demurrer to so much of the declaration as alleged the digging so near, etc., deft. had judgment.

(2) *Qu.*: if it had appeared that pltf.'s house was ancient, or if the complaint had been that the digging occasioned a falling in of soil of pltf., to which no artificial weight had been added, whether an action would not have lain.—*WYATT v. HARRISON* (1832), 3 B. & Ad. 871; 1 L. J. K. B. 237; 110 E. R. 320.

*Annotations.*—*As to (1) Apld.* *Partridge v. Scott* (1838), 1 Horn & H. 31. *Consd.* *Humphries v. Brogden* (1850), 12 Q. B. 739; *Bibby v. Carter* (1859), 4 H. & N. 153; *Dalton v. Angus* (1881), 6 App. Cas. 740. *Refd.* *Jeffries v. Williams* (1850), 5 Exch. 792; *Bower v. Peate* (1876), 1 Q. B. D. 321. *As to (2) Consd.* *Dalton v. Angus* (1881), 6 App. Cas. 740. *Refd.* *Humphries v. Brogden* (1850), 12 Q. B. 739; *Honour v. Backhouse* (1858), E. B. & E. 622; *Rogers v. Taylor* (1858), 2 H. & N. 828. *Generally, Refd.* *Dodd v. Holme* (1834), 1 Ad. & Kl. 493. *Mentd.* *Submarine Telegraph Co. v. Dickson* (1864), 33 L. J. C. P. 139.

**1144.** ———.]—(1) A landowner has a right independent of prescription to the lateral support of his neighbour's land, so far as that is necessary to sustain his soil in its natural state, & also to compensation for damage caused either to the land or to buildings upon it by the withdrawal of such support. Where houses of pltf.'s were injured by mining operations of deft. in adjoining

land which would have caused the soil to subside without the additional weight of the houses a decree was made for perpetual injunction & for compensation.

(2) *Semble*: a landowner may acquire by twenty years' enjoyment the right to lateral support for the additional weight of buildings erected on the land.—*HUNT v. PEAKE* (1860), John. 705; 20 L. J. Ch. 785; 25 J. P. 5; 6 Jur. N. S. 1071; 70 E. R. 603.

*Annotations.*—*As to (1) Refd.* *Richards v. Jenkins* (1868), 18 L. T. 437; *Birmingham Corp. v. Allen* (1877), 46 L. J. Ch. 673. *As to (2) Refd.* *Dalton v. Angus* (1881), 6 App. Cas. 740. *Generally, Mentd.* *Llynvi Co. v. Brogden* (1870), L. R. 11 Eq. 188.

**1145.** ———.]—(1) Where a neighbouring landowner conveyed to a railway co., before Railway Clauses Consolidation Act, 1845 (c. 20), a strip of land for the purposes of the railway, the coals & minerals under the land being reserved, but no provision was made by the special Act for securing adjacent & subjacent support, or the provision was confined to subjacent support only:—*Held*: (1) the railway co. acquired a common law right to the support not specially provided for, & the landowner would be restrained by injunction from working mines under the lands adjacent to the strip sold, so as to endanger the stability of the railway or any of its works; (2) whether the conveyance was made by agreement or under the compulsory powers of the special Act, was immaterial.

(3) Where mines under the adjacent lands had been formerly worked, & through an extraordinary flood of a neighbouring river had been filled with water many years before the sale, & remained in that condition more than twenty years after the sale:—*Held*: the landowner would not be restrained from withdrawing the water, even though the loss of support due to its upward pressure should endanger the stability of the railway works.—*ELLIOT v. NORTH EASTERN RY. CO.* (1863), 10 H. L. Cas. 333; 2 New Rep. 87; 32 L. J. Ch. 402; 8 L. T. 337; 27 J. P. 564; 9 Jur. N. S. 555; 11 W. R. 604; 11 E. R. 1055, H. L.; *varying S. C. sub nom. NORTH-EASTERN RY. CO. v. ELLIOT* (1860), 2 De G. F. & J. 423, L. C.

*Annotations.*—*As to (1) Refd.* *Stourbridge Navigation Co. v. Dudley* (1860), 3 E. & E. 409; *N. E. Ry. v. Crosland* (1862), 32 L. J. Ch. 353; *Goold v. Great Western Deep Coal Co.*, *Great Western Deep Coal Co. v. Goold* (1865), 6 New Rep. 86; *G. W. Ry. v. Bennett* (1867), L. R. 2 H. L. 27; *Mid. Ry. v. Checkley* (1867), L. R. 4 Eq. 19; *L. & N. W. Ry. v. Evans*, [1893] 1 Ch. 16; *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836; *Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co.* (1901), 85 L. T. 53; *Manchester Corp. v. New Moss Colliery*, [1906] 1 Ch. 278. *As to (2) Apld.* *L. & N. W. Ry. v. Walker*, [1903] A. C. 289. *Refd.* *L. & N. W. Ry. v. Evans*, [1893] 1 Ch. 16; *R. v. L. & N. W. Ry.*, [1899] 1 Q. B. 921; *Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co.* (1901), 85 L. T. 53; *Manchester Corp. v. New Moss Colliery*, [1906] 1 Ch. 278. *As to (3) Refd.* *Richards v. Jenkins* (1868), 18 L. T. 437; *Poppell v. Hodgkinson* (1869), L. R. 4 Exch. 218. *Generally, Refd.* *Pountney v. Clayton* (1882), 47 L. T. 731; *L. & N. W. Ry. v. Howley Park Coal & Canal Co.*, [1911] 2 Ch. 97. *Mentd.* *Colebeck v. Girdlers' Co.* (1876), 45 L. J. Q. B. 225; *Mid. Ry. v. Haunchwood Brick & Tile Co.* (1882), 20 Ch. D. 552; *Aldin v. Latimer Clark, Multhead*, [1894] 2 Ch. 437; *Bradford Corp. v. Pickles* (1894), 61 L. J. Ch. 101.

**1146.** ———.]—*Right of property.*—*HUMPHRIES v. BROGDEN*, No. 1150, *post*.

**1147.** ———.]—*Whether an absolute right—Appre-*

coal & minerals:—*Held*: the railway was entitled to the subjacent & adjacent lateral support necessary for its maintenance.—*CALEDONIAN RY. CO. v. BELHAVEN (LORD)* (1857), 3 Jur. N. S. 573.—*SCOT*.

**1.** ———.]—*May be waived.*—In the absence of mining regulations or special mining customs to the contrary,

an owner who leaves a portion of land for mining purposes is entitled to lateral support for the unleased as against the leased portion, unless it is clear from the terms of the lease that the right has been relinquished.—*LONDON & SOUTH AFRICAN EXPLORATION CO. v. ROULIOT* (1890), 8 S. C. 74.—*S. AF*.

**PART X. SECT. 1, SUB-SECT. 1.—**  
A. (b).

*g. Artificial support substituted for natural support—Must be sufficient.*—*Pltf.* was entitled to the lateral support of defts.' land, in which they made excavations whereby pltf.'s land was damaged:—*Held*: in substituting artificial support for the natural

**liable damage.**—The right of the owner of land to the lateral support of his neighbour's land is not an absolute right, & the infringement of it is not a cause of action without appreciable damage.

Where A. dug a well near B.'s land, which sank in consequence, & a building erected on it within twenty years fell, & it was proved that if the building had not been on B.'s land, the land would still have sunk, but the damage to B. would have been inappreciable:—*Held*: B. had no right of action against A.—*SMITH v. THACKERAY* (1866), L. R. 1 C. P. 564; Har. & Ruth. 615; 35 L. J. C. P. 276; 14 L. T. 761; 12 Jur. N. S. 545; 14 W. R. 832.

**Annotations.**—*Consd.* A.-G. v. Conduit Colliery Co., [1895] 1 Q. B. 301. *Refd.* Richards v. Jenkins (1868), 18 L. T. 437; Mitchell v. Darley Main Colliery Co. (1884), 14 Q. B. D. 125. *Mentd.* Hall v. Bristol Corp. (1867), 36 L. J. C. P. 110.

**1148. Right confined to natural undisturbed land.**—Effect of previous excavation under adjacent land.]—Between the land of pltf's. & that of defts., who were owners of a colliery, there was an intermediate piece of land, the coal under which had been worked out some years before by a third party. The effect of the cavity in the intermediate land was, that when defts. worked the coal under their land, subsidence was caused in the surface of pltf's. land. It was admitted that if the intermediate land had been in its natural state no injury would have been caused to pltf's. by defts.' workings:—*Held*: pltf's. had no right of action against defts.

The support to which a landowner is entitled from the adjacent land is confined to such an extent of adjacent land as in its natural undisturbed state was sufficient to afford the requisite support.—*BIRMINGHAM CORPN. v. ALLEN* (1877), 6 Ch. D. 284; 46 L. J. Ch. 673; 37 L. T. 207; 42 J. P. 184; 25 W. R. 810, C. A.

**Annotations.**—*Distd.* Manley v. Burn, [1916] 2 K. B. 121. *Refd.* Dalton v. Angus (1881), 6 App. Cas. 740; Darley Main Colliery Co. v. Mitchell (1886), 11 App. Cas. 127; Manchester Corp. v. New Moss Colliery, [1906] 1 Ch. 278; Salt Union v. Brunner Mond, [1906] 2 K. B. 822; L. & N. W. Ry. v. Howley Park Coal & Cannel Co. (1910), 103 L. T. 26.

**1149. Injury to copyhold land—Waiver by tenant of right to compensation.**—The owner of freehold land & copyhold land adjacent to each other sold the copyhold land, & by a deed of even date with the surrender the purchaser covenanted & granted that the vendor, his heirs, etc., might work in the adjoining freehold land, without being liable to make compensation for any injury caused by such working to certain buildings, authorised by the deed to be erected on the copyhold land, & that the purchaser, his heirs, etc., would indemnify the vendor, his heirs, etc., against any claims for such damage. This deed was not entered on the ct. rolls, nor referred to in the surrender. The copyhold land was afterwards conveyed enfranchised by the purchaser & the lords of the manor to the Church Building Comrs., under whom pltf. took. Neither the lords of the manor, nor the comrs., nor pltf., had notice of the deed. Def't., who took the adjoining freehold land under the original vendor, having by working the mines in it caused the land of pltf. to sink, & damaged the buildings thereon:—*Held*: he was not pro-

tected by the above-mentioned deed from liability to make compensation to pltf.

*Semble*: if both lands had been freehold def't. would still have been liable.—*RICHARDS v. HARPER* (1866), L. R. 1 Exch. 199; 35 L. J. Ex. 130; 30 J. P. 602; 12 Jur. N. S. 770; 14 W. R. 643.

**Annotation.**—*Refd.* Wakefield v. Buccleuch (1867), L. R. 4 Eq. 613.

—*Sec. generally*, COPYHOLDS, Vol. XIII., pp. 80–82, Nos. 1012–1035.

### (c) By Subject Soil or Minerals.

#### *Sec. generally*, MINES.

#### **1150. General rule—Support of surface land.**—

(1) Action on the case by the occupier of the surface of land for negligently & improperly, & without leaving any sufficient pillars & supports, & contrary to the custom of mining in the country where, etc., working the subjacent minerals, *per quod* the surface gave way. It was proved that pltf. was in occupation of the surface, & def't. of the subjacent minerals; but there was no evidence how the occupation of the superior & inferior strata came into different hands. The surface was not built upon. The jury found that defts. had worked the mines, carefully & according to custom, but without leaving sufficient support for the surface:—*Held*: pltf. was entitled to have the verdict entered for him; for that, of common right, the owner of the surface is entitled to support from the subjacent strata; & if the owner of the minerals removes them, it is his duty to leave sufficient support for the surface in its natural state.

(2) The right to lateral support from adjoining soil is not, like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed, as much as after the expiration of twenty years or any longer period (*LORD CAMPBELL, C.J.*).—*HUMPHRIES v. BROGDEN* (1850), 12 Q. B. 739; 20 L. J. Q. B. 10; 16 L. T. O. S. 457; 116 E. R. 1048; *sub nom.* HUMPHRIES v. BROGDEN, 15 Jur. 124.

**Annotations.**—*As to* (1) *Consd.* Smart v. Morton (1855), 5 E. & B. 30; Calc. Ry. v. Sprot (1856), 27 L. T. O. S. 264; Roberts v. Haines (1856), 6 E. & B. 643; Rowbotham v. Wilson (1857), 8 E. & B. 123; Rogers v. Taylor (1858), 2 H. & N. 828; Bonomi v. Backhouse (1859), E. B. & E. 646; Wakefield v. Buccleuch (1867), L. R. 4 Eq. 613; Richards v. Jenkins (1868), 18 L. T. 437; Eadon v. Jeffcock (1872), L. R. 7 Ex. Ch. 379; Dalton v. Angus (1881), 6 App. Cas. 740; Mundy v. Rutland (1883), 23 Ch. D. 81; Butterley Co. v. New Hucknall Colliery Co., [1908] 2 Ch. 475; Davies v. Powell Duffryn Steam Coal Co. (1920), 36 T. L. R. 358. *Refd.* Allaway v. Wagstaff (1859), 4 H. & N. 681; Rowbotham v. Wilson (1860), 8 H. L. Cas. 348; Webb v. Bird (1861), 10 C. B. N. S. 268; *Re* Williams v. Groucott (1863), 4 B. & S. 149; Smith v. Darby (1872), L. R. 7 Q. B. 716; Pountney v. Clayton (1883), 11 Q. B. D. 820. *As to* (2) *Consd.* Calc. Ry. v. Sprot (1856), 27 L. T. O. S. 264; Rowbotham v. Wilson (1857), 8 E. & B. 123; Solomon v. Vintners' Co. (1859), 4 H. & N. 585; Hunt v. Penke (1860), John. 705; Wakefield v. Buccleuch (1867), L. R. 4 Eq. 613; Dalton v. Angus (1881), 6 App. Cas. 740; Howley Park Coal & Cannel Co. v. L. & N. W. Ry., [1913] A. C. 11. *Refd.* Rogers v. Taylor (1858), 2 H. & N. 828; N. E. Ry. v. Elliott (1860), 2 De. G. F. & J. 423; Lamb v. Walker (1878), 3 Q. B. D. 389; Jordonson v. Sutton, Southcoates

support of the soil which had been removed, defts. might construct it of any material, provided it was a sufficient support for the purpose, & they continued to maintain pltf.'s land in its proper position.—*SNARRE v. GRANITE CURLING & SKATING CO.* (1882), 1 O. R. 102.—*CAN.*

#### **h. Street grading for railway—**

**Statutory powers.**—*Exemption from liability.*—A street railway co. in grading a street by agreement with the corp., pursuant to Vancouver Incorporation Act & Amendment, 1895, is not liable for damages for loss of support caused to lands adjoining the street.—*MACDONELL v. BRITISH COLUMBIA ELECTRIC RY. CO.* (1902), 9 B. C. R. 542.—*CAN.*

#### **PART X. SECT. 1, SUB-SECT. 1.—A. (c).**

**k. Mining land—Railways—Right acquired by statute.**—Under Dominion Railway Act, where a railway appropriates a right of way over mining lands, they acquire at once a right of support for the surface of the land taken.—*DAVIES v. JAMES BAY RY. CO.*



m. — *Lease of minerals* — *Right*



sequent injury to buildings on the surface:—**field**: the party who withdraws a natural support or the artificial support which has come in place of the natural support, does so at his peril.—**BALD v. ALLOA COLLIERY CO.** (1854), 16 Duml. (Ct. of Sess.) 870; 26 Sc. Jur. 437.—**SCOT.**

*Sect. 1.—Natural right of support: Sub-sect. 1, A.*  
*(d) & B. (a).]*

withdrawing this support they had committed an actionable nuisance at common law entitling pltf. to damages.—*JORDESON v. SUTTON, SOUTHCOATES & DRYPOOL GAS CO.*, [1899] 2 Ch. 217; 68 L. J. Ch. 457; 80 L. T. 815; 63 J. P. 692; 15 T. L. R. 374, C. A.

*Annotations:—*Conad. *English v. Metropolitan Water Board*, [1907] 1 K. B. 588. *Reid. Batcheller v. Tumbridge Wells Gas Co.* (1901), 84 L. T. 765; *Salt Union v. Brunner Mond*, [1906] 2 K. B. 822; *Fletcher v. Birkenhead Corp.*, [1907] 1 K. B. 205. *Mentd. Goldberg v. Liverpool Corp.* (1900), 82 L. T. 362; *Home & Colonial Stores v. Collis* (1901), 85 L. T. 701.

**1165.** —[By their special Act, which incorporated Waterworks Clauses Act, 1847 (c. 15), defts. were empowered to "make & maintain" certain waterworks, including a shaft or well & pumping station. By the authorised pumping operations, after the completion of the works, a bed of wet running silt which lay directly under & formed the support of pltf.'s land was drawn away, & its abstraction caused a subsidence of pltf.'s house. Pltf. claimed compensation for injurious affection, & in the arbitration proceedings the umpire made an award in his favour. In an action on the award:—*Held*: pltf. was entitled to compensation by Waterworks Clauses Act, 1847 (c. 15), ss. 6 & 12, as being a person injuriously affected, by the supplying & the maintenance, if not also by the construction, of the waterworks.—*FLETCHER v. BIRKENHEAD CORPN.*, [1907] 1 K. B. 205; 76 L. J. K. B. 218; 96 L. T. 287; 71 J. P. 111; 23 T. L. R. 195; 51 Sol. Jo. 171; 5 L. G. R. 293, C. A.; *affg.*, [1900] 1 K. B. 605.

*Annotations:—*Reid. *Salt Union v. Brunner Mond*, [1906] 2 K. B. 822. *Mentd. Prince's Patent Candle Co. v. L. C. C.*, [1908] 2 Ch. 526.

**1166. Pitch.**—Where defts. by removing the lateral support of their land caused the asphalt or pitch which formed the main ingredient of pltf.'s land to melt & ooze forth into their own land & thereupon appropriated it to their own use:—*Held*: an injunction was rightly granted to restrain them, & damages were recoverable both for injury caused by subsidence of pltf.'s surface & for loss of the pitch.—*TRINIDAD ASPHALT CO. v. AMBARD*, [1899] A. C. 594; 68 L. J. P. C. 114; 81 L. T. 132; 48 W. R. 116, P. C.

*Annotation:—*Distd. *Salt Union v. Brunner Mond*, [1906] 2 K. B. 822.

**1167. Brine.**—Pltfs. were the owners of a group of rock-salt mines which had for many years been flooded with brine, by reason of the fact that the working of the mines had caused the ground above them to subside, with the result that surface water found its way down to the beds of rock-salt below, where it became saturated with the salt.

These mines had for many years been connected with one another by means of old underground channels & passages, which it was no longer possible to close, & they formed one large reservoir of brine. Into this reservoir there also found its way a certain quantity of other brine which came through fissures in the soil from land outside pltf.'s property, but a substantial portion of the brine therein was formed by the dissolution of pltf.'s salt rock in the manner above mentioned. Defts., in the exercise of a licence to pump brine granted to them by the previous owner of one of pltf.'s mines, pumped large quantities of brine from the said mine & from the reservoir & appropriated it for their own profit:—*Held*: defts. were not guilty of any actionable wrong in so doing, notwithstanding that they thereby abstracted salt which had formed part of pltf.'s rock, & that the continuance of the pumping would cause fresh surface water to dissolve further portions of pltf.'s rock into brine, which in its turn would be abstracted by defts.' pumps.—*SALT UNION, LTD. v. BRUNNER, MOND & CO.*, [1906] 2 K. B. 822; 76 L. J. K. B. 55; 95 L. T. 647; 22 T. L. R. 835.

*Annotation:—*Reid. *English v. Metropolitan Water Board*, [1907] 1 K. B. 588.

*B. Support of Land with Buildings.*

*(a) In General.*

**1168. Support from adjacent land—General rule.**—*SMITH v. MARTIN* (1672), 2 Wms. Saund. 394; 85 E. R. 1206.

*Annotations:—*Reid. *Humfries v. Brogden* (1850), 15 Jur. 124; *Jeffries v. Williams* (1850), 5 Exch. 792. *Mentd.* *Doc d. Norton v. Webster* (1840), 12 Ad. & El. 442; *Hewson v. South-Western Ry.* (1860), 2 L. T. 369; *Simpson v. Dendy* (1860), 8 C. B. N. S. 433; *Smith v. Ridgway* (1866), L. R. 1, Exch. 331; *Buccleuch v. Metropolitan Board of Works* (1870), L. R. 5 Exch. 221; *A.-G. v. Reynolds*, [1911] 2 K. B. 888; *Early v. Drummond* (1923), 39 T. L. R. 171.

**1169.** — — — — — *PARTRIDGE v. SCOTT*, No. 400, ante.

**1170.** — — — — — *SMITH v. KENRICK*, No. 831, ante.

**1171.** — — — — — *In 1847 comrs. of sewers covered in an open drain, which was vested in them, at the request of an adjoining landowner. In 1872 a building was erected on the land next the drain. In 1883 the comrs. began to enlarge the drain, & in doing so, loosened the foundations of the building & let down the wall. The jury found that defts. were negligent in not putting up proper struts to support the wall:—Held*: defts. were liable for having let down the wall, on the ground that one adjoining landowner must execute works on his own land with reasonable care so as not to injure his neighbour's property.—

**PART X. SECT. 1, SUB-SECT. 1.—**  
**B. (a).**

**1168 i. Support from adjacent land—(general rule).**—Pltf.'s house adjoining land & a wall thereon owned by deft. was damaged by deft. having negligently excavated the soil & pulled down the wall:—*Held*: as deft. had not complied with Sydney Improvement Act, sect. 59, by shoring up & underpinning pltf.'s house, he had been guilty of negligence.—*CANEY v. DAVIS* (1882), 3 N. S. W. L. R. 299.—*AUS.*

**1168 ii.** — — — — — *If an owner of land demise one part of it with a building on it to one person, & subsequently demise an adjoining part to another, the latter cannot legally deprive the former's building of the lateral support of the adjoining soil.*—*TANGYE v. MURPHY* (1890), 16 V. L. R. 101.—*AUS.*

**1168 iii.** — — — — — *Deft. caused*

excavations to be made on his land, & in consequence of the same which were rightfully made, the wall of pltf.'s house on adjoining land fell.—*Held*: deft. was liable for the acts complained of.—*JOHN v. DELANEY* (1890), 16 V. L. R. 729.—*AUS.*

**1168 iv.** — — — — — *An excavation made in his land by deft. W., the predecessor in title of deft. A., extended to the boundary-line between his land & that of pltf. After the excavation was made, W. built a retaining wall for the purpose of providing support to pltf.'s land. This retaining wall got out of repair & failed to answer the purpose for which it was built, & as a result of this a subsidence of pltf.'s land occurred & the soil fell into the excavation. Owing to the condition of the wall, this occurred after A. became the owner of W.'s land:—Held*: deft. A. was responsible for the

damages which pltf. had sustained—the condition caused by W. having been permitted by A. to remain & cause injury to pltf.—*FOSTER v. BROWN* (1920), 48 O. L. R. 1.—*CAN.*

**1168 v.** — — — — — *The fear of a building stance in the street is not entitled to excavate, for the purpose of making a sunk area, in respect that the operation would be attended with danger to the adjoining tenement.*—*MURRAY v. JOHNSTON* (1834), 13 Sh. (Ct. of Sess.) 119.—*SCOT.*

**1168 vi.** — — — — — *The owner of land has a natural right to the lateral support of the adjoining land, for his land & buildings thereon.*—*JOHANNEBURG BOARD OF EXECUTORS & TRUST CO., LTD. v. VICTORIA BUILDING CO., LTD.* (1894), 1 O. R. 43.—*S. AF.*

*n.* — — — — — *Right recognised by Roman-Dutch Law.*—*The Roman-*

**HILL v. COOK & LINCOLN SEWERS COMRS.** (1886), 2 T. L. R. 404, C. A.

**1172. — House newly erected.]—SLINGSBY v. BARNARD** (1616), 1 Roll. Rep. 430; 81 E. R. 586.

*Annotations:—***Folld.** Brown v. Windsor (1830), 1 Cr. & J. 20. **Consd.** Dalton v. Angus (1881), 6 App. Cas. 740. **Refd.** Jeffries v. Williams (1850), 5 Exch. 792; Bonomi v. Backhouse (1858), E. B. & E. 622.

**1173. —.]—WILDE v. MINSTERLEY** (1639), 2 Roll. Abr. 564, tit. Trespass I., pl. 1; cited 12 Q. B., at p. 743.

*Annotations:—***Consd.** Wyatt v. Harrison (1832), 3 B. & Ad. 871; Humphries v. Brogden (1850), 12 Q. B. 739; Dalton v. Angus (1881), 6 App. Cas. 740. **Refd.** Dodd v. Holme (1834), 1 Ad. & El. 493; Jeffries v. Williams (1850), 5 Exch. 792; Rowbotham v. Wilson (1857), 8 E. & B. 123; Hunt v. Peake (1860), John. 705. **Mentd.** Bower v. Peate (1876), 1 Q. B. D. 321.

**1174. —.]—PALMER v. FLESHERS** (1663), 1 Sid. 167; 1 Keb. 625; 82 E. R. 1035; *sub nom.* PALMER v. FLETCHER, 1 Lev. 122.

*Annotations:—***Consd.** Wheeldon v. Burrows (1879), 12 Ch. D. 31; Allen v. Taylor (1880), 16 Ch. D. 355. **Apprvd.** Dalton v. Angus (1881), 6 App. Cas. 740. **Refd.** Tennant v. Goldwin (1704), 2 Ld. Raym. 1089; Compton v. Richards (1814), 1 Price, 27; Swansborough v. Coventry (1832), 9 Bing. 365; White v. Bas (1862), 7 H. & N. 722; Robinson v. Grave (1872), 27 L. T. 648; Ellis v. Manchester Carriage Co. (1876), 2 C. P. D. 13; Russell v. Watts (1885), 10 App. Cas. 590; Birmingham, Dudley & District Banking Co. v. Ross (1888), 38 Ch. D. 295; Myers v. Catterton (1889), 59 L. J. Ch. 315; Phillips v. Low, [1892] 1 Ch. 47; Smith v. Hancock, [1894] 2 Ch. 377; Broomfield v. Williams, [1897] 1 Ch. 602; Hansford v. Jago, [1921] 1 Ch. 322.

**1175. —.]—STANSELL v. JOLLARD** (1803), 1 Selwyn's N. P. 11th ed., p. 457; cited 5 Exch. at p. 796; 155 E. R. 349.

*Annotations:—***Distd.** Woodall v. Hingley (1866), 14 L. T. 167. **Refd.** Rogers v. Taylor (1838), 30 L. T. O. S. 321; Hide v. Thornborough (1846), 2 Car. & Kir. 250; Humphries v. Brogden (1850), 12 Q. B. 739; Solomon v. Vintners' Co. (1859), 4 H. & N. 585; Dalton v. Angus (1881), 6 App. Cas. 740.

**1176. —.]—WYATT v. HARRISON**, No. 1143, *ante*.

**1177. —.]—**(1) Two persons having adjacent lands, the one builds a house at the extremity of his land; the other afterwards excavates his own soil near to, but without touching, the ground so built upon. *Qu.*: whether the party making such excavation is bound to see that his neighbour's foundations be not thereby weakened; & whether, if they be so, he is guilty of an actionable negligence in having so used his own soil without protecting that of his neighbour, although no negligence be shown in the mode of carrying on the work.

(2) Supposing him not to be liable in the case of a newly built house; *qu.*: whether he would be so if the house had stood twenty years before the excavation was made.

(3) Where it is alleged & proved that deft. so negligently, unskilfully, & improperly dug his own soil that pltf.'s house was thereby injured, an action lies; & although it be shown that the house was firm, & could at all events have stood only a few months, still pltf. may recover in proportion to the loss actually suffered, if the jury find that the injury to the house was the consequence of deft.'s negligence; & in determining the question of negligence, the jury ought to consider the state of pltf.'s house.—**DODD v. HOLME** (1834), 1 Ad. & El. 493; 3 Nev. & M. K. B. 739; 110 E. R. 1296.

*Annotations:—***As to (1)** **Refd.** Humphries v. Brogden (1850), 12 Q. B. 739; Bibby v. Carter (1859), 4 H. & N. 153. **As to (2)** **Distd.** Woodall v. Hingley (1866), 14 L. T. 167.

Dutch law recognises a right of lateral support for land & buildings as between adjoining tenements.—**PHILLIPS v. SOUTH AFRICAN INDEPENDENT ORDER OF MECHANICS** (1916), C. P. D. 61.—**AF.**

**o. — Old & defective wall.]—**An old retaining wall built on a sloping piece of ground belonging to A. was the boundary of his property. During excavations by B. the adjoining proprietor, on his own ground, within five

**feet of the wall, a portion of the wall from its foundation fell into B.'s ground which at the point in question sloped down from the wall at a steep gradient. A. brought an action for damages against B.:—Held:** It had

**1178. —.]—**Deft. engaged a contractor to build a warehouse for him on his, deft.'s, premises. The contractor's workmen made a deep excavation for the foundation of the warehouse on deft.'s land, close to the boundary line, between deft.'s & pltf.'s premises. In consequence of the excavation, pltf.'s yard wall adjoining gave way & fell in; & the workmen, without any directions from deft., carried off the materials of the fallen wall. Pltf.'s house was also injured by the excavation. Neither the house nor the wall had been built ten years, & pltf.'s premises were not entitled to any support from deft.'s land. In an action by pltf. against deft. for wrongfully & negligently excavating to the injury of pltf.'s premises, & for wrongfully carrying away the materials of the wall, the judge told the jury that as deft. was in possession of the land adjoining pltf.'s, he was answerable for the wrongful acts of any person allowed by deft. to go upon his premises for the purpose of erecting the warehouse there; & that the existence of any contract between the contractor & deft. was immaterial; & that if the jury should be of opinion that the workmen, whilst they were on deft.'s land by his permission, for the purpose of erecting the warehouse, had, from want of due care, injured pltf.'s wall & buildings, & had carried away from deft.'s land materials belonging to pltf., deft. was liable for the injuries arising from their acts:—**Held:** the direction was wrong; the action was not maintainable without proof that pltf.'s premises were entitled to support from deft.'s land; & deft. could not be liable, though the acts were done on his premises, the workmen committing them not being his servants. & the acts not being done by his direction.—**GAYFORD v. NICHOLLS** (1854), 9 Exch. 702; 2 C. L. R. 1066; 23 L. J. Ex. 205; 18 J. P. 441; 156 E. R. 301; *sub nom.* NICHOLLS v. GAYFORD, Saund. & M. 30; 23 L. T. O. S. 96; 2 W. R. 453.

*Annotations:—***Consd.** Dalton v. Angus (1881), 6 App. Cas. 740. **Refd.** Clothier v. Webster (1862), 12 C. B. N. S. 790.

**1179. —.]—ROGERS v. TAYLOR**, No. 1151, *ante*.

**1180. — House built adjacent to excavated land—Excavation known to defendant.]—**Pltf. was owner of a house erected in 1834 on solid ground. Previously to the building of the house a portion of the minerals had been gotten under a garden which adjoined the house. In 1838 a portion of the minerals was gotten under deft.'s land which adjoined the garden. In 1855 deft. commenced getting out the rest of the minerals under his land. In 1857 pltf.'s land sank, & the house was injured by deft.'s mining operations. It was found by the jury that the sinking of pltf.'s land was caused by deft.'s workings; that some damage would have happened, but not to the same extent, if the garden ground had been left solid; that deft. knew of the excavations under the garden; that the land would have sunk in just the same whether there was a house on it or not; & that the damage to pltf.'s house by the sinking was £300, £250 occasioned solely by deft.'s

feet of the wall, a portion of the wall from its foundation fell into B.'s ground which at the point in question sloped down from the wall at a steep gradient. A. brought an action for damages against B.:—**Held:** It had

*Sect. 1.—Natural right of support: Sub-sect. 1, B. (a) & (b) & C.; sub-sect. 2.]*

workings, & £50 damages caused in part by the excavation under the garden:—*Held*: (1) inasmuch as the sinking of pltf.'s land was in no way caused by the weight of the house, pltf. was entitled to recover whether he had acquired a right to support for his foundations by deft.'s soil or not; (2) although the excavation under the garden contributed to the extent of £50 to cause the damage pltf. was entitled to the whole £300, because, if deft. had not done the wrongful act complained of, no part of the damage would have occurred.

(3) *Semble*: after twenty years a house acquires a right to the lateral support of the soil around it.—*BROWN v. ROBINS* (1859), 4 H. & N. 186; 28 L. J. Ex. 250; 157 E. R. 809.

*Annotations*:—*As to* (1) *Distd.* *Angus v. Dalton & H.M.'s Works & Public Buildings Comrs.* (1877), 47 L. J. Q. B. 163. *Refd.* *Hunt v. Peake* (1860), John. 705; *Stroyan v. Knowles, Hamer v. Same* (1861), 6 H. & N. 454; *Birmingham Corp'n. v. Allen* (1877), 6 Ch. D. 284. *As to* (2) *Refd.* *Richards v. Jenkins* (1868), 18 L. T. 437; *A.-G. v. Conduit Colliery Co.* (1895) 1 Q. B. 301. *As to* (3) *Refd.* *Hunt v. Peake* (1860), John. 705; *Stroyan v. Knowles, Hamer v. Same* (1861), 6 H. & N. 454.

1181. — *Railway works.*—*ELLIOT v. NORTH EASTERN RY. CO.*, No. 1145, *ante*.

1182. *Support from subjacent land.*—*ROGERS v. TAYLOR*, No. 1151, *ante*.

1183. —.—*ELLIOT v. NORTH EASTERN RY. CO.*, No. 1145, *ante*.

1184. *Grant by common owner.*—*RICHARDS v. JENKINS*, No. 224, *ante*.

(b) *Increase of Weight.*

1185. *Weight of building not contributing to subsidence—House erected more than twenty years.*—*BROWN v. ROBINS*, No. 1180, *ante*.

1186. —.—*HUNT v. PEAKE*, No. 1144, *ante*.

1187. —.— *House erected within twenty years.*—Where the working of mines, in however careful a manner, has caused a subsidence of the adjacent land, the owner is entitled to recover in respect of damages to buildings thereon, although erected within twenty years, provided their weight did not contribute to the subsidence.

In 1833, a manufactory was erected on a close, & in 1841, & between that time & 1849, the buildings were enlarged. In Mar. 1842, the close & buildings, which were leased for a term which expired in Oct. 1851, were conveyed in fee by S. the owner, to C. C. died in 1849, & in Nov. 1851, the devisees under his will conveyed the close & buildings to pltf. in fee, who before 1849 was assignee of the term & occupied the buildings. In 1849 & 1850 defts., in getting coal from their mines, near but not immediately adjoining the close, caused the surface to subside, by which the buildings were injured. The devisees of C. did not thereby, in fact, sustain any damage, inasmuch as they incurred no expense, & continued to receive the full rent for the premises, & upon the sale thereof obtained the full value, without reference to any injury thereto, of which they were ignorant, by the mining operations. Subsequently to the sale to pltf., the working of the mines under lands near to but not adjoining the close on which the buildings stood, occasioned a further subsidence. No damage was done by the working of the mines subsequently to July, 1852, but the subsidence of the ground continued, the consequence of the previous mining operations. The mining was skill-

fully conducted, & the buildings did not contribute to the subsidence. In Aug. 1855, pltf. brought an action against deft.:—*Held*: (1) he was entitled to recover damages in respect of the deterioration in value of the manufactory, the machinery broken, the increased expense of keeping it in repair & working order, & the diminished profits both in respect of his occupation before & after the purchase; (2) the devisees of C. might maintain an action for the injury to their reversion during the subsistence of the lease as trustees, & for the benefit of the vendee.—*STROYAN v. KNOWLES, HAMER v. SAME* (1861), 6 H. & N. 454; 30 L. J. Ex. 102; 3 L. T. 746; 9 W. R. 615; 158 E. R. 186.

*Annotations*:—*As to* (1) *Refd.* *Wakefield v. Buccleuch* (1867), L. R. 4 Eq. 613; *Richards v. Jenkins* (1868), 18 L. T. 437; *Lamb v. Walker* (1878), 3 Q. B. D. 389; *A.-G. v. Conduit Colliery Co.* (1895) 1 Q. B. 301; *Manchester Corp'n. v. New Moss Colliery*, [1908] 1 Ch. 278. *Generally, Mentd.* *Woodall v. Hingley* (1866), 14 L. T. 167.

1188. —.—*SMITH v. THACKERAH*, No. 1147, *ante*.

1189. *Weight of building contributing to subsidence—Effect on grant of support.*—G., the owner of certain land, sold it in lots, subject to conditions, by which the purchaser of lot 6 was required to covenant to build according to a certain elevation. Pltf., who was the purchaser of the adjoining lot 7, altered, with G.'s consent, an old building standing on such lot, by raising its wall several feet on the next side to lot 6. Deft., who was the purchaser of lot 6, excavated the land as required to build according to the said conditions, & in consequence of this pltf.'s building fell:—*Held*: as the excavations were authorised by the conditions of sale, & were made therefore with the licence of G., the vendor, pltf. could not sue for the injury he had sustained by his building being so deprived of the lateral support of the land in lot 6.

*Semble*: pltf., assuming he had the right to such support, lost it by raising the old wall & so increasing the superincumbent weight.—*MURCHIE v. BLACK* (1865), 19 C. B. N. S. 190; 34 L. J. C. P. 337; 12 L. T. 735; 11 Jur. N. S. 608; 13 W. R. 896; 144 E. R. 759.

C. *Support of Building by Building.*

*See, generally, NEGLIGENCE; Sect. 2, sub-sect. 3, C., post.*

1190. *No natural right—Owner must shore up his own building.*—Case by a reversioner of a house against the owner of the adjoining house, for pulling it down without shoring up pltf.'s house, in consequence whereof it was impaired, & in part fell down:—*Held*: as pltf. had not alleged or proved any right to have his house supported by deft.'s he was bound to protect himself by shoring, & could not complain that deft. had neglected to do it.—*PEYTON v. LONDON CORPN.* (1829), 9 B. & C. 725; 109 E. R. 269; *sub nom.* *PEYTON v. ST. THOMAS'S HOSPITAL (GOVERNORS)*, 7 L. J. O. S. K. B. 322.

*Annotations*:—*Distd.* *Brown v. Windsor* (1830), 1 Cr. & J. 20; *Humphries v. Brogden* (1850), 12 Q. B. 739. *Consd.* *Angus v. Dalton* (1878), 4 Q. B. D. 162. *Refd.* *Jeffries v. Williams* (1850), 5 Exch. 792; *Rogers v. Taylor* (1858), 2 H. & N. 828; *Solomon v. Vintners' Co.* (1859), 4 H. & N. 585.

1191. —.— *Reasonable care in removing.*—Where notice was given to the occupier of adjoining premises of an intention to pull down & remove the foundations of a building, on part of the footing of one of the walls of which one of the walls of such adjoining premises rested:—*Held*: the party

been proved that the wall was old & defective & that while R.'s operations were the proximate cause of the fall,

they were not of such a character as to have injured a properly constructed wall.—*CAMPBELL'S TRUSTEES v. HEN-*

*DERSON* (1884), 11 R. (Ct. of Sess.) 520; 21 Sc. L. R. 385.—*SCOT*.

giving the notice was only bound to use reasonable & ordinary care in the work, & was not bound in any other way to secure the adjoining premises from injury, although, from the peculiar nature of the soil, he was compelled to lay the foundation of his new building several feet deeper than that of the old.—*MASSEY v. GOYDER* (1829), 4 C. & P. 161.

*Annotations*.—*Consd.* *Angus v. Dalton* (1877), 3 Q. B. D. 85. *Mentd.* *Nicholson v. Brooke* (1848), 2 Exch. 213.

**1192.** ———. *J.*—In 1803, pltf.'s house was built against the pine end wall of deft.'s house, by permission. In 1829, deft. made an excavation in a careless & unskilful manner, in his own land, near to his pine end wall, by which he weakened his pine end wall, & consequently, injured the house of pltf. :—*Held*: an action on the case was maintainable for this injury.—*BROWN v. WINDSOR* (1830), 1 Cr. & J. 20.

*Annotations*.—*Refd.* *Dalton v. Angus* (1881), 6 App. Cas. 740. *Mentd.* *Smith v. Kenrick* (1849), 7 C. B. 515.

**1193.** ———. *Effect of want of knowledge.*—The mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall. Nor, if he be ignorant of the existence of the adjoining wall, as where it is underground, is he bound to use extraordinary caution in pulling down his own.—*CHADWICK v. TROWER* (1839), 6 Bing. N. C. 1; 8 Scott, 1; 8 L. J. Ex. 280; 133 E. R. 1, Ex. Ch.; *previous proceedings, sub nom.* *TROWER v. CHADWICK* (1836), 3 Bing. N. C. 334.

*Annotations*.—*Distd.* *Bradbee v. Christ's Hospital* (1842), 2 Dowl. N. S. 164; *Humphries v. Brogden* (1850), 12 Q. B. 739. *Appld.* *Bonomi v. Backhouse* (1858), E. B. & E. 622. *Consd.* *Southwark & Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 603. *Refd.* *Bibbey v. Carter* (1859), 7 W. R. 193; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Fairbrother v. Bury R. S. A.* (1889), 37 W. R. 514. *Mentd.* *Metcalfe v. Hotherington* (1855), 11 Exch. 257; *Sub-Marine Telegraph Co. v. Dickson* (1864), 15 C. B. N. S. 759; *Fletcher v. Rylands* (1866), L. R. 1 Exch. 265.

**1194.** ———. *J.*—Pltf., in his declaration, complained that he, being possessed of a certain dwelling-house, & deft. being also possessed of a certain other dwelling-house next adjoining that of pltf., deft. proceeded to pull down his house for the purpose of re-building another house on the site thereof; & that deft.'s contriving, etc., by his workmen, etc., behaved & conducted himself so carelessly, negligently & improperly in & about digging & clearing the ground for the foundation of the house so built on the site of his first mentioned house, & in & about underpinning the party wall between that house & the house of pltf., etc., that by & through the carelessness, etc., of deft. & his agents, the party wall, & all the walls, floors, beams, etc., of the house of pltf. were greatly sunk, cracked, weakened, & injured, etc.:—*Held*: the declaration disclosed a good cause of action, for that deft. had no right to underpin the party wall either partially or wholly, unless that could be done without injury to pltf.'s house, even although it might be doubtful whether the interests of the parties were several, or whether they stood in the relation of tenants in common.—*BRADBEE v. CHRIST'S HOSPITAL* (1842), 4 Man. & G. 714; 2 Dowl. N. S. 164; 134 E. R. 294; *sub nom.* *BRADBEE v. LONDON CORPN.*, 5 Scott, N. R. 79; 11 L. J. C. P. 209.

*Annotation*.—*Mentd.* *R. v. Longton Gas Co.* (1860), 29 L. J. M. C. 118.

**1195.** ———. *J.*—(1) A water co. in exercise of statutory powers laid down pipes under the surface of a street, & the highway authority of the district afterwards, in exercise of the power in that behalf given by Metropolis Management Act, 1855 (c. 120), s. 98, proposed to lower the surface

of the street, & to do so without altering or disturbing the position of the pipes, but so as to leave only a few inches of soil over them. In an action by the water co. to restrain the highway authority from lowering the surface of the street without at the time lowering the pipes of the co. to a corresponding depth under the new surface:—*Held*: the above sect. did not impose upon the highway authority, when exercising the power thereby given to them of altering the level of a street, any express or implied duty to exercise also at their own expense the power by the same sect. given of altering the position of the pipes thereunder, for the benefit of the water co., in a case where the highway authority did not require for their own purposes to interfere with such pipes.

(2) Pltfs. can have no higher claim to consideration at the hands of defts. than the owner of a house, for which no right of support from the adjoining house had been acquired, would be entitled to claim against the adjoining owner, who in pulling his own house down withdraws support to which his neighbour is not entitled. It is clear in such case that, though the pulling-down owner must be careful to interfere as little as possible with the adjoining house, he is certainly not called upon to take active steps for its protection, as, for instance, by shoring it up. There is a broad distinction between exercising a right with reasonable care so as not to do avoidable damage, & taking active measures to insure the continuance of something that is not a right in the adjoining owner (*COLLINS, L.J.*).—*SOUTHWARK & VAUXHALL WATER CO. v. WANDSWORTH BOARD OF WORKS*, [1898] 2 Ch. 603; 67 L. J. Ch. 657; 79 L. T. 132; 62 J. P. 756; 47 W. R. 107; 14 T. L. R. 576, C. A.

*Annotations*.—*As to* (2) *Refd.* *East Fremantle Corp. v. Annals* (1901), 71 L. J. P. C. 39; *Ash v. U. N. Pica & Brompton Ry.* (1903), 67 J. P. 417. *Generally, Mentd.* *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1899] 2 Ch. 217; *Roberts v. Charing Cross, Euston, & Hampstead Rly.* (1903), 87 L. T. 732; *The Johannesburg*, [1907] P. 65.

**1196. Compensation for negligently removing house—Under statutory powers.**—A railway co. for the purposes of their undertaking took certain houses standing in a row & structurally connected with the adjoining tenements. In removing one of such houses the stability of the neighbouring house, which had not been taken by the co., was impaired, & the owners sustained damage as well to that house as to others in their occupation. On bill filed for an injunction, it appearing that by due precaution such damage might have been avoided:—*Held*: an injunction was rightly granted, the case not being one for compensation under Lands Clauses Consolidation Act, 1845 (c. 18), s. 68, & an inquiry as to damages would be directed.—*BISCOE v. GREAT EASTERN RY. CO.* (1873), L. R. 16 Eq. 636; 21 W. R. 902.

**Damage to party wall.**—*See BOUNDARIES, Vol. VII., p. 302, Nos. 250, 251.*

**Right to build on wall.**—*See BOUNDARIES, Vol. VII., p. 208, No. 221.*

## SUB-SECT. 2.—EXCLUSION OF RIGHT OF SUPPORT.

*Sec., generally, MINES.*

**1197. General rule**—By express permission or clear implication.—In order to displace the common law right of support, there must be either express permission or clear implication. But where in the case of leases of an upper stratum & of a lower stratum of coal it is knowledge common to the lessees of both strata that the lower stratum cannot be worked on the usual & most approved

- Sect. 1.—Natural right of support: Sub-sect. 2.*  
*Sect. 2: Sub-sects. 1, 2 & 3, A., B. & C.*  
*Sect. 3: Sub-sect. 1.]*

system without causing subsidence of the upper stratum, & provision is made for indemnity against physical damage caused by such working, an injunction will not be granted to prevent the working of the lower stratum.—*BUTTERLEY CO., LTD. v. NEW HUCKNALL COLLIERY CO., LTD.*, [1910] A. C. 381; 79 L. J. Ch. 411; 102 L. T. 609; 20 T. L. R. 415, H. L.; *affg.*, [1909] 1 Ch. 37, C. A.

*Annotations:—Apld.* *Locker-Lampson v. Staveley Coal & Iron Co.* (1908), 25 T. L. R. 136. *Fold.* *Beard v. Moira Colliery Co.*, [1915] 1 Ch. 257. *Apld.* *Jones v. Consolidated Anthracite Collieries & Dynevor*, [1916] 1 K. B. 123. *Fold.* *Weldon v. Butterley Co.*, [1920] 1 Ch. 130. *Refd.* *Davies v. Powell Duffryn Steam Coal Co.*, [1917] 1 Ch. 488; *Thomson v. St. Catharine's College, Cambridge, etc.*, [1919] A. C. 468; *Consett Industrial & Provident Soc. v. Consett Iron Co.*, [1922] 2 Ch. 135. *Mentd.* *Broken Hill Proprietary Co. v. Peninsular & Oriental Steam Navigation Co.*, [1917] 1 K. B. 688.

**1198.** ———.]—The common law right of support may be displaced by express provision or by necessary or clear implication (*SWINFEN EADY, L.J.*)—*BEARD v. MOIRA COLLIERY CO., LTD.*, [1915] 1 Ch. 257; 84 L. J. Ch. 155; 112 L. T. 227; 59 Sol. Jo. 103, C. A.

*Annotations:—Refd.* *Davies v. Powell Duffryn Steam Coal Co.*, [1917] 1 Ch. 488. *Mentd.* *Consett Industrial & Provident Soc. v. Consett Iron Co.*, [1922] 2 Ch. 135.

**By statute.—Under Inclosure Acts.**—*See COMMONS, Vol. XI., pp. 63-68, Nos. 898-912, 917-919.*

**By custom.**—*See CUSTOM & USAGES, Vol. XVII., p. 18, Nos. 187, 188.*

**By instrument severing soil from minerals.**—*See MINES.*

## SECT. 2.—EASEMENT OF SUPPORT.

### SUB-SECT. 1.—NATURE OF EASEMENT.

**1199.** *Distinction between vertical & horizontal support.*—*ROWBOTHAM v. WILSON, No. 8, ante.*

**1200.** *Whether negative easement.*—*DALTON v. ANGUS, No. 4, ante.*

**1201.** ———.]—*GREAT NORTHERN RY. CO. v. INLAND REVENUE COMRS., No. 94, ante.*

**1202.** *Similar to natural right.*—*BACKHOUSE v. BONOMI, No. 1140, ante.*

**1203.** ———.]—*DALTON v. ANGUS, No. 4, ante.*

**1204.** ———.]—*GREENWELL v. LOW BEECHBURN COAL CO., No. 1377, post.*

### SUB-SECT. 2.—ACQUISITION OF EASEMENT.

**By express grant.**—*See Part III., Sect. 1, ante.*  
**By implication of law.**—*See Part III., Sect. 2, ante.*

**By prescription.**—*See Part III., Sect. 3, ante.*

**By statute.**—*See Part III., Sect. 4, ante.*

### PART X. SECT. 2, SUB-SECT. 3.—A.

**1214.1.** *Warranty of support.—Grant of land for building purposes.*—*Ptfs.* & *defts.* were adjoining owners of land. *Ptfs.* derived under a grant, made for building purposes, more than twenty years prior to the injuries complained of. The grantors were the predecessors in title of *defts.* Subsequently to the date of the grant, & after the building of a house by *ptfs.* on their land, a railway cutting was made near the locality; but it did not appear that any injury was thereby caused to *ptfs.* house. *Defts.* having, however,

piled large quantities of stones on their lands, immediately adjoining *ptfs.* house, cracks appeared in the walls of the latter, & *ptfs.* brought an action to recover damages caused by the deprivation of the right of support.—*Held:* *ptfs.* right to support, whether acquired by grant or prescription, was not in any way affected by the alteration of circumstances caused by the making of the railway cutting.—*GREEN v. BELFAST TRAMWAYS CO.* (1887), 20 L. R. Ir. 35.—*IR.*

**1214.11.** ———.]—Where a grant of lands is made for a specified purpose,

such as the construction & use of a railway, the grant, in the absence of any contrary intention appearing *ex facie* of it carries with it by implication a right to reasonable & necessary support for the works to be made upon the lands by the subjacent strata or adjacent lands of the grantor, whether these strata or lands continue to belong to the grantor, or are conveyed by him, subsequent to the date of the grant to another person.—*NORTH BRITISH RY. CO. v. TURNERS, LTD.* (1904), 6 F. (Ct. of Sess.) 900; 41 Sc. L. R. 706; 12 S. L. T. 176.—*SCOT.*

### SUB-SECT. 3.—EXTENT OF EASEMENT.

#### A. Support of Buildings by Adjacent Land.

**1205.** *Whether buildings entitled to support—General rule.*—*DALTON v. ANGUS, No. 4, ante.*

**1206.** ——— *Ancient house.*—*PALMER v. FLESHEES* (1604), 1 Sid. 167; 1 Keb. 625; 82 E. R. 1035; *sub nom.* *PALMER v. FLETCHER*, 1 Lev. 122.

*Annotations:—Consd.* *Wheeldon v. Burrows* (1879), 12 Ch. D. 31; *Allen v. Taylor* (1880), 16 Ch. D. 355. *Apprvd.* *Dalton v. Angus* (1881), 6 App. Cas. 740. *Refd.* *Tenant v. Goldwin* (1704), 2 Ld. Raym. 1089; *Compton v. Richards* (1814), 1 Price, 27; *Swansborough v. Coventry* (1832), 9 Bing. 305; *White v. Bass* (1862), 7 H. & N. 722; *Robinson v. Grave* (1872), 2 L. T. D. 648; *Ellis v. Manchester Carriage Co.* (1876), 2 C. P. D. 13; *Russell v. Watts* (1885), 10 App. Cas. 590; *Birmingham, Dudley & District Banking Co. v. Ross* (1888), 38 Ch. D. 295; *Myers v. Catterson* (1889), 59 L. J. Ch. 315; *Phillips v. Low*, (1892) 1 Ch. 47; *Smith v. Hancock*, [1894] 2 Ch. 377; *Broomfield v. Williams*, [1897] 1 Ch. 602; *Hansford v. Jago*, [1921] 1 Ch. 322.

**1207.** ———.]—*WYATT v. HARRISON, No. 1143, ante.*

**1208.** ——— *House built more than twenty years.*—*STANSELL v. JOLLARD* (1803), Selwyn's N. P. 11th ed., Vol. I., p. 457; cited 5 Exch. at p. 796; 155 E. R. 340.

*Annotations:—Distd.* *Woodall v. Hingley* (1866), 14 L. T. 167. *Consd.* *Dalton v. Angus* (1881), 6 App. Cas. 740. *Refd.* *Hide v. Thornborough* (1846), 2 Ca. & Kir. 250; *Humphries v. Brogden* (1850), 12 Q. B. 739; *Rogers v. Taylor* (1858), 30 L. T. O. S. 321; *Solomon v. Vintners' Co.* (1859), 4 H. & N. 585.

**1209.** ———.]—*HIDE v. THORNBOROUGH, No. 1169, post.*

**1210.** ———.]—*ROGERS v. TAYLOR, No. 1151, ante.*

**1211.** ——— *House built twenty years.*—*DODD v. HOLME, No. 1177, ante.*

**1212.** ———.]—*BROWN v. ROBINS, No. 1180, ante.*

**1213.** ——— *Grant by common owner.*—*SHUBROOK v. TUFNELL, No. 225, ante.*

**1214.** *Warranty of support.—Grant of land for building purposes.*—*CALEDONIAN RY. CO. v. SPROT, No. 256, ante.*

**1215.** ———.]—*SIDDONS v. SHORT, No. 258, ante.*

**1216.** ———.]—*RIGBY v. BENNETT, No. 259, ante.*

#### B. Support of Buildings by Subjacent Land.

**1217.** *Right to support.—Omission from grant by statute.*—*ELLIOT v. NORTH EASTERN RY. CO.*, No. 1145, *ante.*

**1218.** ——— *House built over excavated land.—Excavation existing for twenty years.*—(1) *Ptfs.* houses were built more than twenty years ago upon honeycombed land, *i.e.*, land underneath & in the neighbourhood of which coal mines had been worked. In 1802 *defts.* became the lessees of an adjacent coal mine & worked it, & in 1864 G., the owner of land adjoining to & immediately intervening between *ptfs.* said land & *defts.* mine, recovered damages from *defts.* in an action for an injury accruing from the sinking of his land



by reason of their workings. In an action for damages to pltf.'s houses by their sinking in consequence of the mining operations of defts. under G.'s land, the jury, in answer to four distinct questions by the judge, found that defts.' working caused the injury complained of; that such workings would not have caused it, or any part of it, if the intervening ground & the ground on which pltf.'s houses stood had been left in the solid; that defts. so far knew the ground had not been left in the solid that they ought to have concluded that their operations would be dangerous to the houses; that pltf.'s land & the adjoining intervening land had been mined for more than twenty years, so as to make defts.' operations dangerous; & a verdict was thereupon directed for pltf. Upon a rule for a new trial, on the ground of misdirection in telling the jury to consider whether the ground under pltf.'s land & under G.'s land was in the solid, instead of putting each point to them separately, & in not asking them to find whether defts. or the owners of the land knew of the excavations for twenty years:—*Held*: the findings of the jury in answer to the questions put to them did not amount to establishing the fact of negligence on the part of defts., which was necessary in order to sustain pltf.'s verdict, & as the question of negligence had not been distinctly put & answered by the jury, the rule for a new trial must be made absolute.

(2) *Qu.*: whether the existence of an excavation beneath land for twenty years is to cast upon the adjoining owner absolutely the support of the land as if it were unworked land.—*WOODALL v. HINGLEY* (1866), 14 L. T. 167.

1219. *Grant by common owner.*—*RICHARDS v. JENKINS*, No. 224, *ante*.

#### C. Support of Building by Building.

1220. *Whether building entitled to support from subjacent room.*—*BUSH v. FIELD* (1580). Cary. 90; 21 E. R. 48.

1221. ———.—*CALEDONIAN RY. Co. v. SPROT*, No. 256, *ante*.

1222. ———.—*DALTON v. ANGUS*, No. 4, *ante*.

1223. ———.—*From subjacent party wall.*—Defts. were the owners of two houses in a street, numbered 38 & 40, & of a gateway under 40 & adjoining 38. In 1857 they demised the house No. 38 for a term of 21 years, the lease containing a covenant by the lessee to repair all walls & party walls belonging to the premises. In 1865 they granted a lease to pltf. of the house No. 40 for a term of eleven years, subject to a similar covenant to repair walls & party walls. The wall on the side of the gateway separating it from No. 38 was a party wall between the gateway & the house No. 38 to the height of the first floor. The house of pltf., No. 40, was built so as to extend in part over the top of the gateway & to rest upon this party wall between the gateway & the house No. 38, & to be supported by it. Pltf.'s covenant to repair did not extend to this wall, & there was no covenant by defts. to keep it in repair. In 1874 it was discovered that the walls of that part of No. 40 which was above the gateway were giving way. The damage was owing to the failure of support from the party wall, which had bulged in consequence of the pressure upon it from pltf.'s premises:—*Held*: there was no implied covenant

on the part of defts. to support pltf.'s premises, although it might be an answer to an action upon pltf.'s covenant to repair, that the repair had been rendered impossible by the neglect of some precedent obligation on the part of defts.—*COLEBECK v. GIRDLEERS' Co.* (1870), 1 Q. B. D. 234; 45 L. J. Q. B. 225; 34 L. T. 350; 40 J. P. 590; 24 W. R. 577, D. C.

*See, generally, BOUNDARIES*, Vol. VII., p. 296.

1224. ———.—*Building not immediately adjoining.*

—*SOLOMON v. VINTNERS' Co.*, No. 326, *ante*.

1225. ———.—*Building adjoining.*—*LEMAITRE v. DAVIS*, No. 391, *ante*.

1226. ———.—*—TONE v. PRESTON*, No. 415, *ante*.

1227. *Right of support from adjoining wall—Weight may be imposed not endangering stability.*

—*SHEFFIELD IMPROVED INDUSTRIAL & PROVIDENT SOCIETY v. JARVIS*, [1871] W. N. 208.

1228. ———.—*Grant by common owner.*—*RICHARDS v. ROSE*, No. 223, *ante*.

1229. ———.—*—HOWARTH v. ARMSTRONG*, No. 220, *ante*.

### SECT. 3.—DISTURBANCE OF SUPPORT.

#### SUB-SECT. 1.—WHAT AMOUNTS TO DISTURBANCE.

*See, generally, MINES.*

1230. *Substitution of artificial support for natural support.*—*ROWBOTHAM v. WILSON*, No. 8, *ante*.

1231. ———.—(1) A man, who orders a work to be executed on his own premises, lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief; & cannot relieve himself of his responsibility by employing some one else to do what is necessary to prevent the act he had ordered to be done from becoming wrongful. Pltf. & deft. were respective owners of two adjoining houses, pltf. being entitled to the support, for his house, of deft.'s soil. Deft. employed a contractor to pull down his house, excavate the foundations, & rebuild the house; the contractor took the risk of supporting pltf.'s house, as far as might be necessary, during the work, & to make good any damage & satisfy any claims arising therefrom. Pltf.'s house was injured in the progress of the work, owing to the means taken by the contractor to support it being insufficient:—*Held*: deft. was liable, even if the undertaking as to risk, etc., had amounted, which it did not, to an express stipulation that the contractor should do, as part of the works contracted for, all that was necessary to support pltf.'s house.

(2) The removal of soil, to the support of which an adjacent building or land may be entitled, is not in itself wrongful, & becomes so only when damage to the adjoining property results; whence it follows that if by artificial means of support the damage can be prevented, no cause of action arises (*COCKBURN, C.J.*).—*BOWER v. PEATE* (1870), 1 Q. B. D. 321; 45 L. J. Q. B. 446; 35 L. T. 321; 40 J. P. 789.

*Analogies*:—As to (1) *Apprvd.* *DALTON v. ANGUS* (1881), 6 App. Cas. 740. *Appld.* *LEMAITRE v. DAVIS* (1881), 51 L. J. Ch. 773. *Consd.* *HUGHES v. PERCEVAL* (1883), 8 App. Cas. 443. *Reid.* *BIRMINGHAM CORPN. v. ALLEN* (1877), 6 Ch. D. 284; *Burt v. Victoria Graving Dock Co. & London*

had the means of knowing, that his house was affording support to the other.—*GATELY v. MARTIN*, [1900] 2 I. R. 209.—*IR.*

#### PART X. SECT. 2, SUB-SECT. 3.—C.

1225 i. *Whether building entitled to support—Building adjoining.*—Where an easement of support is claimed by

the owner of one of two adjoining houses, which have not a common origin, against the owner of the other, it must be shown that the owner of the servient tenement knew, or



**Sect. 3.—Disturbance of support: Sub-sects. 1 & 2.****Part XI. Sect. 1: Sub-sect. 1, A., B. & C.]**

& St. Katherine's Dock Co. (1882), 47 L. T. 378; Jolliffe v. Woodhouse (1894), 10 T. L. R. 553; Odell v. Cleveland House (1910), 102 L. T. 602; Selby v. Whitbread, [1917] 1 K. B. 736. *Generally, Mentd.* Whitely v. Pepper (1877), 46 L. J. Q. B. 436; Barham v. Ipswich Dock Comrs. (1885), 54 L. T. 23; Hardaker v. Idle District Council, [1896] 1 Q. B. 335; Penny v. Wimbledon U. C. (1899), 68 L. J. Q. B. 704; Cribb v. Kynoch, [1907] 2 K. B. 548; Cox v. Coulson, [1916] 2 K. B. 177.

**1232. Whether must cause appreciable damage.]**—SMITH v. THACKERAH, No. 1147, *ante*.

**1233. —.**—[A railway co. constructed a railway on the level across a highway in the district of which the relators were the urban sanitary authority. Subsequently depts. worked coal mines in a proper & usual manner beneath the highway, with a result that a gradual & uniform subsidence to the extent of about ten feet vertically took place in the highway, railway, & surrounding land. No actual damage was done to the highway thereby, nor was it rendered less convenient; but the railway co. placed ballast under the railway so as to maintain it at its original level, with the result that an embankment was formed obstructing the use of the highway. In an action against depts. for damages for the obstruction to the highway:—*Held*: (1) depts. were not liable; (2) assuming the highway to be repairable by the inhabitants at large, & therefore vested in the relators under Public Health Act, 1875 (c. 55), s. 149, the subsidence of the highway having been substantial,

the relators, notwithstanding that they had suffered no appreciable damage by reason of such subsidence, were entitled to judgment with nominal damages for the injury to their proprietary right.—*A.-G. v. CONDUIT COLLIERY CO.*, [1895] 1 Q. B. 301; 64 L. J. Q. B. 207; 71 L. T. 771; 59 J. P. 70; 43 W. R. 386; 11 T. L. R. 57; 15 R. 267, D. C.

*Annotations*:—*As to* (2) *Refd.* Wednesbury Corpn. v. Lodge Holes Colliery Co., [1905] 2 K. B. 823. *Generally, Mentd.* Weld-Blundell v. Stephens, [1920] A. C. 956.

**SUB-SECT. 2.—REMEDIES.**

**1234. When cause of action arises—Whether from time support withdrawn or from occurrence of damage—Statute of Limitations.]**—GILLON v. BODDINGTON, No. 1352, *post*.

**1235. —.**—[—]—ROWBOTHAM v. WILSON, No. 8, *ante*.

**1236. —.**—[—]—HALL v. NORFOLK (DUKE), No. 1378, *post*.

**1237. —.**—**Must be appreciable damage.]**—SMITH v. THACKERAH, No. 1147, *ante*.

*Assessment of continuing damage.]*—*See* DAMAGES, Vol. XVII., pp. 90, 91, Nos. 77–82.

*Assessment of prospective damage.]*—*See* DAMAGES, Vol. XVII., p. 91, Nos. 83–85.

*Legal proceedings generally.]*—*See* Part XII., Sect. 2, sub-sect. 2, *post*.

**Part XI.—Miscellaneous Easements.****SECT. 1.—AIR.****SUB-SECT. 1.—RIGHT TO FREE AND UNINTERRUPTED PASSAGE OF AIR.****A. In General.**

*See, generally, Part VII., ante.*

**1238. Distinguished from easement of light.]**—

BLAND v. MOSLEY (1587), cited in 9 Co. Rep. at p. 58 a; 1 Bulst. at pp. 115, 116; Hut. at p. 136; 77 E. R. 817; *sub nom.* MOSLEY v. BALL, Yelv. at p. 216.

*Annotations*:—*Consd.* Dalton v. Angus (1881), 6 App. Cas. 740; Chastey v. Ackland (1897), 13 T. L. R. 237. *Refd.* Hughes v. Kome (1612), Yelv. 215; Cross v. Lewis (1824), 2 B. & C. 686; Rea v. Shuard (1837), 6 L. J. Ex. 125.

**1239. —.**—**Grounds for Injunction.]**—CITY OF LONDON BREWERY CO. v. TENNANT, No. 475, *ante*.

**1240. —.**—[—]—BAXTER v. BOWER, No. 984, *ante*.

**B. Extent of Right.**

**1241. Whether right to general passage of air—To mill.]**—GOODMAN & GORE'S CASE (1613), Godb. 189; 78 E. R. 115.

**PART X. SECT. 3, SUB-SECT. 2.**

*p. When cause of action arises.]*—*Held*: if the principle of lateral support, which prevails as between adjoining proprietors, applies as between a private owner & the municipal corpn. owning or controlling the municipal highway, the right is to damages when suffered by reason of the withdrawal of that support, & not before.—FOSTER v. MEDICINE HAT CITY (1914), 28 W. L. R. 685; 6 W. W. R. 548; 17 D. L. R. 391.—*CAN.*

*q. Action for damages—Maintainable by tenant of building damaged.]*—An action against the proprietor of adjoining land for damage done to a building by the removal of the lateral support afforded by such adjoining

land, may be maintained by the tenant of the building.—MCCANN v. CHISHOLM (1883), 2 O. R. 506.—*CAN.*

*r. —.*—*Whether actual damage necessary.]*—No actual damage is necessary to support an action for the disturbance of an easement of support for a building.—RAMAKRISHNA v. SETHARAMA (1914), 1 L. R. 37 Mad. 527.—*IND.*

*s. —.*—*Danger actual or imminent necessary.]*—Where an owner excavates land adjoining that of a neighbour no action will lie against him unless thereby danger actually has been caused or has become imminent.—CENTRAL S. A. RYS. v. GELDENHUIS MAIN REEF G. M. CO., LTD. (1907), T. H. 270.—*S. AF.*

**1242. —.**—[—]—TRAHERN'S CASE (1613), Godb. 233; 78 E. R. 135.

*Annotation*:—*Refd.* Webb v. Bird (1863), 13 C. B. N. S. 841.

**1243. —.**—[—]—ANON. (1621), Win. 3; 124 E. R. 3.

*Annotations*:—*Refd.* R. v. Pappineau (1726), 2 Stra. 686; Webb v. Bird (1862), 8 Jur. N. S. 621.

**1244. —.**—[—]—WEBB v. BIRD, No. 364, *ante*.

**1245. —.**—**Obstruction to chimney.]**—FLIGHT v. PROVIS (1859), 33 L. T. O. S. 122.

**1246. —.**—[—]—BRYANT v. LEFEVER, No. 319, *ante*.

**1247. —.**—[—]—(1) No action will lie for the erection of a building which causes a chimney to smoke in premises upon adjoining land; & a demise of a dwelling-house does not by implication grant any right to the free passage of air or smoke from the same over adjoining land of the grantor. (2) The question whether a mtgor. is in such possession of rents & profits of land as will entitle him, under Jud. Act, s. 25 (5), to bring an action in respect of such land is to be determined by reference to all the circumstances of the case,

**PART XI. SECT. 1, SUB-SECT. 1.—B.**

*t. Whether right to general passage of air—Sufficient for sanitary purposes—Passage of current of wind—Cannot be acquired by prescription.]*—The owner of a house cannot by prescription claim to be entitled to the free & uninterrupted passage of a current of wind. He can claim no more air than what is sufficient for sanitary purposes.—BARROW v. ARCHER (1864), 2 Hyde, 125.—*IND.*

*u. —.*—*Co-extensive with right to light—Interference must amount to nuisance to be actionable.]*—The right of air is co-extensive with the right to light. To give a right of action, either prior or subsequently to Limitation Act, 1871, in a case, where there is no

by the possibility of doing justice upon the existing record between all parties interested. Where the owner of the equity of redemption suing for damages for obstruction to light & air had granted a second mtge. with power to the mtgee. to collect the rents, & both mtgees., though declining to be joined in the action, had expressed their readiness to give all requisite discharges to effect:—*Held*: the mtgor. could maintain the action in his own name, but the damages recovered must be paid into ct., to await the execution by the mtgees. of a discharge of all claims by them against deft.—*BENNETT v. HUGHES* (1886), 2 L. R. 715, D. C.

**1248.** —[—]—A right to have air come over a neighbour's land in a particular channel to a particular place may be established by immemorial user; but in the absence of actual contract, no one can claim a right to have the general current of air over his neighbour's property to his property kept uninterrupted.

Pltfs.' house was in a terrace fronting east. Deft.'s house adjoined it & was the most northerly house in the terrace. On the north was an open square. Along the back of the terrace was a space 8 feet wide, bounded on the west by a high wall, & divided into yards to the terrace houses. Opposite to pltfs.' house at the back was a urinal used by a great number of people, & the conveniences of the houses in the terrace were ventilated at the back. Deft. raised by sixteen feet a new building which formed the northern boundary of his yard. This erection to some extent darkened pltfs.' ancient lights & caused a stagnation of air in their yard, so that the exhalations from the urinal & conveniences were not carried off, & pltfs.' house became less healthy through want of ventilation. The judge considered that the interference with light was trifling & might be compensated by £10 damages, but that the interference with ventilation was serious; & granted an injunction against the continuance of the new building:—*Held*: as the exhalations had not arisen from any act of deft., the stagnation in pltfs.' yard caused by deft.'s new building was not actionable either as an interference with a legal right or as a nuisance, & the injunction must be discharged.

Although Prescription Act, 1832 (c. 71), does not apply to air, a right to have it come over another's land, in some definite direction to some particular place can be established by what is called immemorial user, or by user which may have had for its origin some lost grant or agreement binding on the owners of the servient tenement (*LINDLEY, L.J.*).

The law will not imply a grant except it is of something definite. The undefined passage of air is too vague (*LOPES, L.J.*).—*CHASTEY v. ACKLAND*, [1895] 2 Ch. 389; 64 L. J. Q. B. 523; 72 L. T. 845; 43 W. R. 627; 11 T. L. R. 460; 39 Sol. Jo. 582; 12 R. 420, C. A.; *varied on appeal*, 1897] A. C. 155, H. L.

*Annotation*:—*Refd. Davis v. Town Properties Investment Corp.*, [1903] 1 Ch. 797.

**1249. Passage through defined channel—For ventilation.**—*GALE v. ABBOTT*, No. 889, *ante*.

express contract on the subject, for an interference with the access of air to dwelling-houses by building on adjoining land, the obstruction must be such as to cause what is technically called a nuisance to the house; in other words, to render the house unfit for the ordinary purposes of habitation & business. There is no such right as

right to the uninterrupted flow of south breeze as such.—*DELHI & LONDON BANK v. HEM LAL DUTT* (1887), 1 L. R. 14 Calc. 839.—*IND.*

b. — *Encroachment by protrusion of beams—No right to air above beams.*—[Pltfs.' beams overhung deft.'s soil & deft. erected a building, which overhung those beams. A question having arisen as to whether the beams

**1250.** —[—]—*BASS v. GREGORY*, No. 382, *ante*.

**1251.** — *Prescription Act, 1832 (c. 71), s. 2.*—*HARRIS v. DE PINNA*, No. 850, *ante*.

**1252.** — *Grant of land in general terms.*—*ALDIN v. LATIMER CLARK, MUIRHEAD & CO.*, No. 264, *ante*.

**1253.** — *Immemorial user.*—(*CHASTEY v. ACKLAND*, No. 1248, *ante*).

**1254. Passage to definite aperture—User more than thirty years.**—*HALL v. LICHFIELD BREWERY CO.*, No. 339, *ante*.

**1255.** — *Grant of land in general terms.*—*ALDIN v. LATIMER CLARK, MUIRHEAD & CO.*, No. 264, *ante*.

**1256.** — *May be acquired by prescription.*—[

(1) A right to the access of air to a defined aperture over a servient tenement may be acquired though there is no defined channel over the servient tenement through which the air flows. (2) The grant of such a right may be implied from general words in a conveyance of a building from a grantor entitled in fee to the adjoining land though such land is subject to a lease.

On Jan. 19, 1905, the H. Co. conveyed to the pltf. in fee a piece of land with a stable on it. The stable was ventilated by apertures to which the air had access over an open yard which the co. owned in fee subject to a lease for a term of which 28 years were unexpired. On Aug. 3, 1905, the co. conveyed the yard to deft., the lessee joining to merge the term. Deft. put up a hoarding entirely closing the ventilators of the stable:—

*Held*: on the principle of derogation from a grant, neither the co. nor deft. as their assignee could erect anything on the yard which prevented the use of the stable as a stable. A mandatory injunction granted to remove the hoarding.

(3) The rule that a man may not derogate from his grant is a rule of law & not a rule of equity at all. I do not think it depends upon an implication of a covenant on the part of the grantor (*NEVILLE, J.*).

(4) The right to light & the right to air through a particular aperture in a house or building on the dominant tenement is capable of being acquired by prescription (*NEVILLE, J.*).—*CABLE v. BRYANT*, [1908] 1 Ch. 259; 77 L. J. Ch. 78; 98 L. T. 98.

*Annotations*:—*As to* (2) *Refd. Schwann v. Cotton*, [1916] 2 Ch. 459; *Westwood v. Heywood*, [1921] 2 Ch. 130.

*Extraordinary user.*—*See* No. 917, *ante*.

### C. Acquisition of Right.

**1257. By express grant or covenant.**—*MOORE v. RAWSON*, No. 511, *ante*.

**1258.** —[—]—*BRYANT v. LEFEVER*, No. 349, *ante*.

**1259.** —[—]—*HALL v. LICHFIELD BREWERY CO.*, No. 339, *ante*.

**1260. By implication of law.**—*HALL v. LICHFIELD BREWERY CO.*, No. 339, *ante*.

**1261.** —[—]—*BENNETT v. HUGHES*, No. 1217, *ante*.

**1262.** —[—]—*ALDIN v. LATIMER CLARK, MUIRHEAD & CO.*, No. 264, *ante*.

**1263. By presumption of lost grant.**—*BASS v. GREGORY*, No. 382, *ante*.

gave pltf. a right to the column of air above them:—*Held*: deft., being the owner of the soil, was entitled *prima facie* to all above it & the diminution in his rights by reason of the beams did not extend beyond the protrusion of the beams themselves.—*RANCHOD SHAMJI v. ABDULHAJI MITTARHAI* (1901), 1 L. R. 28 Bom. 428.—*IND.*

**Sect. 2.—Deposits and erections on and over servient tenement. Sects. 3, 4 & 5: Sub-sects. 1, 2 & 3.]**

L. J. Ch. 291; 48 L. T. 297; 47 J. P. 517; 31 W. R. 488, C. A.

**Annotation.**—*Reid*, Swainston v. Flinn & Metropolitan Board of Works (1883), 48 L. T. 634.

**1284. To deposit rocks upon foreshore.]**—The predecessor in title of deft., who was the owner of land adjoining the foreshore which had been conveyed by the Crown to pltf. more than twenty years before action brought, placed rocks & piles upon a certain part of the foreshore belonging to pltf. for the purpose of protecting a house upon his land from the encroachment of the sea:—*Held*: the question of dispossession was one of intention; the rocks were placed upon the foreshore by deft.'s predecessor, not in order to assert a title to the ownership of the soil, but as ancillary to the use by deft. of his own property—namely, for its protection from the sea; pltf. had never been dispossessed, & had therefore a right to the land in question, subject to the right of deft. to an easement over the land for the purpose of protecting his house from the sea, by means of rocks & piles placed on the land.—*PHILPOT v. BATH* (1905), 21 T. L. R. 634; 49 Sol. Jo. 618, C. A.; *affg.* (1904), 20 T. L. R. 589.

**Annotation.**—*Reid*, Beaufort v. Alrd (1901), 20 T. L. R. 602.

**SECT. 3.—EAVESDROPPING.**

*See, generally*, NUISANCE.

**1285. Effect of alteration of user—Discharge through spouts.]**—The occupier of a house who has a right to have the rain fall from the eaves of it upon another man's land cannot put up spouts to collect that rain & discharge it upon such land in a body.—*REYNOLDS v. CLARKE* (1725), 2 Ld. Rayn. 1399; 1 Stra. 634; Fortes. Rep. 212; 8 Mod. Rep. 272; 92 E. R. 410.

**Annotations.**—*Mentd.* Gules v. Bayley (1766), 2 Wils. 313; Scott v. Shepherd (1773), 3 Wils. 403; Day v. Edwards (1794), 5 Term Rep. 648; Ogle v. Barnes (1799), 8 Term Rep. 188; Leame v. Bay (1803), 3 East, 593; Hopper v. Reeve (1817), 1 Moore, C. P. 407.

**1286. — Increase of height of wall.]**—*THOMAS v. THOMAS*, No. 536, *ante*.

**PART XI. SECT. 3.**

**e. How acquired—Long user—Contract.]**—Deft., by a user of more than twenty years, had acquired the right to have the eaves of his barn project over the line of pltf.'s land:—*Held*: this gave deft. nothing more than an easement.—*WOOD v. GIBSON* (1897), 30 N. S. R. 15.—**CAN.**

**f. — — — — —.]**—Pltf. & deft. were owners, respectively, of two adjoining houses having a space between them belonging to pltf. Pltf. built a new storey to his house, with a roof overhanging the roof of deft.'s house, & to an easement as against deft. of compelling deft. to receive upon the roof of his house the rain-water which flowed from the newly erected roof of pltf.:—*Held*: pltf. could only have acquired such easement either by contract or prescription, on neither of which did he rely.—*MOHANLAL JECHAND v. AMRATLAL BACHE DAS* (1878), 1 L. R. 3 Bom. 174.—**IND.**

**g. — — — — — Remedy for disturbance.]**—Where pltf.'s eaves had projected over deft.'s roof, which rested on a common wall, for more than thirty years, & pltf. had thus acquired a right to have the water carried from his roof on to deft.'s roof, & where defts. raised the common wall & removed pltf.'s eaves:—*Held*: pltf. was entitled to relief either by

damages or injunction.—*NASARIBHAI AHMEDIBHAI v. MADRUDIN* (1892), 1 L. R. 16 Bom. 533.—**IND.**

**h. — — — — — By grant.]**—Pltf.'s predecessor in title built two houses with a passageway between them, & the eavestrough & part of the eaves of deft.'s house projecting over the passageway. He then conveyed to deft.'s predecessor in title the westerly house, "with the privilege & use of the projection of the roof . . . as at present constructed," & covenanted for the quiet & undisturbed enjoyment of the projection, & that, on any sale or conveyance of the house to the east, he would "save & reserve the right . . . to such projection." Subsequently he conveyed the easterly house, with the land between the two houses, to pltf., "subject to the right . . . to the use of the projection . . . as at present constructed:—*Held*: deft. was not bound to prevent the snow & water discharged from the clouds upon his roof from falling from it upon pltf.'s land, & the easement of shedding snow & water, as had been done ever since deft.'s house was built, was necessary to the reasonable enjoyment of the property granted.—*HALL v. ALEXANDER* (1902), 23 C. L. T. 178; 3 O. L. R. 482; 1 O. W. R. 204.—**CAN.**

**k. — — — — — Ancient right.]**—If a party has ancient right to the discharge of

**1287. — — — — —.]**—Pltf. was the owner of certain premises, the eaves of which projected over adjoining land of deft.'s, & had become entitled by length of user to have the rain-water drop from such eaves on to deft.'s land. Pltf. in rebuilding his premises carried the wall abutting on deft.'s land to a slightly greater height than before & consequently raised the height of the eaves from the ground to the same extent:—*Held*: in the absence of any evidence that a greater burden was thrown on the servient tenement by the alteration, the easement was not thereby destroyed, & pltf. was entitled to the right of eavesdrop from the premises as altered.—*HARVEY v. WALTERS* (1873), L. R. 8 C. P. 162; 42 L. J. C. P. 105; 28 L. T. 343; 37 J. P. 343.

**Annotation.**—*Mentd.* Clarke v. Somersetshire Drainage Comrs. (1888), 57 L. J. M. C. 96.

**1288. Discharge through drain into common sewer.]**—*PYER v. CARTER*, No. 210, *ante*.

**SECT. 4.—FISHERIES.**

*See FISHERIES.*

**SECT. 5.—NUISANCE.**

**SUB-SECT. 1.—IN GENERAL.**

*See, generally*, NUISANCE.

**1289. Acquired by twenty years' user.]**—By lapse of time, if the owner of the adjoining tenement, which, in the case of light or water, is usually called the servient tenement, has not resisted for a period of twenty years, then the owner of the dominant tenement has acquired the right of discharging the gases or fluid, or sending smoke or noise from his tenement over the tenement of his neighbour (*LORD ROMILLY, M.R.*).—*CRUMP v. LAMBERT* (1867), L. R. 3 Eq. 409; 15 L. T. 600; 31 J. P. 485; 15 W. R. 417; *on appeal*, 17 L. T. 133, L. C.

**Annotations.**—*Reid*, Colls v. Home & Colonial Stores, [1901] A. C. 179. *Mentd.* Inchbald v. Robinson, Inchbald v. Harrington (1868), 20 L. T. 109; Roskell v. Whitworth (1871), 19 W. R. 804; Chibnall v. Paul

water from his roof on a certain piece of land, it is not competent for a purchaser of the land to exercise his right thereto in such a manner as to interfere with the easement, & impose the trouble & expense on the owner of the easement of procuring some new mode of discharge.—*SHEO NAUTH SINGH v. BIRNATH SINGH* (1867), 2 Agra, pt. 2, 181.—**IND.**

**l. What constitutes.]**—The maintenance of the roof or eaves of pltf.'s house projecting over a small part of deft.'s land served only to retain in the owner of the paper-title an easement to continue the projection.—*DE VAULT v. ROBINSON* (1920), 48 O. L. R. 31; 34 D. L. R. 591; 18 O. W. N. 328.—**CAN.**

**m. — — — — —.]**—The possession of a panoh or eaves for discharge of water overhanging deft.'s land is an easement.—*CHOTALAL HIRACHAND v. MANILAL GAGALBHAI* (1913), 1 L. R. 37 Bom. 491.—**IND.**

**PART XI. SECT. 5, SUB-SECT. 1.**

**n. Whether acquirable.]**—Deft. obstructed the flow of water, etc., from pltf.'s yard, whereby pltf.'s yard became flooded. Pltf. claimed a right by prescription to have the water of his yard flow through deft.'s yard:—*Held*: there could be no easement of a nuisance.—*CRONIN v. O'SHEA* (1896), 30 I. L. T. 436.—**IR.**

(1881), 29 W. R. 536; Grosvenor Hotel Co. v. Hamilton (1894), 9 R. 819; Lyons v. Wilkins, [1899] 1 Ch. 255; Rushmore v. Poline & Alfieri, [1906] 1 Ch. 234; Bosworth-Smith v. Gwynnes (1919), 122 L. T. 15.

**1290. Abatement by local authority—Nuisances Removal Act, 1855 (c. 121), s. 12.**—F., the owner of six houses let to yearly tenants, made a drain from them by leave of the owner of adjoining land through his land into a watercourse on W.'s land, where the drainage became a nuisance:—*Held*: an order under the above sect. was rightly made on F.—*BROWN v. BUSSELL* (1868), L. R. 3 Q. B. 251; *sub nom.* *BROWN v. BUSSELL*, *FRANCOMB v. FREEMAN*, 9 B. & S. 1; 37 L. J. M. C. 65; 18 L. T. 19; 32 J. P. 196.

*Annotations*:—*Mentl.* *Richmond Union Guardians v. St. Paul's* (1868), 18 L. T. 522; *St. Helens Chemical Co. v. St. Helens Corpn.* (1876), 1 Ex. D. 196; *Scarborough Corpn. v. Scarborough R. S. A.* (1876), 1 Ex. D. 344; *Riddell v. Spear* (1879), 40 L. T. 130; *Fordom v. Parsons*, [1894] 2 Q. B. 780.

*See, also*, Part XII., Sect. 2, sub-sect. 1, *post*.

#### SUB-SECT. 2.—NOISE AND VIBRATION.

*See, generally*, NUISANCE.

**1291. Whether twenty years' user necessary.**—

In case for a nuisance to pltf.'s occupation of his dwelling-house deft. pleaded that he had possessed his workshops for ten years before pltf. became possessed of his term in the dwelling-house, & had there carried on his trade without complaint from the occupiers of pltf.'s house:—*Held*: the plea should have shown a holding for twenty years.—*ELLIOTSON v. FEETHAM* (1835) 2 Bing. N. C. 134; 1 Hodg. 259; 2 Scott, 174; 132 E. R. 53.

*Annotations*:—*Consd.* *Bliss v. Hall* (1838), 4 Bing. N. C. 183; *Crump v. Lambert* (1867), L. R. 3 Eq. 409. *Refd.* *Inchbald v. Robinson*, *Inchbald v. Barrington* (1868), 20 L. T. 109.

**1292. — Burden of proof.**—A private hotel kept by pltf. adjoined a house, the ground floor of which had for twenty years been used as a livery stable without causing annoyance to him. In Feb. 1871, deft. became tenant of the latter premises, & made certain alterations in a stable which was separated from pltf.'s dining room by a party wall only, & had up to that time been chiefly used as a coach-house. In place of the wooden mangers therein, which ran at right angles to the said room, deft. put up iron mangers parallel with, & affixed to, the party wall; for halter ropes he substituted iron chains; he laid down a pavement of a more resonant substance than that forming the previous floor, & having rearranged the stalls as loose boxes, kept several horses in them. The consequence of these changes was that the movement of the horses created an intolerable noise & vibration, which disturbed the quiet of pltf.'s house, drove away his lodgers, & well nigh ruined him. In Jan. 1872, he filed a bill to restrain deft. from continuing the nuisance:—*Held*: no prescriptive right to use the stable so as to occasion annoyance had been acquired, & an actionable nuisance was committed causing serious injury to pltf., who was therefore entitled to an injunction, damages, & costs.—*BALL v. RAY* (1873), 8 Ch. App. 467; 28 L. T. 346; 37 J. P. 500; 21 W. R. 282, L. C. & L. J.J.; *subsequent proceedings*, 30 L. T. 1, L. C. & L. J.J.

*Annotations*:—*Consd.* *Broder v. Saillard* (1876), 2 Ch. D. 692. *Refd.* *Byass v. Bettam* (1885), 2 T. L. R. 88; *Harrison v. Southwark & Vauxhall Water Co.*, [1891] 2 Ch. 409; *Howland v. Dover Harbour Board* (1898),

14 T. L. R. 355; *Sanders-Clark v. Grosvenor Mansions Co. & Alessandri*, [1900] 2 Ch. 373; *A.-G. v. Cole*, [1901] 1 Ch. 205; *Rushmore v. Poline & Alfieri*, [1906] 1 Ch. 134. *Mentl.* *Reinhardt v. Montastri* (1889), 42 Ch. D. 68; *Odell v. Cleveland House* (1910), 102 L. T. 602.

**1293. —**—*SANDER v. MANLEY & ROGERS*, [1878] W. N. 181.

**1294. — Actionable nuisance during period of user.**—*STURGES v. BRIDGMAN*, No. 57, *ante*.

#### SUB-SECT. 3.—SMOKE AND OFFENSIVE SMELLS.

**1295. Offensive smell—Whether twenty years' user necessary.**—To an action of nuisance for carrying on the business of a tallow chandler, in a messuage adjoining the messuage of pltf., it is no plea that deft. was possessed of his messuage & the business was carried on, before pltf. became possessed of & occupied the adjoining messuage.

Pltf. came to the house he occupies with all the rights which the common law affords, & one of them is, a right to wholesome air. Unless deft. shows a prescriptive right to carry on his business in the particular place, pltf. is entitled to judgment (*TINDAL, C.J.*).

The smells & noises of which pltf. complains are not hallowed by prescription, & under this plea deft. cannot justify their continuance (*VAUGHAN, J.*).

*Semble*: twenty years' user will legalise the nuisance.—*BLISS v. HALL* (1838), 4 Bing. N. C. 183; 6 Dowl. 442; 1 Arn. 19; 5 Scott, 500; 7 L. J. C. P. 122; 2 Jur. 110; 132 E. R. 758.

**1296. —**—*Case for annoying pltf. in the enjoyment of his house, by causing offensive smells to arise near to, in, & about it. Plea, enjoyment as of right for twenty years of a mixen on deft.'s land contiguous & near to pltf.'s house, whereby, during all that time, offensive smells necessarily & unavoidably arose from the said mixen. On a traverse of the right, deft. had a verdict:—Held*: the plea was bad, & pltf. entitled to judgment *non obstante*, for it did not show a right to cause offensive smells in pltf.'s premises, nor that any smells had, in fact, been used to pass beyond the limits of deft.'s own land.

There is no claim of an easement, unless you make it appear that the offensive smells had been used for twenty years to go over to pltf.'s land (*LORD DENMAN, C.J.*).—*FLIGHT v. THOMAS* (1839), 10 Ad. & El. 500; 7 Dowl. 741; 2 Per. & Dav. 531; 8 L. J. Q. B. 337; 3 Jur. 822; 113 E. R. 224.

*Annotation*:—*Consd.* *O'Brien v. Enright* (1867), 15 W. R. 637.

**1297. Smoke—Whether twenty years' user necessary.**—To a declaration in case for an injury arising from smoke issuing out of deft.'s factory chimneys, deft. justified, under a prescriptive right to have the smoke issuing from the chimneys. This plea was traversed, & pltf. new assigned. It was proved that one of the chimneys whence the smoke issued had been erected for more than 20 years:—*Held*: upon the issue raised by the traverse to this plea, deft. was entitled to have the verdict entered for him.—*BENNETT v. THOMPSON* (1856), 6 E. & B. 683; 25 L. J. Q. B. 378; 27 L. T. O. S. 202; 2 Jur. N. S. 613, 670; 4 W. R. 594, 609, 614; 119 E. R. 1018.

*Annotation*:—*Mentl.* *Knapman v. Fryer* (1857), 26 L. J. Ex. 143.

*See, also*, Nos. 319, 1217, *ante*.

as a right capable of being acquired by prescription.—*KAMHINATHI DADA SHENUT v. NARAYAN* (1897), 1 L. R. 22 Bom. 831.—*IND.*

#### PART XI. SECT. 5, SUB-SECT. 3.

**o. Smoke—How acquired.**—The definition of easement in Easement

Act, 1882, is wide enough to embrace a right to discharge smoke over adjoining land, & s. 28, cl. (d), expressly recognises the right to pollute air

## SECT. 6.—PEWS AND VAULTS.

Pews.]—See ECCLESIASTICAL LAW.

Vaults.]—See BURIAL &amp; CREMATION, Vol. VII., pp. 529, 530, 553, Nos. 92–103, 300.

## SECT. 7.—PRIVACY.

1298. No easement can be acquired by user.]—RICHARDSON v. TAYLOR (1694), Comb. 242; 90 E. R. 454.

1299. ———.]—CHANDLER v. THOMPSON, No. 993, ante.

1300. ———.]—TURNER v. SPOONER, No. 962, ante.

1301. ———.]—TAPLING v. JONES, No. 841, ante.

1302. ———.]—The law does not recognise any easement of prospect or privacy.—BROWNE v. FLOWER, [1911] 1 Ch. 219; 80 L. J. Ch. 181; 103 L. T. 557.

Annotation:—Mentd. Harmer v. Jumbil (Nigeria) Tin Areas, [1921] 1 Ch. 200.

## SECT. 8.—PROSPECT OR VIEW.

1303. View from house—Whether easement can be acquired.]—ALDRED'S CASE, No. 904, ante.

1304. ———.]—An action will not lie for building a wall, by means of which a prospect is destroyed.—KNOWLES v. RICHARDSON (1670), 2 Keb. 642; 1 Mod. Rep. 55; 86 E. R. 727.

Annotation:—Mentd. Chastey v. Ackland (1895), 72 L. T. 845.

## PART XI. SECT. 7.

p. Whether easement can be acquired.]—KOMATHI v. GURUNADA PILLAI (1866), 3 Mad. 141.—IND.

a. ———.]—Held: plff. was not entitled to compel deft. to remove certain windows in his house which overlooked the apartments occupied by the females of plff.'s household.—RAMMAL v. MAHESH BABOO (1868), 5 B. L. R. 667, n.—IND.

r. ———.]—Defts. having opened certain windows &amp; erected a verandah in their house which commanded a view of plff.'s female apartments, plffs. brought a suit against them to have the windows closed &amp; the verandah removed.—Held: no such suit was maintainable.—MAHOMED ABDUR RAHIM v. BIRJU SAHU (1870), 5 B. L. R. 676; 14 W. R. 103.—IND.

s. ———.]—A suit to close doors recently opened in the house of a neighbour on the ground that such doors overlook the zenana or female apartments of plff., does not lie.—GOLAM ALI v. MAHOMED ZAHIR ALI (1870), 6 B. L. R. App. 76.—IND.

t. ———.]—Where plff. opened a new window in his house at Dharwar, which rendered deft.'s house less private than before.—Held: plff. was not guilty of any tortious act, &amp; should not be debarred from improving his own house, though the effect might be, to some extent, prejudicial to his neighbour.—SRINIVAS UPPIKAR v. REID (1872), 9 Bom. 266.—IND.

(a. ———.)—The invasion of privacy by opening windows is not a wrong for which an action will lie.—AZIZ v. AMERHULBI (1894), 1 L. R. 18 Mad. 165.—IND.

b. ———.]—Increased facilities not allowed.—If plff.'s privacy was invaded, &amp; deft. could not establish his right by long usage, the former was entitled to have the windows closed, &amp; the latter could not be allowed to open new windows, merely because the comfort &amp; ventilation of his own

building would be increased.—GOOR DASS v. MANOHAR DASS (1867), 2 Agra 269.—IND.

c. ———.]—Held: the fact that plff.'s zenana house might be to some extent overlooked by persons standing on the roof of deft.'s house was no justification for defts. opening fresh doors or windows in the wall of their upper storey looking towards plff.'s house, whereby plff.'s house might be overlooked without the person inspecting it being visible to the occupants of that house.—ABDUL RAHMAN v. BHAGWAN DAS (1907), 1 L. R. 29 All. 582.—IND.

d. ———.]—May be barred by agreement.—Deft. constructed a window &amp; apertures (jalis) in the back wall of his house &amp; they commanded plff.'s khadki or courtyard which could be used for females to bathe &amp; similar purposes of privacy. From deft.'s window the people sleeping in plff.'s house could be seen &amp; from the apertures, though above a man's height, a person, if he was so inclined, could peep through into plff.'s house &amp; the male apartment next to the open verandah (osari). Plff. having sued for an injunction restraining deft. from making any openings in his wall.—Held: though it was doubtful whether plff. was entitled to relief on the ground of the invasion of his privacy, still as there was a written agreement between the parties in the year 1870 whereby deft.'s father agreed that he would not make any opening in his back wall, plff. had the right to require deft. to close the said apertures &amp; window.—MULIA BHANA v. SUNDAR DANA (1913), 1 L. R. 38 Bom. 1.—IND.

e. Waiver.—In 1844 defts. constructed a toll-house close to or on the boundary of their land, with windows overlooking the adjoining lot. This was done with the knowledge &amp; consent of persons who were then proprietors, &amp; was not objected to by them or any subsequent owner till after the purchase of the adjoining

1305. ———.]—ARNOLD v. JEFFERSON (1697), Holt, K. B. 498; 3 Salk. 247; 90 E. R. 1174.

Annotation:—Mentd. Hannam v. Mockett (1824), 2 B. &amp; C. 934.

1306. ———.]—But now you come in a very special &amp; particular case on a particular right to a prospect. I know no general rule of common law which warrants that, or says, that building so as to stop another's prospect is a nuisance (LORD HARDWICKE, L.C.).—A.-G. v. DOUGHTY (1752), 2 Ves. Sen. 453; 28 E. R. 290, L. C.

Annotations:—Consd. Dalton v. Angus (1881), 6 App. Cas. 740. Mentd. Ripon v. Hobart (1834), 3 My. &amp; K. 169.

1307. ———.]—FISHMONGERS' CO. v. EAST INDIA CO., No. 905, ante.

1308. ———.]—WELLS v. ODY, No. 914, ante.

1309. ———.]—If the owner of one of several houses throws out a bow in the rear, of the depth of eight feet, the whole space opposite being open, his next-door neighbour cannot, on the ground of an interference with his ancient lights, prevent it. But it would be a sufficient injury, if contrary to an express covenant, to induce the ct. to interfere.—WESTERN v. MACDERMOTT (1866), 2 Ch. App. 72; 36 L. J. Ch. 76; 15 L. T. 641; 31 J. P. 73; 15 W. R. 265, L. C.

Annotations:—Consd. Leech v. Schweder (1874), 9 Ch. App. 465, n.; Mannors v. Johnson (1875), 1 Ch. D. 673. Held. Austerberry v. Oldham Corp'n. (1885), 29 Ch. D. 750; Hooper v. Bromet (1903), 89 L. T. 37. Mentd. Re Drew &amp; p. Mason (1866), 35 Beav. 443; Poulett v. Hood (1866), 35 Beav. 234; Tulk v. Metropolitan Board of Works (1868), 1 L. R. 3 Q. B. 687; Keates v. Lyon (1869), 4 Ch. App. 218; Master v. Hainsard (1876), 46 L. J. Ch. 505; Fairclough v. Marshall (1878), 4 Ex. D. 37; Ronalds

lot by plff. In 1900 plff. sued defts. to have the windows closed up.—Held: as plff. &amp; his ancestors had waived objection to the manner in which the toll-house had been constructed, &amp; permitted the windows to remain there, the demolition could not be required, at least so long as the building continued to exist in the condition in which it had been so constructed.—PARENT v. QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES (1901), 22 C. L. T. 46; 31 S. C. R. 556.—CAN.

## PART XI. SECT. 8.

1303 i. View from house—Whether easement can be acquired.]—Plff. filed his bill to restrain defts. from closing windows which looked across a lane on which defts. were erecting a building. Plff. had no title to the lane, but the former owner of it had given him to understand that the lane would never be built on.—Held: a perpetual injunction was granted, restraining defts. from closing the lane.—BIGGAR v. ALLAN (1869), 15 Gr. 358.—CAN.

1303 ii. ———.]—Plff. by injunction sought to prevent the completion of a large frame warehouse which deft. was erecting.

The warehouse was situated directly between plff.'s house &amp; the river &amp; would obstruct plff.'s view of the river.—Held: plff. had no right to the unobstructed view of the river.—MCBEAN v. WYLLIE (1902), 14 Man. L. R. 135.—CAN.

f. ———.]—Long user—Interruption.—Where a person has enjoyed an easement by having windows overlooking the lands of an adjoining proprietor for any period, even one day over nineteen years, he cannot be deprived thereof unless he subsequently submits to an interruption of such easement for a period of twelve months.—BURNHAM v. GARVEY (1879), 27 Gr. 80.—CAN.

g. ———.]—Action for obstructing.—Jalandar of vendor of property.—On covenant for quiet enjoyment.—Plff. &amp;

*v. Cowlshaw* (1879), 11 Ch. D. 866; *Chitty v. Bray* (1883), 48 L. T. 860; *Brown v. Inskip* (1884), Cab. & El. 231; *Martin v. Spicer* (1886), 55 L. T. 821; *Nottingham Patent Brick & Tile Co. v. Butler* (1886), 54 L. T. 441; *Sheppard v. Gilmore* (1887), 57 L. J. Ch. 6; *Merodith v. Wilson* (1893), 69 L. T. 336; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Formby v. Barker*, [1903] 2 Ch. 539.

**1310.** ———.] —*BROWNE v. FLOWER*, No. 1302, *ante*.

**1311.** ——— **Obstruction of view of procession—Obstruction lawfully erected.**]—*FOUL v. DEVONSHIRE CLUB* (1887), 3 T. L. R. 700.

**1312.** ——— **Obstruction unlawfully erected.**]—Pltf. was tenant of a house which overlooked the route of a procession. She proposed to let seats on a stand on the ground floor, & she in fact let a balcony & windows on the first floor to G. for the day of the procession for the purpose of viewing it. Defts., a metropolitan borough council, pursuant to resolution, unlawfully erected a stand in the highway which obstructed the view of the procession from the first & ground floors of pltf.'s house. Before the day of the procession arrived, G., seeing that the view from the first floor would be obstructed, asked pltf. to release him from his agreement, & pltf. did so. A number of persons interviewed pltf. as to hiring seats on the ground floor, but on seeing the preparation for the stand they refrained from doing so. Pltf. brought her action against defts. for the obstruction to & interference with the free use & enjoyment & occupation of her premises & the county ct. directed the jury that the erection of the stand was a public nuisance, & if pltf. had suffered special & individual loss therefrom she was entitled to recover damages from defts.:—*Held*: she was entitled to recover as damages the profit she had lost on G.'s contract, & that which, but for defts.' act, she would have made by letting seats on the ground floor. —*CAMPBELL v. PADDINGTON CORPN.*, [1911] 1 K. B. 869; 80 L. J. K. B. 739; 104 L. T. 394; 75 J. P. 277; 27 T. L. R. 232; 9 L. G. R. 387, D. C.

**1313.** **View of house—Whether easement can be acquired—Display of goods in shop.**]—The ct. will not restrain the erection of buildings which merely prevent goods displayed in a shop from being seen from places whence they would previously have been seen.—*SMITH v. OWEN* (1866), 35 L. J. Ch. 317; 14 W. R. 422.

**1314.** ——— **Business premises.**]—The erection of a building obstructing the view of business premises, but without obstructing light & air, cannot be made the subject of an injunction.—*BUTT v. IMPERIAL GAS CO.* (1866), 2 Ch. App. 158; 16 L. T. 820; 31 J. P. 310; 15 W. R. 92, L. C.

**1315.** ——— **Display of advertisements.**]—In an action, in which the claim was admitted, deft. counterclaimed an injunction in the following

circumstances. Pltf. & deft. were the respective owners & occupiers of two adjoining houses abutting on a street which was a public highway. The side wall of deft.'s house projected into the street a short distance beyond the front of pltf.'s house. There was no door or other opening in the side wall. Pltf. affixed boards at right angles to the front of his house & close to deft.'s side wall covering the wall to a height of 22 feet from the pavement. The boards did not constitute an obstruction to the street, but they prevented deft. from having access to the wall from the street for the purpose of repairing it, & from exhibiting advertisements upon it:—*Held*: the right of access to a highway enjoyed as a private right by the owner of premises adjoining the highway is not limited to the right to pass from the premises to the highway & *vice versa*, but includes the right of access to a wall of the premises in which there is no door or other opening, & the right to have advertisements on the wall displayed to the uninterrupted view of the members of the public using the highway: the act of pltf. was a wrongful interference with the private right of deft.; & deft. was entitled to an injunction restraining pltf. from maintaining the boards in the position above described.—*CORB v. SAXBY*, [1914] 3 K. B. 822; 83 L. J. K. B. 1817; 111 L. T. 814.

#### SECT. 9.—SEWERS AND DRAINS.

See SEWERS & DRAINS.

#### SECT. 10.—CHIMNEYS.

**1316.** **Use of chimneys —In adjoining wall.**]—A. sold to B., the owner of the adjoining premises, the right of using two chimneys in A.'s wall. The consideration was paid, & they were used for eleven years, but no grant was executed. C. purchased A.'s house without notice of the right; but there being fourteen chimney pots on the wall & only twelve flues in A.'s house:—*Held*: (1) C. was put on inquiry, he had constructive notice of the right, & was bound by it, & an injunction was granted to restrain him from stopping up the two chimneys; (2) it was not necessary that the bill should pray for a specific performance, & the absence of a grant was immaterial.—*HERVEY v. SMITH* (1856), 22 Beav. 299; 52 E. R. 1123; *previous proceedings* (1855), 1 K. & J. 389.

*Annotations:—As to* (1) *Distd.* *Allen v. Seckham* (1879), 11 Ch. D. 790. *Reid. L. & N. W. Ry. v. L. & Y. Ry.* (1867), L. R. 4 Eq. 174; *Baxter v. Bower* (1875), 23 W. R. 805; *Bonner v. G. W. Ry.* (1883), 48 L. T. 619; *Union Lighterage Co. v. London Dredging Dock Co.*, [1902] 2 Ch. 557; *Cory v. Davies*, [1923] 2 Ch. 95.

deft. occupied adjoining shops under leases from the same landlord, pltf. having the prior lease. Pltf. brought this action to restrain deft. from obstructing his view, & deft. served a third party notice upon the landlord, claiming, under a covenant for quiet enjoyment, to be protected against pltf.'s claim:—*Held*: deft. could not call upon his landlord to defend him against an unfounded claim; but if pltf.'s claim was well founded, it was by reason of an easement expressly or impliedly granted by his lease, & deft. took subject to such easements, & could not claim that the landlord covenanted with him for quiet enjoyment of that which did not pass under his lease; & therefore, whether pltf.'s claim was well or ill founded, the landlord was not a proper party to be

called on for indemnity.—*SCRIPTURE v. REILLY* (1891), 14 P. R. 249.—**CAN.**

**h.** ——— **Covenant not to erect buildings—Does not apply to trees.**]—S. owned adjacent properties A. & B., & sold B., & a condition was inserted in the deed of transfer of B. "that no buildings shall be erected on B. which may in any way obstruct the view from A."—*Held*: that obstruction of the view of A. by trees planted by defendant after the sale to him of B., was not an infringement of the servitude.—*MYBURGH v. JAMISON* (1861), 4 S. 8.—**S. AF.**

**k.** **View of house—Whether easement can be acquired—Display of goods in shop.**]—The owner of two adjoining shops leased one to pltf. & the other to deft. Pltf.'s shop window had been

so constructed as to present a side view to persons coming along the street, the object being to attract their attention, & obtain their custom for the wares displayed in the shop; & the privilege was shown to be a very important one. The tenant of the adjoining shop having placed a show case in an open space or door-way of his shop, so as to intercept the view of pltf.'s window, was restrained by injunction from continuing the obstruction.—*BRUMMEL v. WHARIN* (1866), 12 Gr. 283.—**CAN.**

**l.** ———.] —*Held*: no action will lie for the removal of erections in front of a shop merely on the ground that such erections obstruct the view which passers-by formerly had of the shop.—*GOPH NATH v. MUNRO* (1906), 1 L. R. 29 All. 22. —**IND.**

*Sect. 10.—Chimneys. Sect. 11. Part XII. Sects. 1 & 2: Sub-sects. 1 & 2, A.]*

**1317. — In party wall.]—**JONES v. PRITCHARD, No. 220, *ante*.

#### SECT. 11.—OTHER EASEMENTS.

**1318. To allow animals to stray.]—**A man may prescribe to have a game of swans within his manor, & may prescribe that his swans may swim within the manor of another.—**SWANS' CASE** (1592), 7 Co. Rep. 15 b; 77 E. R. 435.

*Annotations:—***Mentd.** Lyster v. Home (1639), Cro. Car. 544; Davies v. Powell (1738), Cooke, Pr. Cas. 146; Hannam v. Mockett (1824), 4 Dow. & Lty. K. B. 518; R. v. Robinson (1859), 8 Cox, C. C. 115; Blades v. Higgs (1865), 20 C. B. N. S. 214.

**1319. To tether horses.]—**JOHNSON v. THROUGHGOOD (1625), 11ob. 64; 80 E. R. 213.

*Annotation:—***Mentd.** Burgen v. Steer (1692), 12 Mod. Rep. 25.

**1320. Washing place.]—**BOND'S CASE (1639), March, 16; 82 E. R. 391.

*Annotation:—***Mentd.** Constable v. Nicholson (1863), 14 C. B. N. S. 230.

**1321. Tin-bound.]—**A tin-bound is a mere

casement, for which an ejectment cannot be brought.—**DOE d. FALMOUTH (EARL) v. ALDERSON** (1836), 1 M. & W. 210; 4 Dowl. 701; 1 Gale, 441; Tyr. & Gr. 543; 5 L. J. Ex. 153; 150 E. R. 410.

*Annotations:—***Consd.** Rogers v. Brenton (1847), 10 Q. B. 26. **Held.** Vice v. Thomas (1842), 4 Y. & C. Ex. 538. **Mentd.** Holmes v. Powell (1856), 8 De G. M. & G. 572.

**Overhanging trees.]—**See AGRICULTURE, Vol. II., p. 64, No. 406.

**1322. Use of dock.]—**By an agreement made between G. & C., under whom resp. & applt. respectively claimed, it was agreed, "that the dock between their wharves, on the eastern side of the separation, shall for ever remain open as it now stands; that is to say, that neither of them shall fill it up with wharves or other incumbrances, whereby the convenience of the same may be damaged to either party":—**Held**: the effect of this agreement was to create an easement that the dock should remain open as it then stood for the convenience of either party to use it as a dock; & if it was intended that one party should have a more limited right therein than the other, such limited easement should have been created by express words.—**MORTON v. SNOW** (1873), 20 L. T. 501; 38 J. P. 100, P. C.

## Part XII.—Disturbance of Easements.

### SECT. 1.—WHAT AMOUNTS TO DISTURBANCE.

**Ways.]—**See Part VII., Sect. 8, *ante*.

**Light.]—**See Part VIII., Sect. 4, sub-sect. 1, B., *ante*.

**Water.]—**See Part X., Sect. 2, sub-sect. 2, C.; Sect. 2, sub-sect. 3, C. (c), *ante*

**Support.]—**See Part X., Sect. 3, *ante*.

### SECT. 2.—REMEDIES FOR DISTURBANCE.

#### SUB-SECT. 1.—ABATEMENT.

*See, generally, NUISANCE.*

**1323. When justified—Obstruction threatened.]**

#### PART XI. SECT. 10.

**1317 i. Use of chimney.—In party wall.]** The owner of a house subdivided it, & let the north part to G. This consisted of two rooms, a front & back room, the former having a chimney, but not the latter. G. had a stove in the back room, & the only way he could use it was by passing a stovepipe through a hole in the partition between his & the south part, & thence into the chimney in that part. The owner subsequently leased the south part to deft., who at the time he became tenant was aware of the existence of the stovepipe. G. afterwards assigned to plff., & on leaving took down the pipe. Plff. on coming in, put up a pipe of his own, with the consent of, or at least without any objection by, deft. Deft. having afterwards taken down the pipe & stopped up the hole:—**Held**: he was a wrongdoer, for he only held the south part subject to the user or easement of plff. of the stovepipe & hole.—**CULVERWELL v. LOCKINGTON** (1875), 24 C. P. 611.—**CAN.**

#### PART XI. SECT. 11.

**m. To maintain architectural designs.]—***Semble*: there is no such thing as an easement to maintain appearances in the way of architectural designs.—**ALBERTA LOAN & INVESTMENT CO. v. BEVERIDGE & JOHNSTON**

(1913), 24 W. L. R. 255; 4 W. W. R. 995; 6 Alta. L. R. 212.—**CAN.**

**n. Shade & shelter.]—**In an action for an injunction to prevent deft. from interfering with a ditch & hedge on his own land, plff. claimed an "easement of shade & shelter" for his cattle:—**Held**: no such easement existed in law.—**COCKRANE v. VERNER** (1895), 29 L. T. 571.—**IR.**

**o. Water-race on goldfields.]—**The rights of a grantee of a water-race on the goldfields are analogous to easements, & the extinguishment of such rights in whole or in part are determined on the same principles as apply to the extinguishment of easements.—**CHIN FAN v. DAVIS** (1893), 11 N. Z. L. R. 396.—**N.Z.**

**p. To play golf.—St. Andrew's links.]—****DENPARKER v. CLEGHORN** (1813), 2 Dow. 40; 3 E. R. 780.—**SCOT.**

**q. Curb stone to protect wall.]—**A party had enjoyed for upwards of twenty years possession of a curb stone placed against the wall of her property in a court or vennel belonging to an adjoining proprietor to protect the wall from carts, etc.; this stone having been removed at his own hand by the adjoining proprietor, the party set up a row of stones along the wall, cemented with lime, in the line of the original curb stone:—**Held**: as this operation had been occasioned by the act of the proprietor removing the curb

stone, & as the row of stones was in the line of the original stone, & was no practical encroachment on the vennel, the party was entitled to have the adjoining proprietor & all others interdicted from removing them.—**BLACK v. DRYBURGH** (1840), 2 Duml. (Ct. of Sess.) 583.—**SCOT.**

**r. Obstructing public passage.]—**Where the proprietors of a tenement fronting a public street had been for upwards of forty years in the practice of loading goods in a passage forming a common access from the street to several back tenements, & thereby obstructing the passage:—**Held**: they had acquired no right to do so, & interdict granted against their interfering with the free & reasonable use of the passage by the proprietor of the back tenement.—**STAVART, PATT & CO. v. BROWN BROTHERS & CO.** (1878), 6 R. (Ct. of Sess.) 35.—**SCOT.**

#### PART XII. SECT. 2, SUB-SECT. 1.

**1326 i. When justified—Obstruction completed—Entry justified.]—**W. T. devised to T. A. a lot of land, & to T. C. a right of way adjoining the lot on its northern side, to be used in common by T. C. & the owners or occupiers of the property situated on the north side of the right of way. The administrator of W. T. sold to G. the land to the north of the lot,



**1327.** ————]—*R. v. ROSEWELL* (1699), 2 Salk. 459; 91 E. R. 397.

*Annotations:—**Reid*, *Solomon v. Vintners' Co.* (1859), 4 H. & N. 585. *Mentl*, *Perry v. Fitzhove* (1846), 8 Q. B. 757.

**1328.** ————]—*REIGNOLDS v. EDWARDS*, No. 614, *ante*.

**1329.** ————]—*By owner in fee—Though not in possession.*—*PROUD v. HOLLIS*, No. 669, *ante*.

**1330.** ————]—To an action of trespass for entering a close of pltf.'s & pulling down a stable, deft. pleaded that he was possessed of a dwelling-house adjoining pltf.'s close, & was entitled to have the light & air enter through a certain ancient window therein; that the stable wrongfully & unlawfully obstructed the light & air & darkened the window, wherefore he entered pltf.'s close & pulled down the stable to remove the obstruction. To this plea pltf. replied *de injuriâ*.—*Held*: the replication was good, as the plea consisted merely of excuse; it neither claimed any interest in pltf.'s land, nor set up such a right by virtue of an authority from pltf. within the true meaning of the rule which precludes the adoption of this general form of replication.

Here the plea only shows a lawful excuse given by law to deft. for entering pltf.'s land & pulling down the stable there, because it was a nuisance & obstruction to the right he has to enjoy his own land without inconvenience (*ALDERSON, B.*).—*THOMPSON v. EASTWOOD* (1852), 8 Exch. 69; 19 L. T. O. S. 313.

**1331.** *Extent of remedy—Excessive user—Only excess can be removed.*—Pltf., who had a right to irrigate his meadow by placing a dam of loose stones across a small stream, & occasionally a board or fender, fastened the board by means of two stakes, which had never been done by his predecessors. Deft., who had rights on the same stream, removed the stakes & the board also.—*Held*: deft. had no right to remove the board as well as the stakes, on the ground that the stakes gave the board a character of permanency incompatible with her own rights.

If a party who had a right to a stone weir were to erect buttresses, one who should oppose the erection of the buttresses could not justify demolishing the weir as well as the buttresses (*TINDAL, C.J.*).—*GREENSLADE v. HALLIDAY* (1830), 6 Bing. 379; 4 Moo. & P. 71; 8 L. J. O. S. C. P. 124; 130 E. R. 1326.

**1332.** ————]—*Right to abate whole user.*—*CAWKWELL v. RUSSELL*, No. 1077, *ante*.

**1333.** ————]—*Reasonable manner.*—Pltf., having a prescriptive right to a flow of water, led by means of a gutter laid in a mill-stream at a point where an ancient weir was erected, lengthened the gutter for the purpose of irrigating more land. The flow of water down deft.'s mill-stream was diminished, & deft. in consequence pulled down the ancient weir, which prevented the water from flowing down pltf.'s gutter.—*Held*: no suspension

reserving a right of way on its south side, the description of which agreed with the right of way devised to T. C. G. sold by the same description, & with same reservation, to M. who, in turn, sold to the municipality of the county of C. B.:—*Held*: the building of a fence across the way by pltf. constituted an obstruction which defts. were justified in removing.—*MCLENNAN v. HUTCHINGS* (1917), 50 N. S. R. 359.—*CAN.*

**PART XII. SECT. 2, SUB-SECT. 2.—A.**  
s. *When cause of action arises—*

*Limit of time.*—When a right of free access for light & air is obstructed by the erection of a permanent structure a cause of action accrues to the person whose easement is destroyed at the time the structure is complete, & therefore 21 J. 1, c. 16, sect. 3, bars the right to recover damages for the injury in an action brought more than six years from the date of completion of the structure.—*GREEN v. WALKLEY* (1901), 27 V. L. R. 503.—*AUS.*

t. *Onus of proof of easement on plaintiff.*—In an action for obstructing

of pltf.'s right to the enjoyment of the flow of water as it had formerly existed was caused by his having become a wrongdoer, & deft. was not justified in stopping pltf.'s excessive user by means which altogether prevented his enjoyment of the water, but only in stopping it by the least injurious means in his power. *Semble*: if there had been a confusion of rights, deft. would have been justified in abating the nuisance.—*HILL v. COCK* (1872), 26 L. T. 185; 36 J. P. 552.

—*Easement of light.*—*See* Part VIII., Sect. 5, sub-sect. 2, A. (b), *ante*.

**1334.** ————]—*Interference with sewer.*—Where an urban sanitary authority constructed a sewer under the bed of a goit, on which deft. had a mill & a mill-pond to which water was supplied by the goit, without giving notice to deft. as required by Public Health Act, 1875 (c. 55), s. 32, & deft. forcibly dug down to, broke, & plugged the sewer:—*Held*: (1) the interest of deft. was an easement, & so came within the definition of "lands" in sect. 4 of the Act, even if deft. was not the actual owner, & pltfs., therefore, had no authority to carry a sewer under the goit; but (2) deft. having cut the sewer, & thereby caused great inconvenience & risk of disease to the public, there would be no costs in the action; (3) deft. was within his rights in counter-claiming for damages, as pltfs., by resisting his title had given him no opportunity of agreeing upon damages.—*CLECKHEATON URBAN DISTRICT COUNCIL v. FIFTH* (1898), 62 J. P. 536; 42 Sol. Jo. 669.

**1335.** *Whether remedy barred—By refusal to grant mandatory injunction.*—A building society had established against defts. a right of way over part of the property in the receiver's hands, but so much of their claim as asked for the removal of a house which obstructed the way was dismissed without costs, & no damages were given. The society applied for leave, notwithstanding the receivership, to proceed under their common law rights to abate the obstruction:—*Held*: though the society had failed to obtain a mandatory injunction, it did not follow that they had lost their right to abatement, or that other means were not still open to them of asserting their rights of way.—*JANE v. CAPSEY*, [1891] 3 Ch. 411; 61 L. J. Ch. 55; 65 L. T. 375; 40 W. R. 87.

*Annotation:—**Mentl*, *Whadcoat v. Shropshire Ry.* (1893), 37 Sol. Jo. 650.

**1336.** ————]—*By appointment of receiver by court.*—*JANE v. CAPSEY*, No. 1335, *ante*.

## SUB-SECT. 2.—LEGAL PROCEEDINGS.

### A. *In General.*

**1337.** *Immaterial how right acquired.*—*CHOLLOCOMBE v. TUCKER* (1614), 1 Roll. Abr. 109, pl. 38.

**1338.** *Whether acquired by user or grant immaterial.*—*LEECH v. SCHWEDER*, No. 834, *ante*.

a road pltf. declared that he was possessed of a certain close, & by reason thereof was entitled to a certain way, which he charged defts. with obstructing. Defts. traversed the right of way set up:—*Held*: pltf. was bound to show an easement as alleged, & could not proceed for the obstruction of a public highway, even if he could, no special damage was alleged, without which he could not sue as a private individual.—*FISHER v. VAUGHAN TOWNSHIP* (1854), 12 U. C. R. 55.—*CAN.*

a. *Action on covenant for quiet*

*Sect. 2.—Remedies for disturbance: Sub-sect. 2, A. & B. (a) & (b).]*

**1339. Proof of easement different from that claimed—Relief not granted.]**—Where a party claims an easement, & proves only a part of his claim, the easement proved constitutes a different easement from the one claimed, & the claimant cannot obtain relief.—*FELKIN v. HERBERT* (1864), 11 L. T. 173.

*Annotation:—Mentd. Kirk v. R., A.-G. v. Kirk* (1872), L. R. 14 Eq. 558.

**When cause of action arises—Disturbance of support.]—See Part X., Sect. 3, sub-sect. 2, ante.**

#### *B. Who may sue.*

##### *(a) In General.*

**1340. Lessee for years.]**—An action on the case may be maintained by a lessee for years for obstructing the lights of an ancient messuage.—*SYMONDS v. SEABOURNE* (1633), Cro. Car. 325; 79 E. R. 884.

*Annotation:—Reid. St. John v. Moody* (1675), 1 Vent. 274.

**1341. Tenant from year to year—Injunction limited to duration of tenancy.]**—*SIMPER v. FOLEY*, No. 553, *ante*.

**1342. — Under notice to quit.]**—A tenant from year to year filed a bill against adjoining tenants holding under the same landlord to restrain the erection of new buildings interfering with the free access of light & air to the premises occupied by him. The landlord thereupon gave the tenant notice to quit, & at the time of the hearing, only eight months of the tenancy were unexpired:—*Held*: though the extent of pltf.'s interest did not necessarily disentitle him to relief, yet it was a material ingredient for consideration; & as it was not clear that pltf. had sustained material injury, & as the inconvenience to defts. of compelling them to pull down their buildings would be far greater than any which pltf. could endure if the buildings were allowed to stand & he were left to bring an action for damages, the bill ought to be dismissed without costs, without prejudice to any action pltf. might be advised to bring.—*JACOMB v. KNIGHT* (1863), 3 De G. J. & Sm. 533; 2 New Rep. 295; 32 L. J. Ch. 601; 27 J. P. 547; 8 L. T. 621; 11 W. R. 812; 46 E. R. 743, L. J.

**1343. — Insignificant interest.]**—A local authority, for the purpose of repairing the surface of a highway, cut away part of a bank at the side of a road, the bank representing the accumulated road scrapings of many previous years. The yearly tenant of an adjoining small cottage & garden brought an action against the local authority, alleging that the wall of his garden had been rendered unsafe through the partial removal of the bank:—*Held*: (1) the bank was within the boundaries of the original highway, & the cutting away of a portion of it had not materially affected the support to pltf.'s wall; (2) as pltf. had no substantial interest in his holding, & had suffered no damage which could not easily be rectified, his action was a piece of useless litigation & an abuse of process, & must be dismissed with costs under Public Authorities Protection Act, 1893 (c. 61).—*WEBSTER v. BAKEWELL RURAL COUNCIL* (1916), 86 L. J. Ch. 89; 115 L. T. 678; 80 J. P. 437; 14 L. G. R. 1109.

**1344. Tenancy to commence on future day—Injury caused prior to commencement of tenancy.]**—Pltf. agreed to take a theatre for eight weeks to commence on a future day. Before the com-

mencement of the term & before entry by pltf., defts. by excavations on their property deprived the theatre of the support of the adjacent lands, so that the theatre was rendered unsafe & was closed during the eight weeks by order of the proper local authorities. Pltf. sued defts. in respect of the damage suffered by him in consequence of their acts:—*Held*: defts. had injured a proprietary right of pltf. who was, therefore, entitled to maintain the action.—*GILLARD v. CHESHIRE LINES COMMITTEE* (1884), 32 W. R. 943, C. A.

*Annotations:—Mentd. Wallis v. Hands*, [1893] 2 Ch. 75; Mann, Crossman & Paulin v. Land Registry (Registrar), [1918] 1 Ch. 202.

**1345. Master in occupation of tenement by servant.]**—A servant put into the occupation of a cottage, with less wages on that account, does not occupy it as a tenant, but the master may properly declare on it as his own occupation in an action on the case for a disturbance of a right of way over deft.'s close to such cottage. It matters not that the cottage was divided into two parts, one of which only was in the occupation of such servant, the other being occupied by a tenant paying rent.—*BERTIE v. BEAUMONT* (1812), 16 East, 33; 104 E. R. 1001.

*Annotations:—Mentd. Ricketts v. Salway* (1819), 1 Chit. 104; *It. v. Hall* (1822), 1 L. J. O. S. K. B. 20.

**1346. Mortgagor—Acquiescence of mortgagees.]**—*BENNETT v. HUGHES*, No. 1247, *ante*.

**1347. Married woman entitled to separate use.]**—Where defts. contemplated erecting premises which would if completed, it was alleged, interfere with the ancient lights of two messuages, one of which belonged to a husband & the other to his wife, separate actions were brought by husband & wife claiming, *inter alia*, an injunction & damages. The title of the wife did not appear. On a motion for an injunction defts. admitted the right of pltf.s., & had previously offered to amend their plans accordingly. They objected, however, to paying two sets of costs:—*Held*: if it should turn out that the wife was not entitled to her separate use, the taxing master should disallow any extra costs occasioned by bringing two actions instead of one.—*HEIMBS v. NEWCASTLE CO-OPERATIVE SOCIETY* (1897), 76 L. T. 109.

**1348. Executor of deceased plaintiff—Obstruction of light.]**—The sole pltf. in an action for a mandatory injunction & damages for obstruction to the access of light to a freehold house, having died more than six months after the issue of the writ, B., the exor. & devisee, obtained the common order to carry on proceedings. On motion to discharge this order for irregularity, on the ground that the cause of action did not continue, & that there was no transmission of interest to B.:—*Held*: though any action by B., as exor., for injury to pltf.'s real estate might, under Civil Procedure Act, 1833 (c. 42), s. 2, be limited to the six months prior to pltf.'s death, still he could recover damages to this extent: that, with regard to the peculiar equitable remedy to have the obstruction to light removed, this was an equitable right subsisting in pltf. at the time of her death, which, with the equitable remedy by mandatory injunction, devolved to B. as her devisee, & consequently proceedings could properly be carried on by B.—*JONES v. SIMES* (1890), 43 Ch. D. 607; 59 L. J. Ch. 351; 62 L. T. 447.

*Annotation:—Mentd. Peebles v. Oswaldtwistle U. D. C.*, [1896] 2 Q. B. 159.

*Compare No. 1376, post.*

*enjoyment—Plaintiff must prove disturbance.—Held*: in an action on a covenant for quiet enjoyment pltf.

must show an interruption or obstruction of the easement, in order to entitle him to recover.—*PLATT v.*

*GRAND TRUNK RY. CO. OF CANADA* (1886), 12 O. R. 119.—*CAN.*

(b) *Reversioners.*

**1349. General rule.**—(1) A Ct. of Equity interferes by injunction to prevent an injury in respect of a legal right, simply on the ground of the damage it produces to property; & the jurisdiction of the ct. is not confined to restraining injury to the enjoyment & comfort in the occupation: therefore it is not necessary that a pltf. filing a bill for an injunction to restrain such an injury should be in the actual occupation of the property.

(2) Where a pltf. filed a bill for an injunction to restrain the erection of an addition to the house adjoining one of his own, so as to interfere with the windows, which he alleged were ancient lights, some of which had been recently enlarged, & some new lights had been opened, & an *interim* order had been granted; upon a motion for an injunction the ct. gave pltf. liberty to bring an action at law, but allowed deft. to proceed with the new building to a specified height, on his undertaking to abide by any order the ct. might make as to pulling down any addition which might be made to the erection complained of by the bill, & also undertaking to admit at the trial that the erection had been carried to such specified height.—*WILSON v. TOWNEND* (1860), 1 Drew. & Sm. 324; 30 L. J. Ch. 25; 3 L. T. 352; 25 J. P. 116; 6 Jur. N. S. 1100; 9 W. R. 30; 62 E. R. 403.

*Annotations*:—As to (2) *Refd.* Cooper v. Hubbuck (1860), 30 Beav. 169; Jones v. Tapping (1862), 12 C. B. N. S. 826. *Generally, Mentd.* Wood v. Conway Corp'n., [1914] 2 Ch. 47.

**1350. For injury done to reversion—By lessee—Light.**—An action will lie for the owner of the inheritance in a house for stopping up windows.

We are of opinion that pltf. may at present maintain an action for the injury to his inheritance by obstructing the ingress of light & air into the house & this action does as well lie against pltf.'s own lessee as against any other person (*per Cur.*).—*THOMLINSON v. BROWN* (1755), Say. 215; 96 E. R. 857.

*Annotations*:—*Foll.* Jesser v. Gifford (1767), 4 Burr. 2141. *Refd.* Atterdell v. Stevens (1808), 1 Taunt. 183.

**1351. —Light.**—*JESSER v. GIFFORD* (1767), 4 Burr. 2141; 98 E. R. 116.

*Annotations*:—*Refd.* Bower v. Hill (1835), 1 Bing. N. C. 519; Battishill v. Reed (1856), 18 C. B. 696; Simpson v. Savage (1856), 1 C. B. N. S. 347; Metropolitan Assoen. v. Petch (1858), 5 C. B. N. S. 504; Mayfair Property Co. v. Johnston, [1894] 1 Ch. 508. *Mentd.* Atterdell v. Stevens (1808), 1 Taunt. 183; Johnstone v. Hall (1856), 20 J. P. 579.

**1352. —Support.**—(1) Pltf., in 1822, had a remainder in fee in a wharf expectant on a tenancy for life of his father. Defts., in that year, dug soil out of their dock which was contiguous, & the water thereby undermined the wall of the wharf. In 1823, pltf.'s father died, & in 1824, the action of the water on the wall had undermined it so far that it fell:—*Held*: pltf. had a right of action against defts., although they had done no act since the death of pltf.'s father, by which pltf. came into possession of the freehold of the wharf.

(2) By a private Act of Parliament, it was enacted, that defts. should be sued within "six calendar months after the act committed":—*Held*: the limitation ran from the time of the consequential injury happening, & not from the doing of the act which caused that consequential injury; as, here, the act itself was not tortious or injurious, except from those consequences which occurred some time after.—*GILLON v. BODDINGTON* (1824), 1 C. & P. 541; Ry. & M. 161, N. P.

*Annotations*:—As to (2) *Dist.* Nicklin v. Williams (1854), 10 Exch. 259; Bonomi v. Backhouse (1858), E. B. & E. 622. *Refd.* Wordsworth v. Barclay (1830), 1 B. & Ad. 391; Mitchell v. Darley Main Colliery Co. (1864), 14 Q. B. D. 125. *Generally, Mentd.* Howell v. Young (1826), 5 B. & C. 259.

**1353. —**—Pltf. having demised a cottage without exception of mines:—*Held*: he might sue in case for an injury occasioned to the cottage by a stranger who had excavated coal, though it was not clear whether the injury resulted from excavation under the cottage, or under an adjoining house, in the occupation of pltf.—*RAINE v. ALDERSON* (1838), 4 Bing. N. C. 702; 1 Arn. 329; 6 Scott. 691; 7 L. J. C. P. 273; 2 Jur. 327; 132 E. R. 959.

**1354. —**—The second count of a declaration stated that a messuage & land, the reversion whereof belonged to pltf., were in fact supported by the land adjoining; yet deft. wrongfully & negligently dug & made divers excavations in the land adjoining without sufficiently shoring the messuage & land, & thereby deprived them of their support, whereby they sank & were injured. The third count stated that pltf., by reason of her interest in the messuage & land, was entitled to have the messuage supported laterally by certain land adjoining; yet deft. wrongfully & negligently dug & made divers excavations in the land adjoining without sufficiently shoring the said messuage & land, & thereby deprived the messuage of the support to which pltf. was so entitled, whereby the messuage & land sank & were injured:—*Held*: (1) the second count was good, although it did not allege any right to support, for as it did not appear that deft. was the owner of the adjoining land, he must be taken to be a stranger & a wrong-doer; (2) the third count was also good.—*HIBBY v. CARTER* (1859), 4 H. & N. 153; 28 L. J. Ex. 182; 32 L. T. O. S. 260; 7 W. R. 193; 157 E. R. 795.

*Annotation*:—As to (1) *Apld.* Richards v. Jenkins (1868), 18 L. T. 437.

**1355. —**—*STROYAN v. KNOWLES, HAMER v. SAME*, No. 1187, *ante*.

**1356. —**—Chancery Amendment Act, 1857 (c. 27), in conferring upon cts. of equity a jurisdiction to award damages instead of an injunction, has not altered the settled principles upon which those cts. interfered by way of injunction; & in cases of continuing actionable nuisance the jurisdiction so conferred ought only to be exercised under very exceptional circumstances.

An electric lighting co. erected powerful engines & other works on land near a house which was subject to a lease. Owing to excavations for the foundations of the engines, & to vibration & noise from the working of them, structural injury was caused to the house, & annoyance & discomfort to the lessee. The lessee & the reversioners brought separate actions against the co. for an injunction & damages in respect of the nuisance & injury thus occasioned:—*Held*: (KEKEWICH, J.) (1) both the lessee & the reversioners were entitled to relief, but, under the circumstances, by way of damages & not of injunction.

(2) Ptf's. in both actions appealed against the refusal of the injunction:—*Held*: there was nothing in either case to justify the ct. in refusing to aid, by injunction, the legal rights which had been established.

It may be stated as a good working rule that damages may be given in substitution for an injunction in cases where there are found in combination the four following requirements, viz. where the injury to the pltf.'s legal rights is (a) small, (b) capable of being estimated in money, (c) can be adequately compensated by a small money payment, & (d) where the case is one in which it would be oppressive to deft. to grant an injunction (A. L. SMITH, L.J.).—*SHELPER v. CITY OF LONDON ELECTRIC LIGHTING CO., MEUX'S*

**Sect. 2.—Remedies for disturbance: Sub-sect. 2, B.  
(b), C. & D. (a) i.]**

**BREWERY CO. v. CITY OF LONDON ELECTRIC LIGHTING CO.**, [1895] 1 Ch. 287; 64 L. J. Ch. 216; 72 L. T. 34; 43 W. R. 238; 11 T. L. R. 137; 39 Sol. Jo. 132; 12 R. 112, C. A.; *subsequent proceedings*, [1895] 2 Ch. 388, C. A.

*Annotations*:—*As to* (1) *Reid*. Colwell v. St. Pancras B. Co., [1904] 1 Ch. 707. *As to* (2) *Apld.* Westmoreland v. New Sharlston Colliery Co. (1898), 79 L. T. 716; Jordonson v. Sutton, Southcoates & Drypool Gas Co., [1899] 2 Ch. 217. *Consd.* Cowper v. Laidler, [1903] 2 Ch. 337; Higgins v. Betts, [1905] 2 Ch. 210. *Distd.* Kino v. Jolly, [1905] 1 Ch. 480. *Apld.* Itleys v. Halifax Corp'n. (1907), 97 L. T. 278; Gilling v. Gray (1910), 27 T. L. R. 39. *Distd.* Bailey v. Holborn & Finsbury (1914), 110 L. T. 574. *Consd.* Pottley v. Parsons, [1914] 1 Ch. 704; Leeds Industrial Co-op. Soc. v. Slack (1924), 40 T. L. R. 745. *Reid*. Wise v. Metropolitan Electric Supply Co. (1894), 10 T. L. R. 446; Collis v. Home & Colonial Stores, [1904] A. C. 179; Saunby v. London (Ontario) Water Comm., [1906] A. C. 110; Sharp v. Harrison, [1922] 1 Ch. 502. *Generally*. *Mentd.* Allport v. Securitie Corp'n. (1895), 64 L. J. Ch. 491; Midwood v. Manchester Corp'n., [1905] 2 K. B. 597.

**1357. ——— Injury caused by tenant—Water.**—*EGREMONT v. PULMAN*, No. 1115, *ante*.

**1358. ——— Of permanent character—Light.**—The custom of London, which allows a man to build to any height upon ancient foundations, although he may darken his neighbour's lights thereby, must be confined to cases where all the four walls of the building belong to the party, & will not justify him in raising an obstruction by means of three walls of his, so as to darken the lights in a fourth wall belonging to his neighbour.

This is a case in which the reversioner may maintain an action, because it is an injury to the right that he complains of; & the effect of letting the obstruction stand might be, that, from the death of witnesses, evidence of its erection might be lost, & so the injury would become permanent (*TENTERDEN, L.J.*).—*SHADWELL v. HUTCHINSON* (1820), 3 C. & P. 615; Mood. & M. 350; *subsequent proceedings* (1830), 4 C. & P. 334; (1831), 2 B. & Ad. 97.

*Annotations*:—*Apld.* Metropolitan Asscn. v. Petch (1858), 5 C. B. N. S. 501. *Mentd.* Johnstone v. Hall (1856), 20 J. P. 579.

**1359. ———**—A declaration for an injury to the reversionary interest of pltf. by obstructing ancient lights, is sufficient if it show an obstruction which may operate injuriously to the reversion either by its being of a permanent character or by its operating in denial of the right.—*METROPOLITAN ASSCN. v. PETCH* (1858), 5 C. B. N. S. 504; 27 L. J. C. P. 330; 23 J. P. 119; 4 Jur. N. S. 1000; 141 E. R. 204.

*Annotation*:—*Reid*. Mayfair Property Co. v. Johnston, [1894] 1 Ch. 508.

**1360. ———**—*NOBLE v. HARRISON* (1892), 37 Sol. Jo. 131.

**1361. ——— Way.**—*BAXTER v. TAYLOR*, No. 822, *ante*.

**1362. ———**—*BOWER v. HILL*, No. 502, *ante*.

**1363. ———**—*BELL v. MIDLAND RY. CO.*, No. 810, *ante*.

**1364. ——— Noise.**—In order to entitle a reversioner to maintain an action for an injury to his reversion, it is necessary that the wrong complained of should be in its nature permanent. Therefore:—*Held*: a reversioner could not maintain an action against a railway co. for making loud hammering noises in a shed adjoining his house, by reason whereof the tenant quitted, though it appeared that he was afterwards unable to let the house except at a lower rate.

There is a distinction between a nuisance & an easement. No right can be gained by continuing a public nuisance (*POLLOCK, C.B.*).—

*MUMFORD v. OXFORD, WORCESTER & WOLVERHAMPTON RY. CO.* (1856), 1 H. & N. 34; 25 L. J. Ex. 265; 27 L. T. O. S. 58; 156 E. R. 1107.

*Annotations*:—*Apld.* Simpson v. Savage (1856), 1 C. B. N. S. 347. *Reid*. Mott v. Shoolbrod (1875), L. R. 20 Eq. 22; Cooper v. Crabtree (1881), 19 Ch. D. 193; Byass v. Bettam (1885), 2 T. L. R. 88; Rust v. Victoria Graving Dock Co. & London & St. Katherine Dock Co. (1887), 36 Ch. D. 113. *Mentd.* Tancred v. Allgood (1859), 4 H. & N. 438.

**1365. ——— Way.**—*KIDGILL v. MOOR*, No. 809, *ante*.

**1366. ——— Operating in denial of right—Light.**—*METROPOLITAN ASSCN. v. PETCH*, No. 1359, *ante*.

**1367. No substantial damage proved—Light.**—Mandatory injunction refused, & nominal damages, without costs on either side, granted in a case where pltf. had only a life interest, subject to an existing lease, & where, though there was a substantial interference with present comfort in respect of light, there was no prospective injury or diminution in the saleable value of the property. There being no case as to air, pltf.'s case as to light was made less strong by its being addressed conjointly to air & light. As proceedings were taken under the old practice, pltf. should have sought his remedy by action at law.—*PERKINS v. SLATER* (1876), 35 L. T. 356.

**1368. ———**—Where a reversioner who sued for an injunction to restrain building so as to obstruct access of light, failed to prove substantial damage, the ct. refused to direct any inquiry as to damages.—*KINO v. RUDKIN* (1877), 6 Ch. D. 160; 46 L. J. Ch. 807.

*Annotation*:—*Mentd.* Richards v. Revett (1877), 37 L. T. 632.

**1369. ———**—*DYE v. PATMAN* (1897), 62 J. P. 135; 46 W. R. 200; 42 Sol. Jo. 97.

**1370. After damages recovered in previous action—Light.**—It is no defence to an action for obstructing ancient lights, that the nuisance merely affects pltf.'s right as reversioner, & that he has already, in a former action, recovered against deft. for the same obstruction.—*SHADWELL v. HUTCHINSON* (1831), 2 B. & Ad. 97; 9 L. J. O. S. K. B. 142; 109 E. R. 1070.

*Annotations*:—*Reid*. Baxter v. Taylor (1832), 1 Nev. & M. K. B. 11; Battishill v. Reed (1856), 18 C. B. 696.

**1371. Immediate reversion not in plaintiff—Light.**—A declaration in case for the obstruction of ancient lights, stated that the messuage "was in the possession of F. as tenant thereof to pltf., the reversion thereof then belonging to pltf." Upon a plea "that the reversion of the said several premises, etc., did not at any or either of the said times, when, etc., belong to pltf. *modo et formâ*":—*Held*: the issue was supported by evidence that at the time, when, etc., F. was in possession, & that he paid the rent to pltf. up to the last quarter day before action brought; although a lease for a term unexpired, from pltf. to another person, was put in evidence.—*BENNETT v. DUNCAN* (1845), 6 L. T. O. S. 171.

*C. Who may be sued.*

**1372. Lessee under lease subsequent to obstruction.**—*RIPPON v. BOWLES* (1616), 1 Roll. Rep. 221; 81 E. R. 446; *sub nom.* RYPPON v. BOWLES, Cro. Jac. 373; 79 E. R. 318.

*Annotations*:—*Reid*. Lambert v. Bessey (1680), T. Raym. 467; Rosewell v. Prior (1701), 1 Ld. Raym. 713; Thompson v. Gibson (1841), 7 M. & W. 456.

**1373. Clerk responsible for erection of obstructing building—Co-defendant with contractor.**—In an action on the case for obstructing pltf.'s lights, a clerk who superintended the erection of the building by which they were darkened, & who alone

directed the workmen, may be joined as a co-deft. with the original contractor.—*WILSON v. PETO* (1821), 6 Moore, C. P. 47.

*Annotation*:—*Refd.* Thompson v. Gibson (1841), 7 M. & W. 456.

**1374. Lessee of ecclesiastical corporation.**—Injunction granted to prevent the obstruction of ancient lights, against a lessee of an ecclesiastical corp., subject to plffs. establishing their right to the easement in an action.—*SUTTON v. MONTFORT (LORD)* (1831), 4 Sim. 559; 58 E. R. 209.

*Annotation*:—*Mentd.* Wilson v. Townend (1860), 1 Drew. & Sm. 324.

**1375. Servient owner—Work carried out by contractor.**—*BOWER v. PEATE*, No. 1231, *ante*.

**1376. Executors of deceased defendant—Obstruction of light.**—The continuance of an obstruction to ancient lights is an "injury committed" in respect of property within (Civil Procedure Act, 1833 (c. 42), s. 2, giving rise to a cause of action *de die in diem*, & therefore an action in respect of the continuance of the obstruction in the lifetime of the person who caused it may be maintained against his exors. or administrators notwithstanding that the obstructing building was completed more than six calendar months before his death.—*JENKS v. CLIFDEN (VISCOUNT)*, [1897] 1 Ch. 694; 66 L. J. Ch. 338; 76 L. T. 382; 45 W. R. 424; 41 Sol. Jo. 350.

**1377. Owner of partly worked mines—Loss of support due to previously worked minerals.**—

(1) A lessee of underground strata is not liable in damages to the owner of buildings on the surface, who has acquired a right to have the buildings uninjured by underground workings, for injury occasioned to the buildings by reason of subsidence happening during the currency of the lease, caused, not by any act of commission on the part of the lessee, but resulting from an excavation made in the underground strata by the lessee's predecessor in title prior to the date of the lease. Where plffs.' buildings, erected more than twenty years before action, on land, the mines under which were worked by defts. under a lease, were injured, during the currency of the lease, & within six years before action, by subsidence caused, not by the acts of defts., but by the acts of their predecessor in title, done prior to the date of the lease:—*Held*: defts. were not liable.

(2) Although the right of the owner of the surface & the right of the owner of the buildings on the surface not to have the land or buildings interfered with by underground workings on the part of the owner of the minerals stand upon different footings as to the modes of acquiring them, yet the right as regards buildings when once acquired is in character the same as the right of the

owner of the surface (*BRUCE, J.*).—*GREENWELL v. LOW BECHBURN COAL CO.*, [1897] 2 Q. B. 165; 66 L. T. Q. B. 643; 76 L. T. 759; 13 T. L. R. 471.

*Annotations*:—*As to* (1) *Consd.* Hall v. Norfolk, [1900] 2 Ch. 493. *Distd.* A.-G. v. Roe, [1915] 1 Ch. 235. *Refd.* Westmorland v. New Sharlston Colliery Co. (1898), 79 L. T. 716.

**1378.** ————*—*—(1) The owner of minerals is not liable for damage caused to neighbouring land by subsidence occasioned by the working of the minerals by his predecessor in title, although the damage did not actually occur until after the owner came into possession.

(2) It has been settled that where a subsidence occurred through coal workings the right of action on the part of the person damaged by the subsidence arose when the damage occurred & not when the coal was removed; & Stat. Limitations ran from the latter date & not from the former (*KEKEWICH, J.*).—*HALL v. NORFOLK (DUKE)*, [1900] 2 Ch. 493; 69 L. J. Ch. 571; 82 L. T. 836; 64 J. P. 710; 48 W. R. 505; 16 T. L. R. 443; 44 Sol. Jo. 550.

*See, further, MINES.*

*Compare* No. 1318, *ante*.

*See, also, No. 1350, ante.*

#### D. Form of Relief by Action.

##### (a) Injunction.

##### i. In General.

*See, generally, INJUNCTION.*

**1379. Whether remedy available—Damages not adequate compensation.**—To enable a party to obtain an injunction in equity the mischief complained of must be such as cannot properly & adequately be compensated by pecuniary damages.

—*WOOD v. SUTCLIFFE* (1851), 2 Sim. N. S. 163; 21 L. J. Ch. 253; 18 L. T. O. S. 104; 16 Jur. 75; 61 E. R. 303.

*Annotations*:—*Refd.* A.-G. v. Bradford Canal Proprietors (1866), L. R. 2 Eq. 71. *Mentd.* A.-G. v. Kingston-on-Thames Corp., (1865), 12 L. T. 665; *Crossley v. Lightowler* (1867), 16 L. T. 438.

**1380.** ————*No legal right infringed.*—Tenant under an agreement for a lease having filed a bill to restrain his lessor from obstructing the ancient lights in the premises comprised in the agreement, but not asking to have the agreement specifically performed—motion for injunction refused.—*FOX v. PURSELL* (1855), 3 Sm. & G. 242 65 E. R. 643.

*Annotation*:—*Mentd.* Harris v. De Pinna (1886), 33 Ch. D. 238.

**1381.** ————*Delay in assertion of right.*—*WINTLE v. BRISTOL & SOUTH WALES UNION RY. CO.*, No. 821, *ante*.

**1382.** ————*Damage slight.*—*WINTLE v. BRISTOL & SOUTH WALES UNION RY. CO.*, No. 821, *ante*.

#### PART XII. SECT. 2, SUB-SECT. 2.— D. (a) i.

**1379 i. Whether remedy available—Damages not adequate compensation.**—It was not intended by Specific Relief Act, 1877, s. 54, that a man should not have an injunction granted to him unless his property would be practically destroyed if the injunction were not granted. Where plff. had for over twenty years carried on the business of manufacturing a particular kind of cloth in a certain house, & deft. built in the neighbourhood of that house in such a manner as to render plff.'s house practically useless for the purposes of his manufacture:—*Held*: plff. was entitled to an injunction & not merely to damages.—*YARO v. NANA-ULLAH* (1897), 1 L. R. 19 All. 259.—*IND.*

**1381 i.** ————*Delay in assertion of right.*—In an advocacy of a summary

petn. to the sheriff, paying for interdict against a continuous proprietor erecting buildings on a piece of ground over which the petr. had a servitude *non edificandi*:—*Held*: as the building was nearly completed when the application was presented, the petr. in so far as it prayed for interdict was not presented *tempestive* & ought not to be granted.—*LOWSON'S TRUSTEES v. GRAMMOND* (1861), 3 Macph. (Ct. of Sess.) 53; 37 Sc. Jur. 28.—*SCOT.*

*b.* ————*Support from walls of building.*—M. W. conveyed half of certain lands to G. W., describing the same by metes & bounds, & afterwards died having devised the other half to M. There was a house on the lands in question so situate that half of it was on the portion granted to G. W., & half on the portion devised to M. Subsequently M. commenced to pull down the half of the house situate on

the land devised to her, & G. W. applied in the present action for an injunction to restrain the same:—*Held*: he was entitled to the relief claimed.—*WRAY v. MOUNSON* (1885), 9 O. R. 180.—*CAN.*

*c.* ————*Light.*—In an action for the obstruction of ancient light in plff.'s building by a new building, it was found that an obstruction, amounting to an actionable nuisance, had been caused by the new building, & an injunction was granted, not to be enforced for a period sufficient to enable defts. to abate the nuisance.

Defts. then caused the wall of the new building, which intercepted the light, to be faced with white tiles, which they alleged so improved the light coming to plff.'s windows as to abate the nuisance:—*Held*: an actionable obstruction of ancient light cannot be justified by the substitution of light

*Sect. 2.—Remedies for disturbance: Sub-sect. 2, D.*  
(a) i., ii. & iii.]

1383. ———. ———.]—JOHNSON v. WYATT, No. 916, ante.

1384. ———. ———.]—CURRIERS' CO. v. CORBETT, No. 1429, post.

1385. ———. ———.]—ROBSON v. WHITTINGHAM, No. 919, ante.

1386. ———. ———.]—DENT v. AUCTION MART CO., PITAGIRI v. SAME, MERCERS' CO. v. SAME, No. 953, ante.

1387. ———. ———.]—KINO v. RUDKIN, No. 1368, ante.

*See, also, Sub-sect. 2, D. (b), i., post.*

1388. ———. Defendant offering to reinstate plaintiff.]—LOW v. INNES, No. 1427, post.

1389. ———. Defendant offering to alter plan of building.]—VERE v. MINTER (1914), 49 L. Jo. 129.

———. Land compulsorily acquired under statute.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI, pp. 136, 137, Nos. 232-243.

1390. ———. Windows enlarged by plaintiff—Light.]—Where the owner of a building having ancient lights replaces them by new larger windows, the ct. will not interfere by injunction to restrain the owner of the servient tenement from obstructing them.—HEATH v. BUCKNALL (1869), L. R. 8 Eq. 1; 38 L. J. Ch. 372; 20 L. T. 549; 23 J. P. 532; 17 W. R. 755.

*Annotations:—*Consd. Staigbt v. Burn (1869), 5 Ch. App. 163. N.E. Aynsley v. Glover (1874), L. R. 18 Eq. 544. Refd. Newson v. Pender (1884), 27 Ch. D. 43. Mentd. Harvey v. Walters (1873), L. R. 8 C. P. 162.

#### ii. *Quia timet* Action.

1391. Whether court will restrain apprehended injury.]—HERZ v. UNION BANK OF LONDON, No. 943, ante.

1392. ———. ———.]—Where a probable nuisance was distinctly sworn to, an injunction was granted as of course, subject to an action at law.

It is sufficient allegation to support an application for injunction to restrain obstruction to ancient lights that pltf. has possessed the house for twenty years & upwards.—GOOCH v. MARSHALL (1859), 1 L. T. 210.

1393. ———. ———.]—AYNSLEY v. GLOVER, No. 389, ante.

1394. ———. ———.]—DICKER v. POPHAM, RADFORD & CO., No. 1405, post.

1395. ———. ———.]—(1) If, in an action *quia timet* for a threatened illegal obstruction to ancient lights by the erection of a building, the ct. is able from the evidence to satisfy itself that substantial damage will be caused by the building when com-

pleted, then the action will lie & an injunction be granted, as they will in all other cases of apprehended nuisances, unless the act complained of is in itself lawful & does not *per se* constitute a nuisance. The decision in *Colls v. Home & Colonial Stores*, No. 830, ante, has not abrogated the jurisdiction of the ct. to entertain actions *quia timet* in cases of obstruction of ancient lights. If there is only an honest difference of opinion as to whether an illegal obstruction will result the ct. will decide & not hold that pltf. should have waited & ascertained the result of the erection of the new building before bringing his action.

(2) *Semble*: the term "irreparable damage" as used in this class of cases means no more than that the damage is substantial & could not be adequately remedied by a pecuniary payment. *Qu.*: whether in such a case the ct. has power to grant damages in lieu of an injunction.—LITCHFIELD-SPEER v. QUEEN ANNE'S GATE SYNDICATE, LTD. (No. 2), [1919] 1 Ch. 407; 88 L. J. Ch. 137; 120 L. T. 505; 35 T. L. R. 253; 63 Sol. Jo. 390. *Annotation:—*As to (1) Refd. Slack v. Leeds Industrial Co. Soc., [1923] 1 Ch. 431.

*See, also, NUISANCE.*

1396. Whether damages granted in lieu of injunction.]—In an action for an injunction to restrain deft. from further building so as to interfere with pltf.'s ancient lights, & for a mandatory injunction to compel him to pull down like buildings already constructed, pltf. proved that if deft.'s building was completed it would seriously interfere with his light; but he failed to prove that the commercial value of his premises, or the facility of letting them, would be materially affected. The premises of pltf. & deft. were both leaseholds held under the same lessor, who had consented to the erection of deft.'s building, & it was held that under the special circumstances the ct. was justified in giving damages both for the completed & the threatened interference, instead of an injunction. On appeal:—*Held*: pltf., having proved his legal right to the light, & that the proposed building would infringe that right, & there being no special circumstances disentitling him to relief, he was entitled to an injunction as to the threatened building & to damages only as to the completed buildings.

*Qu.*: whether the ct. has jurisdiction to give damages in respect of threatened injury, instead of an injunction.—MARTIN v. PRICE, [1894] 1 Ch. 276; 63 L. J. Ch. 209; 70 L. T. 202; 42 W. R. 262; 10 T. L. R. 172; 38 Sol. Jo. 127; 7 R. 90, C. A.

*Annotations:—*Consd. Sheller v. City of London Electric

reflected from a white surface, when the injured owner has no legal right to the continuance of these newly-created conditions.—BLACK v. SCOTTISH TEMPERANCE LIFE ASSURANCE CO., [1908] 1 L. R. 541, 561, 577; 42 L. L. T. 194.—IR.

d. ———. *Watercourse—Diversion.*]—A riparian proprietor whose property has been injuriously affected by the unlawful diversion of the natural flow of a watercourse may obtain relief by injunction restraining the continuation of the tortious acts so committed.—LEAHY v. NORTH SYDNEY TOWN (1906), 37 S. C. L. 464.—CAN.

e. ———. *Obstruction.*]—*Held*: pltf. was entitled to a declaration, as between him & defts., of a right to the usual & accustomed flow of water in artificial watercourses, which deft. had obstructed, & to an injunction to restrain the defts. from obstructing the same.—MULLAN v. ROUGHPORT BLEACHING & DYING CO., LTD. (1889), 21 L. R. 17, 73.—IR.

f. ———. *Injury must be substantial.*]—In cases of obstruction of right to an uninterrupted flow of water, it must appear from the evidence in each case that the interference or obstruction complained of is not a trivial, but a substantial injury in order to warrant relief by way of injunction.—PONNUSAWMI TAVER v. MADURA COLLECTOR (1869), 5 Mad. 6.—IND.

g. ———. *Construction of dams for irrigation.*]—Pltf. granted a perpetual injunction to prevent defts., who were riparian owners lower down the course, from interfering with the construction of dams for the purpose of irrigating pltf.'s agricultural land.—KALU KHABIR v. JAN MEAH (1901), 1 L. R. 29 Calc. 100.—IND.

h. ———. *Grant of former injunction—In respect of same property.*]—A. obtained an injunction against B. restraining him from obstructing A. in the exercise of his right of way to his

(A.'s land) over B.'s land. A. subsequently sold his land to C. B. similarly obstructed C. C. then brought a suit against B. for an injunction in terms similar to that formerly obtained by A. B. contended that C.'s remedy, if any, was by way of execution of the decree obtained by A.:—*Held*: as the injunction did not run with the land, there was, in the circumstances of the case, no bar to pltf.'s suit.—JAMSETJI MANEKJI v. HARI DAYAL (1907), 1 L. L. 32 Bom. 181.—IND.

#### PART XII. SECT. 2, SUB-SECT. 2.—D. (a) ii.

k. *Whether court will restrain apprehended injury—Obstruction of flow of flood water.*]—The right to discharge water in flood-time across the land of another is not a continuous right, & is not infringed by the erection of an embankment on the servient tenement, which would have the effect of obstructing the flow of flood-water, until the event occurs in respect of

& that the apprehended damage will, if it comes, be very substantial.—**GANGABAI v. PURSHOTAM** (1907), 1 L. R. 32 Bom. 146.—**IND.**



**Sect. 2.—Remedies for disturbance: Sub-sect. 2, D.**  
**(a) iii. & iv.]**

**Dalton v. Angus** (1881), 6 App. Cas. 740; **Smith v. Baxter**, [1900] 2 Ch. 138; **Gardner v. Hodgson's Kingston Brewery Co.**, [1903] A. C. 229; **Hyman v. Van Den Bergh**, [1908] 1 Ch. 167.

**1409. — Trivial damage—Light.]—COOKE v. STANSFIELD** (1892), 36 Sol. Jo. 730.

**1410. Terms upon which granted or refused—Undertaking by defendant to abate—Light.]—A** building was in course of erection at a distance of thirty feet from the windows of a mansion, & an injunction was applied for to restrain deft. from proceeding with the erection:—**Held**: there was no case for an immediate injunction; but pltf. was put upon terms to try the legal right, deft. undertaking to abate if a verdict should go against him.—**SMITH v. ELGER** (1839), 3 Jur. 790.

**1411. — — — — —.]—Aynsley v. Glover**, No. 1408, *ante*.

**1412. — — — — —.]—Newson v. Pender**, No. 966, *ante*.

**1413. — — — — —.]—Plaintiff's windows altered—Undertaking to restore original windows—Light.]—COOPER v. HUBBUCK**, No. 978, *ante*.

**1414. — — — — —.]—Staught v. Burn**, No. 982, *ante*.

**1415. — — — — —.]—Undertaking by plaintiff as to damages—Light.]—STONE v. CITY OF LONDON REAL PROPERTY CO.** (1860), 12 Jur. N. S. 558.

**Undertaking by plaintiff as to damages generally.]—See Sub-sect. 2, E. (b), post.**

**1416. Whether mandatory injunction granted—Light.]—Injunction against stopping lights until trial of the right; which was directed on the motion. (Ct. will never on motion make an adverse order to pull down what has been done.—RYDER v. BENTHAM** (1750), 1 Ves. Sen. 543; 27 R. R. 1194.

**Annotations:—Refd.** A.-G. v. Cleaver (1811), 18 Ves. 211; **Blakenmore v. Glamorganshire Canal Navigation** (1832), 1 My. & K. 151; **Loud v. Murray** (1851), 17 L. T. O. S. 248.

**1417. — — — — —.]—Younge v. Shaper**, No. 925, *ante*.

**1418. — — — — —.]—In an action for obstruction of light & air, an application for an injunction compelling deft. to take down a hoarding erected by him until trial was refused, it not being shown that deft. had not a perfect right to erect the hoarding.—ANON.** (1875), 20 Sol. Jo. 102; **Bitt. Prac. Cas.** 77; 1 **Char. Cham. Cas.** 17.

**1419. — — — — —.]—Undertaking by defendant not to proceed—Light.]—(1) Nothing but an Act of Parliament can give any one man the right to take the property of another without his consent; even although it be then intended to make to the owner of such property an adequate pecuniary compensation.**

(2) Where a bill was filed for an injunction to restrain defts. from interfering with pltf's. right to light & air, & an interlocutory motion was made accordingly, but before such motion was made the interference was carried to a certain point beyond which defts. then undertook it should not be extended:—**Held**: although the ct. might, at the hearing of the cause, grant a mandatory injunction, the better course was merely to continue, till then, defts. undertaking.—**DUNBALL v. WAL-**

**TERS** (1865), 35 Beav 565; 12 L. T. 759; 55 E. R. 1016.

**1420. — — — — —.]—Johnstone v. Royal Courts of Justice Chambers Co.**, [1883] W. N. 5, C. A.

**1421. — — — — —.]—Building hurried on—After notice of intended application to court—Light.]—Deft.** in an action to restrain him from building so as to darken pltf.'s lights, upon receiving notice of motion for injunction, put on a number of extra men, & by working night & day ran up his wall to a height of nearly 40 feet before receiving notice that an *ex parte interim* injunction had been granted. It appeared to be a question of some nicety whether the lights were ancient lights. On the motion coming on, the judge restrained deft. from further building, & from permitting the wall which he had erected to remain:—**Held**: this order was right, as deft. had endeavoured to anticipate the action of the ct. by hurrying on his building, & what he had erected ought therefore to be at once pulled down, without regard to the ultimate result of the action.—**DANIEL v. FERGUSON**, [1891] 2 Ch. 27; 39 W. R. 599, C. A.

**Annotations:—Apld.** Von Joel v. Hornsey, [1895] 2 Ch. 774; **Keeble v. Poole & Lucas** (1898), 42 Sol. Jo. 791.

**1422. — — — — —.]—Deft.** was erecting a building near pltf.'s house. Pltf. warned deft. that if the building were continued he would sue to restrain it as an obstruction of his ancient lights. After action brought deft. evaded service of the writ for several days, & in the meantime continued the building till substituted service on him was effected:—**Held**: deft.'s evasion of the writ brought the case within the principle of **Daniel v. Ferguson**, No. 1421, *ante*, pltf. was entitled to an interlocutory mandatory injunction ordering deft. to pull down so much of the building as had been erected after pltf. had warned deft. that he intended to bring an action.—**VON JOEL v. HORNSEY**, [1895] 2 Ch. 774; 65 L. J. Ch. 102; *sub nom.* **VAN JOEL v. HORNSEY**, 73 L. T. 372, C. A.

**Annotation:—Apld.** **Keeble v. Poole & Lucas** (1898), 42 Sol. Jo. 791.

**1423. — — — — —.]—Keeble v. Poole & Lucas** (1898), 42 Sol. Jo. 791.

**Mandatory injunctions.]—See Sub-sect. 2, D. (a), iv., post.**

**1424. Whether granted ex parte—Light.]—An** injunction against obstructing ancient lights was granted on affidavit, before appearance, & without notice, pltf. having also commenced an action previous to filing the bill.—**A.-G. v. NICHOL** (1809), 3 Mer. 687; 36 E. R. 263.

**Annotation:—Refd.** **Dewhurst v. Wrigley** (1837), **Coop. Pr. Cas.** 319.

**1425. — — — — —.]—In vacation—Light.]—CLIENTS' INVESTMENT CO. v. COLLINS** (1892), 36 Sol. Jo. 789.

**1426. — — — — —.]—Baldwin v. Lancashire & Yorkshire Ry. Co.** (1892), 36 Sol. Jo. 777.

**iv. Mandatory Injunction.**

**1427. Whether granted—Offer by defendant to reinstate plaintiff—Light.]—Where** an offer is made which will have the effect of putting a pltf. in as favourable a position as before the erection

**PART XII. SECT. 2, SUB-SECT. 2.—**  
**D. (a) iv.**

**m. Whether granted—Delay by plaintiff.]—Held**: pltf. had, by his inactivity in insisting on his rights while defts. building complained of was in course of construction, disentitled himself to a mandatory injunction

for its removal.—**SIMPSON v. EATON (T.) CO.** (1907), 10 O. W. R. 569; 15 O. L. R. 161.—**CAN.**

**n. — — — — —.]—Where** pltf. has not applied for an injunction at the earliest opportunity, but has waited till the building complained of by him has been completed, & then asks the

ct. to have it removed, a mandatory injunction will not generally be granted.—**BENODE COOMAREE DOSSEE v. SOUDAMINNY DOSSEE** (1889), 1 L. R. 16 Cal. 252.—**IND.**

**o. — — — — —.]—Pltf.** brought his suit for a mandatory injunction to demolish buildings which deft. had

of the building or obstruction complained of, the ct. ought not to interfere to compel the pulling down of such building, or to restrain its completion.

—Low v. INNES (1864), 4 De G. J. & Sm. 286; 11 L. T. 217; 10 Jur. N. S. 1037; 46 E. R. 929, L. C.

**1428. — Injury completed before action brought—Light.**—There is no rule which prevents the ct. from granting a mandatory injunction where the injury sought to be restrained has been completed before the filing of the bill; & there is no difference in this respect between injury to easements & to other rights. But the ct. will only grant such an injunction to prevent extreme or very serious damage. Under Chancery Amendment Act, 1858 (c. 27), it is discretionary with the ct. whether it will award damages or leave pltf. to obtain them at law.—DURELL v. PRITCHARD (1865), 1 Ch. App. 244; 35 L. J. Ch. 223; 13 L. T. 545; 14 W. R. 212; *sub nom.* DARRELL v. PRITCHARD, 12 Jur. N. S. 16, L. J.J.

**Annotations.**—*Consd.* Calcraft v. Thompson (1867), 31 J. P. 675; Gort v. Clark (1868), 18 L. T. 343; City of London Brewery Co. v. Tennant (1873), 9 Ch. App. 212; Stanley of Alderley v. Shrewsbury (1875), L. R. 19 Eq. 616. *Distd.* Krehl v. Burrell (1879), 11 Ch. D. 146. *Apld.* McManus v. Cooke (1887), 35 Ch. D. 681. *Refd.* Curriers' Co. v. Corbett (1865), 4 De G. J. & Sm. 764; Martin v. Douglas (1867), 10 W. R. 268; Maguire v. Grattan (1868), 16 W. R. 1189; Sparling v. Clarkson (1869), 17 W. R. 518; Dickinson v. Harbottle (1873), 28 L. T. 186; Baxter v. Bower (1875), 44 L. J. Ch. 625; Chustey v. Ackland, [1895] 2 Ch. 389. *Mentd.* Martin v. Hoadon (1866), L. R. 2 Eq. 425; Robson v. Whittingham (1866), 1 Ch. App. 442; A.-G. v. Mid Kent Ry. & S. E. Ry. (1867), 3 Ch. App. 100; Goodson v. Richardson (1874), 9 Ch. App. 221; Warren v. Brown, [1900] 2 Q. B. 722.

**1429. —**—It is not every interference with the access of light which will entitle a pltf. to the interference of a ct. of equity; he must show material injury in order to obtain the assistance of the ct.

*Semble:* (TURNER, L.J.) where a bill seeks a merely preventive remedy, a mandatory injunction cannot be granted.

*Qu.:* whether a mandatory injunction will be granted ordering the removal of works already completed.—CURRIERS' Co. v. CORBETT (1865), 4 De G. J. & Sm. 764; 13 L. T. 154; 29 J. P. 644; 11 Jur. N. S. 719; 13 W. R. 1056; 46 E. R. 1119, L. J.J.

**Annotations.**—*Consd.* Stanley of Alderley v. Shrewsbury (1875), L. R. 19 Eq. 616. *Refd.* Aynsley v. Glover (1871), L. R. 18 Eq. 644; National Provincial Plate Glass Insco. v. Prudential Assce. (1877), 6 Ch. D. 757; Holland v. Worley (1884), 26 Ch. D. 578; Colls v. Home & Colonial Stores, [1904] A. C. 179. *Mentd.* Robson v. Whittingham (1866), 1 Ch. App. 442; Senior v. Pawson (1866), L. R. 3 Eq. 330; Heath v. Bucknall (1869), L. R. 8 Eq. 1; Smith v. Smith (1875), L. R. 20 Eq. 500; Ellis v. Manchester Carriage Co. (1876), 2 C. P. D. 13; Kinn v. Hudkin (1877), 6 Ch. D. 160; Warner v. McBryde (1877), 36 L. T. 360; Wheeldon v. Burrows (1879), 12 Ch. D. 31; Birmingham, Dudley & District Banking Co. v. Ross (1888), 38 Ch. D. 295.

erected. The ct., on account of pltf.'s delay in bringing his suit, declined to grant the mandatory injunction.—MUHAMMAD v. GULAB KAI (1898), 1 L. R. 20 All. 345.—**IND.**

*p.* — *Railway crossings.*—Where defts., a ry. co., purchased land from pltf., & verbally agreed to make & maintain over & under crossings to be built on the land, & for more than ten years defts. maintained the crossings, but afterwards caused some to be filled up or obstructed.—*Held:* pltf. was entitled to an injunction to restrain defts. from interfering with the crossings.—CLOUSE v. CANADA SOUTHERN RY. CO. (1883), 4 O. R. 28; *revid.*, 13 S. C. R. 139.—**CAN.**

*q.* — *Watercourse.*—A riparian proprietor whose property has been injuriously affected by the unlawful diversion of the natural flow of a water-

course may obtain relief by injunction restraining the continuation of the tortious acts so committed.—LEAHY v. NORTH SYDNEY TOWN (1906), 37 S. C. R. 464.—**CAN.**

*r.* — —Through one opening of a tank water flowed in, & by another opening water flowed out, into two channels. Pltf. & his predecessors in title used from time immemorial the water of the tank through these openings & channels for irrigating their lands.—*Held:* pltf. were entitled to an injunction restraining the deft. from closing up either of the openings.—MADHUB DASS BATHAGI v. JOGESH CHUNDER BARKAR (1902), 1 L. R. 30 Cal. 281.—**IND.**

*s.* — —Ryotwari lands belonging to pltf. had been irrigated for more than 60 years by a channel without any interference on the part

**1430. —**—Where on the site of old buildings the erection of new buildings of much greater height, materially obstructing the access of light & air to adjoining property, has been completed before complaint made or bill filed, the ct., although it has jurisdiction to grant a mandatory injunction, will not do so in a case where the owner of such property has himself treated the case as one for compensation by damages. But having that jurisdiction, it will direct an inquiry to assess damages, & will not leave pltf. to his remedy by action.

Although a month should elapse between the completion of the building & any objection thereto, the ct. will not consider that there was laches or acquiescence on the part of the owner of the adjoining property when he was not himself in possession or occupation of it.—GORT (VISCOUNTS) v. CLARK (1868), 18 L. T. 343; 16 W. R. 569, L. J.J.

**Annotations.**—*Consd.* Roskell v. Whitworth (1871), 19 W. R. 804. *Refd.* Sheller v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co., [1895] 1 Ch. 287.

**1431. —**—On a bill for injunction to restrain the completion & continuance of a building seriously obstructing ancient lights, it appeared that the building was almost completed before bill filed; that pltf. had, before the commencement of the works, information that some building was proposed, & that she was abroad during the actual building, & had done nothing amounting to acquiescence.—*Held:* a mandatory injunction could not be granted; & an inquiry as to damages should be directed, though not prayed by the bill.—STANLEY OF ALDERLEY (LADY) v. SHREWSBURY (EARL) (1875), L. R. 19 Eq. 616; 44 L. J. Ch. 389; 32 L. T. 248; 23 W. R. 678.

**1432. —**—Where the walls of a building which interfered with ancient lights were complete at the filing of the bill, & the roof was on at the hearing of the cause, the ct. did not grant a mandatory injunction to pull down any part of the building, but ordered an inquiry as to the damage sustained in respect of the loss of light.—MOTT v. SHOOLBRED (1875), L. R. 20 Eq. 22; 44 L. J. Ch. 380; 23 W. R. 545.

**Annotations.**—*Refd.* Smith v. Smith (1876), 44 L. J. Ch. 630. *Mentd.* Louder v. Moody (1875), 44 L. J. Ch. 711; Broder v. Saillard (1876), 2 Ch. D. 692; Fritz v. Hobson (1889), 14 Ch. D. 542; Cooper v. Crabtree (1881), 19 Ch. D. 193; Byas v. Bottom (1885), 2 T. L. J. 88; House Property & Investment Co. v. H. P. Home Nall Co. (1885), 29 Ch. D. 190.

**1433. —**—The fact that a building which obstructs ancient lights has been completed before writ issued will not prevent the granting of a mandatory injunction for its removal. The material point for consideration is the state

of Govt. Deflt., without any justifying cause, blocked up the mouth of the channel cutting off the entire supply of water. Pltf. sued to restrain defts. by injunction from interfering with the channel.—*Held:* pltf. was entitled to the injunction *sued for*.—RAMA CHAYAN v. SUBRAMANIAM AIVAR (1907), 1 L. R. 31 Mad. 171.—**IND.**

*t.* — *Light & air.*—When the ct. is asked to interfere by injunction to restrain the obstruction of light & air to a dominant tenement, the question to be determined is, is the obstruction such as seriously to interfere with the comfort or enjoyment of the owners of the dominant tenement, or such as to cause a material injury to it—an injury which cannot be completely compensated by damages? The ct. will in such cases interfere, as well by mandatory as by preventive

*Sect. 2.—Remedies for disturbance: Sub-sect. 2, D.*  
(a) *iv.* & (b) *i.*

of the new building when pltf. first complains.—*LAWRENCE v. HORTON* (1890), 59 L. J. Ch. 440; 62 L. T. 749; 38 W. R. 555; 6 T. L. R. 317.

*Annotations:—Apld.* *Shic v. Godfrey*, [1893] W. N. 115; *Keeble v. Pooole & Lucas* (1898), 42 Sol. Jo. 791.

**1434. — Injury not substantial—Light.**—*DURELL v. PRITCHARD*, No. 1428, *ante*.

**1435. — — — — —**—*CALCRAFT v. THOMPSON*, No. 923, *ante*.

**1436. — — — — —**—The ct. will grant a mandatory injunction only in cases of extreme & serious injury. A. & B. were two houses, separated from each other by a gullet two feet wide. In A. there was a window a foot square, five feet above the ground, on one side of the gullet, the window in question being the only window of the pantry of A. The owner of B., in the lifetime of a tenant for life of A., & with her approval, pulled down B., & built a new house in such a manner as to encroach upon the gullet, & to exclude the light & air from the pantry of A. After the death of the tenant for life of A., the reversioners filed a bill against the owner of B. for a mandatory injunction, or alternatively for damages for the obstruction of light & air:—*Held*: under the circumstances, the inconvenience was not sufficiently serious to entitle pltf. to relief, either by mandatory injunction, or by an inquiry to assess damages.—*SPARLING v. CLARSON* (1869), 17 W. R. 518.

**1437. — — — — —**—The ct. will not grant a mandatory injunction to restrain an obstruction of light & air, except in cases where a substantial injury has been sustained.—*BRADEN v. PERRY* (1868), 10 L. T. 760; 17 W. R. 185; *previous proceedings* (1869), L. R. 3 Eq. 465.

**1438. — — — — —**—*PERKINS v. SLATER*, No. 1367, *ante*.

**1439. — — — — —**—In cases of obstruction to ancient lights, the question whether a mandatory injunction will be granted to compel the removal of the obstruction depends on whether the damages which would be granted in lieu of injunction would or would not be substantial. Where, therefore, the total damages recoverable for such an obstruction, coupled with two other causes of complaint, amounted to less than £20:—*Held*: the damages were not substantial, & that no injunction could be granted, but only damages.—*WEBSTER v. WHEWALL* (1880), 15 Ch. D. 120; 49 L. J. Ch. 704; 42 L. T. 808; 28 W. R. 951.

*Annotations:—Mentd.* *Quilter v. Heatly* (1883), 23 Ch. D. 42; *Roberts v. Oppenheim* (1884), 26 Ch. D. 724; *Re Hinchliffe* (1891), 12 R. 33.

**1440. — Light used for extraordinary pur-**

injunction, provided that in the circumstances of the case there is nothing inequitable in putting in force the former remedy. The ct. will look not merely to the use to which rooms in a dwelling-house from which light is obstructed are actually put at the time of the obstruction, but also to the use to which they may be put for all reasonable purposes of occupation. It is immaterial whether light is admitted through a window or a door. In case of obstruction, the owner of the dominant tenement is in either case entitled to protection.—*RATANJI HARMASJI v. ENALJI HARMASJI* (1871), 8 Bom. 181.—**IND.**

**a. — — — — —**—Where pltf. & deft., being owners, respectively, of two adjoining houses & the verandahs immediately in front of those houses, agreed that they should keep the verandahs open & not build upon them

or divide them by a wall:—*Held*: the fact that deft., when re-building his house, built its new front wall in advance of pltf., in breach of the agreement, is not sufficient in itself to justify the ct. in granting a mandatory injunction ordering its removal.—*RANCHHOD JAMNADAS v. LALLU HARIBHAI, LALLU HARIBHAI v. RANCHHOD JAMNADAS* (1873), 10 Bom. 95.—**IND.**

**b. — — — — —**—Re-erection of his house by deft., so as to darken some of the principal rooms of pltf.'s house, making them unfit for occupation during the day without artificial light is an injury against which the ct. will grant relief by issuing a mandatory injunction directing deft. to pull down so much of the house as is necessary to stop the injury.—*JAMNADAS SHANKARLAL v. ATMARAM HAR-*

*pose.*—*LAZARUS v. ARTISTIC PHOTOGRAPHIC CO.*, No. 949, *ante*.

**1441. — Delay by plaintiff—Light.**—*BAXTER v. BOWER*, No. 984, *ante*.

**1442. — Light.**—*SHIEL v. GODFREY & CO.*, [1893] W. N. 115.

**On interlocutory application.**—*See* Nos. 1416, 1423, *ante*.

**Damages in lieu of injunction.**—*See* Sub-sect. 2, D. (b) *i.*, *post*.

(b) *Damages.*

*i. In Lieu of Injunction.*

*See, generally, DAMAGES*, Vol. XVII., pp. 78 et seq.

**1443. General rule.**—*SHELFER v. CITY OF LONDON ELECTRIC LIGHTING CO., MEUX'S BREWERY CO. v. CITY OF LONDON ELECTRIC LIGHTING CO.*, No. 1356, *ante*.

**1444. — — — — —**—*COLLS v. HOME & COLONIAL STORES, LTD.*, No. 830, *ante*.

**1445. Distinction in cases of light & water.**—Injury to rights of air & light generally proceeds from permanent structural obstruction; while injury to water rights may proceed from causes which vary. Hence the ct. inclines to award damages in lieu of injunction in the former case, but will generally decline to do so in the latter.—*PENNINGTON v. BRINSOP ILL COAL CO.* (1877), 5 Ch. D. 709; 46 L. J. Ch. 773; 37 L. T. 149; 25 W. R. 874.

*Annotations:—Refd.* *Fritz v. Hobson* (1880), 14 Ch. D. 542; *Ormerod v. Todmorden Joint Stock Mill Co.* (1883), 11 Q. B. D. 155; *Stollmeyer v. Petroleum Development Co.*, [1918] A. C. 498, n. *Mentd.* *Owen v. Faversham Corp.* (1908), 72 J. P. 404.

**1446. Jurisdiction of court to award.**—*JOHNSON v. WYATT*, No. 916, *ante*.

**1447. — — — — —**—*DURELL v. PRITCHARD*, No. 1428, *ante*.

**1448. — — — — — Case for mandatory injunction not established.**—*CITY OF LONDON BREWERY CO. v. TENNANT*, No. 475, *ante*.

**1449. — — — — — Case for perpetual injunction established.**—Where pltf. has established his right to a perpetual injunction against deft. the ct. has no power under Chancery Amendment Act, 1858 (c. 27), to oblige him against his will to accept damages in lieu of the injunction.—*KRIEHL v. BURRELL* (1879), 11 Ch. D. 146; 40 L. T. 637; 27 W. R. 805, C. A.; *previous proceedings* (1878), 10 Ch. D. 420, C. A.

*Annotations:—Consd.* *Holland v. Worley* (1884), 26 Ch. D. 578. *Refd.* *Gaskin v. Balls* (1879), 13 Ch. D. 324; *Greenwood v. Hornsey* (1886), 33 Ch. D. 471; *Martin v. Price*, [1894] 1 Ch. 276; *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508; *Allport v. Security Co.* (1895), 13 R. 420; *Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287; *Westmoreland v. New Sharlston*

*JIVAN* (1877), 1 L. R. 2 Bom. 133.—**IND.**

**c. — — — — —**—Where deft., without leave or licence, took possession of pltf.'s window as completely as if he had blocked it up altogether:—*Held*: no precedent warranted the substitution of damages for an injunction in such a case against pltf.'s will.—*NANDKISHOR BALGOVAN v. BHAGUBHAI PRANVALABHAI* (1884), 1 L. R. 8 Bom. 95.—**IND.**

**d. — — — — —**—Pltf. complained that defts. intended to build so as to obstruct the passage of light & air through an ancient window in his house, & render a room therein unfit for use, & prayed for a perpetual injunction restraining defts. from so building. It was proved that the wall intended to be built would so shut out the light & air as to render the room completely

Colliery Co. (1898), 79 L. T. 716; Leeds Industrial Co-op. Soc. v. Slack (1924), 40 T. L. R. 745.

**1450.** ———.]—**NATIONAL PROVINCIAL PLATE GLASS INSURANCE CO. v. PRUDENTIAL ASSURANCE CO.**, No. 968, *ante*.

**1451. Grounds for granting or refusing—Injury capable of compensation.**—The jurisdiction of the ct. to interfere by way of mandatory injunction should be exercised with great caution. *Semble*: it should not be exercised at all where damages afford an adequate compensation for the injury done.

It is the duty of the ct. in a case in which it considers damage has been done, though not of such a character as to warrant the exercise of its jurisdiction by mandatory injunction, to direct an inquiry before itself, in order to ascertain the measure of damage that has actually been sustained.—**ISENBERG v. EAST INDIA HOUSE ESTATE CO., LTD.** (1863), 3 De G. J. & Sm. 263; 3 New Rep. 345; 33 L. J. Ch. 392; 9 L. T. 625; 28 J. P. 228; 10 Jur. N. S. 221; 12 W. R. 450; 46 E. R. 637, L. C.

*Annotations*:—**Consd.** R. v. Darlington L. B. of Health (1865), 6 B. & S. 562. **Apld.** Stanley of Alderley v. Shrewsbury (1875), L. R. 19 Eq. 616. **Consd.** Slack v. Leeds Industrial Co-op. Soc., [1923] 1 Ch. 431. **Refd.** Betts v. De Vitro (No. 2) (1864), 11 L. T. 533; Martyn v. Lawrence (1864), 10 L. T. 188; Carriers' Co. v. Corbett (1865), 29 J. P. 469; Senior v. Pawson (1866), L. R. 3 Eq. 330; Stretton v. Great Western & Brentford Ry. (1870), 5 Ch. App. 751; Pottery v. Parsons (1914), 84 L. J. Ch. 81. **Mentd.** Clowes v. Staffordshire Potteries Waterworks Co. (1872), 27 L. T. 521.

**1452.** ———.]—**Mandatory injunction not asked for.**—**MARTIN v. HEADON**, No. 921, *ante*.

**1453.** ———.]—**Plaintiff treating matter as one for compensation.**—In a case where the circumstances justified the ct. in granting a mandatory injunction at the hearing to compel defts. to pull down newly erected buildings to the height of the former ones, on the ground of obstruction to pltf.'s light & air; but where pltf., having heard of the intended structure in Apr. did not complain till Nov. following, during which time defts. had laid out large sums; & where pltf. had also, since bill filed, made an offer to take a money compensation for the injury to her rights, the ct., instead of granting an injunction, directed an inquiry as to the amount of damages sustained by pltf.—**SENIOR v. PAWSON** (1866), L. R. 3 Eq. 330; 15 W. R. 220.

*Annotations*:—**Consd.** Slack v. Leeds Industrial Co-op. Soc., [1923] 1 Ch. 431. **Refd.** Sharp v. Wilson, Rotheray (1905), 93 L. T. 155.

**1454.** ———.]—**DENT v. AUCTION MART CO., PILGRIM v. SAME, MERCERS' CO. v. SAME**, No. 953, *ante*.

dark & unfit for use.—**Held**: pltf. was entitled to an injunction.—**KADARSHAI v. RAHIMHAI** (1889), 1 L. R. 13 Bom. 671.—**IND.**

**e.** ———.]—**A mandatory injunction will be granted to remove an obstruction of an easement to light & air where the character of the obstruction is such that its consequence is to darken pltf.'s house so as to make it uncomfortable & in part useless.**—**MUTHU KRISHNA AYYAR v. SOMALINGA MUTHUNAGANDRIEN** (1913), 1 L. T. 36 Mad. 11.—**IND.**

#### PART XII. SECT. 2, SUB-SECT. 2.— D. (b) i.

**1451 i. Grounds for granting or refusing—Injury capable of compensation.**—Where defts. in 1871, without authority, diverted a watercourse on certain land, & afterwards made compensation therefor to the then owner of the land, pltf.'s predecessor in title. Pltf., having failed to prove

actual damage, was allowed nominal damages & the ct. directed a reference to ascertain the compensation to which pltf. would be entitled as upon an authorised diversion of the watercourse under 51 Vict., c. 29, s. 90 (b) (D.).—**TOLTON v. CANADIAN PACIFIC RY. CO.** (1892), 22 O. R. 204.—**CAN.**

**1451 ii.** ———.]—**Pltf. owned a house in which he had resided for twenty-four years. Through windows in the south wall he had during all that time enjoyed free access of light & air. Defs. purchased the land to the south of pltf.'s house, & proceeded to build on the site; the north wall of the new building was about six feet distant from the south wall of pltf.'s house, & was intended to be sixty-four feet high, i.e., about twenty feet higher than pltf.'s loft windows. Pltf. sued for an injunction.—Held**: pltf. was entitled to damages, but not to an injunction.—**DUNCANHOPE COWARD v. MURRAY v. LIMBOY** (1888), 1 L. R. 13 Bom. 252.—**IND.**

**1455.** ———.]—**GORT (VISCOUNTESS) v. CLARK**, No. 1430, *ante*.

**1456.** ———.]—**Delay by plaintiff.**—**SENIOR v. PAWSON**, No. 1453, *ante*.

**1457.** ———.]—**Damage to defendant by injunction.**—**SENIOR v. PAWSON**, No. 1453, *ante*.

**1458.** ———.]—**Deprivation of property without plaintiff's consent.**—**DUNBALL v. WALTERS**, No. 1410, *ante*.

**1459.** ———.]—**DENT v. AUCTION MART CO., PILGRIM v. SAME, MERCERS' CO. v. SAME**, No. 953, *ante*.

**1460.** ———.]—**Circumstances under which the ct. will grant a mandatory injunction instead of damages under Chancery Amendment Act, 1858 (c. 27), considered.**

In granting a mandatory injunction the ct. did not mean that the man injured could not be compensated by damages, but that the case was one in which it was difficult to assess damages, & in which if [the mandatory injunction] were not granted, deft. would be allowed practically to deprive pltf. of his property if he would give him a price for it (**JESSEL, M.R.**).—**SMITH v. SMITH** (1875), L. R. 20 Eq. 500; 44 L. J. Ch. 630; 32 L. T. 787; 23 W. R. 771.

*Annotations*:—**Consd.** National Provincial Plate Glass Insce. v. Prudential Assce. (1877), 6 Ch. D. 757; Holland v. Worley (1884), 26 Ch. D. 578. **Refd.** Lawrence v. Horton (1890), 62 L. T. 749; Martin v. Price, [1894] 1 Ch. 276; Cowper v. Laidler, [1903] 2 Ch. 337.

**1461.** ———.]—**In exercising the discretion given by Chancery Amendment Act, 1858 (c. 27), s. 2, to award damages in substitution for an injunction, in the case of a substantial interference with pltf.'s ancient lights, the ct. will not, when the result of deft.'s buildings would be, if they were allowed to continue, to render pltf.'s property absolutely useless to him, compel pltf. to sell his property out & out to deft. But if the injury to pltf. will be less serious, & his property will remain substantially useful to him if deft.'s buildings are permitted to continue, the ct. may exercise its discretion by awarding pltf. damages in lieu of an injunction, & for the purpose of exercising that discretion the ct. will take into consideration the nature & situation of the property, as for example, the circumstance that it is situate in the centre of a large city, such as London.—**HOLLAND v. WORLEY** (1884), 26 Ch. D. 578; 54 L. J. Ch. 268; 50 L. T. 526; 49 J. P. 7; 32 W. R. 749.**

*Annotations*:—**Consd.** Greenwood v. Hornsey (1886), 33 Ch. D. 471. **Expld.** Dickier v. Popham, Radford (1890), 63 L. T. 379. **Dtd.** National Telephone Co. v. Baker, [1893] 2 Ch. 186. **Consd.** Martin v. Price, [1894] 1 Ch. 276; Cowper v. Laidler, [1903] 2 Ch. 337. **Refd.** Sheller v.

**f.** ———.]—**Joint owners of mill dam.—Prescriptive right of one.**—One of two joint owners of a mill dam, each having a mill on opposite sides of the river by which the dam was formed, was entitled to a prescriptive right to the supply of water as furnished by the dam all the way across the river, & to dam back the water on pltf.'s land, but the other owner was not. In an action to restrain both owners from backing the water to the detriment of pltf.:—**Held**: the dam as a piece of property was an entire thing, & that pltf. was not entitled to an injunction restraining the use of the water, his remedy being in damages against the owner not entitled to the easement.—**STOTHARD v. HILLARD** (1890), 19 O. R. 542.—**CAN.**

**g.** ———.]—**Plaintiff's acquiescence.**—Where pltf. & defts., being owners, respectively, of two adjoining houses & the verandahs immediately in front of those houses, agreed that they should keep the verandahs open & not build

**Sect. 2.—Remedies for disturbance: Sub-sect. 2, D.**  
**(b) i. & ii. & E. (a) & (b).]**

City of London Electric Lighting Co., *Moux's Brewery Co. v. City of London Electric Lighting Co.* (1894), 12 R. 112; *Leeds Industrial Co-op. Soc. v. Slack* (1924), 40 T. L. R. 745.

**1462.** ———. ———.]—*COWPER v. LAIDLER*, No. 1397, *ante*.

**1463.** ———. ———. **Damages not asked for.**]—*STANLEY OF ALDERLEY (LADY) v. SHREWSBURY (EARL)*, No. 1431, *ante*.

**1464.** ———. **Offer by defendant to abate if ordered.**]—*GREENWOOD v. HORNSEY*, No. 959, *ante*.

**1465.** ———. **Possible future use of plaintiff's premises.**]—In an action to restrain the obstruction of ancient lights, where the right of pltf. to relief rests mainly upon damage, not suffered at the time but likely to accrue within a reasonable time, the ct. will nevertheless grant an injunction to enforce that right, & not give compensation by way of damages. In a case of this character the possible future application of pltf.'s premises must be considered, in granting an injunction, or directing an inquiry as to damages. —*DICKER v. POPHAM, RADFORD & Co.* (1890), 63 L. T. 379.

**1466.** ———. **Balance of convenience.**]—*BALL v. DERBY (EARL)* (1874), cited in [1894] 1 Ch. at p. 281; *sub nom. BATT v. DERBY (EARL)*, cited in 63 L. T. at p. 381.

*Annotations:—Consd. Dicker v. Popham, Radford* (1890), 63 L. T. 379; *Martin v. Price*, [1894] 1 Ch. 276.

**1467.** ———. **Unfair conduct of defendant.**]—*COLLS v. HOME & COLONIAL STORES, LTD.*, No. 830, *ante*.

**1468.** ———. ———.]—I think this is not a case for a mandatory injunction. There is no case of sharp practice or unfair conduct on the part of deft. It is not a case of irredeemable damage, or of the house being rendered uninhabitable, nor is it a case in which damages cannot be regarded as reasonable & adequate compensation. I think it is impossible to doubt that the tendency of the speeches in the House of Lords in *Colls v. Home & Colonial Stores, Ltd.*, No. 830, *ante*, is to go a little further than was done in *Shelley v. City of London Electric Lighting Co.*, No. 1356, *post*, & to indicate that as a general rule the ct. ought to be less free in granting mandatory injunctions than it was in years gone by (*COZENS-HARDY, L.J.*). —*KINE v. JOLLY*, [1905] 1 Ch. 480; 74 L. J. Ch. 174; 92 L. T. 209; 53 W. R. 462; 21 T. L. R. 128; 49 Sol. Jo. 104, C. A.; *affd. sub nom. JOLLY v. KINE*, [1907] A. C. 1, H. L.

*Annotations:—Reid. Higgins v. Betts*, [1905] 2 Ch. 210. *Mentd. Davis v. Marrable*, [1913] 1 Ch. 421; *Paul v. Robson* (1914), 83 L. J. P. C. 301; *Hoare v. McAlpine*, [1923] 1 Ch. 167.

*See, also, NUISANCE.*

**Prospective injury.**]—*See* Sub-sect. 2, D. (a) ii., *ante*.

**ii. Measure of Damages.**

*See, generally, DAMAGES, Vol. XVII., pp. 130 et seq.*

**1469. Loss of support—Value of house before**

upon them or divide them by a wall. —*Held*: the ct. should satisfy itself whether pltf. protested against the new wall whilst in course of erection, or quietly acquiesced in what deft. was doing, & only objected when the wall was completed. In the latter case the ct. should only award damages. —*RANCHOD JAMNADAS v. LALLU HARIBHAI, LALLU HARIBHAI v. RANCHOD JAMNADAS* (1873), 10 Bom. 95. —*IND.*

**h.** ———. ———.]—Where the whole of the direct light, which formerly came to pltf.'s building, was taken

away by deft.'s new building. Inasmuch as pltf. was shown the plans of the proposed new building & no proceedings were instituted, until deft.'s building had reached a height of 30 ft., & as on that date permission was given to deft. to go on building at his own risk, & deft. had nearly completed his building at a very large cost by the date of hearing of this suit when the building had reached a height of 70 ft., & as pltf.'s building was a small old-fashioned house, which, in the ordinary course, would in a few years be pulled down & rebuilt:—

**subsidence.**]—A. & B. were the owners of adjoining lands, & the house of A. had for more than twenty years been supported by the adjoining land of B., who dug a foundation for some intended buildings so near the house of A. that it fell. —*Held*: (1) if A.'s house had been so supported, & both parties knew it, pltf. had a right to such support as an easement; (2) deft. could not withdraw that support without being liable in damages for any injury that pltf. might sustain thereby, which damages should be such as to put pltf. in the same state in which he was before, but the jury ought not to give him a new house for an old one. —*HIDE v. THORNBOROUGH* (1846), 2 Car. & Kir. 250, N. P.

*Annotations:—As to* (1) *Consd. Solomon v. Vintners' Co.* (1859), 4 H. & N. 585. *Distd. Woodall v. Hingley* (1866), 14 L. T. 167. *Consd. Dalton v. Angus* (1881), 6 App. Cas. 740. *Reid. Humphries v. Brogden* (1850), 12 Q. B. 739; *Rogers v. Taylor* (1858), 30 L. T. O. S. 321. *As to* (2) *Consd. Humphries v. Brogden* (1850), 12 Q. B. 739. *Reid. Rogers v. Taylor* (1858), 30 L. T. O. S. 321; *Whitham v. Kershaw* (1886), 16 Q. B. D. 613.

**1470. Obstruction to light—To new & old windows—Damages recoverable for both.**]—Claimants, being the owners of certain buildings with ancient lights, pulled them down & erected a new building on their site. The position of certain portions of the windows of the new building coincided with that of portions of the old windows, while other portions of the new windows occupied wholly different positions. Before any right to the access of light to the non-coinciding portions of the new windows had been acquired, a railway co., in the exercise of their powers, erected a warehouse which obstructed the lights of windows in the new building: —*Held*: claimants were entitled to compensation in respect of the whole of the windows so obstructed, including the windows & portions of windows which did not coincide with any of the ancient lights. —*Re LONDON, TILBURY & SOUTH-END RY. CO. & GOWER'S WALK SCHOOLS TRUSTEES* (1889), 24 Q. B. D. 326; 62 L. T. 306; 38 W. R. 343; *sub nom. Re GOWERS WALK SCHOOLS TRUSTEES & LONDON, TILBURY & SOUTH-END RY. CO.*, 59 L. J. Q. B. 162; 6 T. L. R. 120, C. A.

*Annotations:—Expld. & Distd. Horton v. Colwyn Bay & Colwyn U. C.*, [1908] 1 K. B. 327. *Expld. & Apld. Griffith v. Clay*, [1912] 2 Ch. 291. *Mentd. Simmons v. London Joint Stock Bank, Little v. London Joint Stock Bank*, [1891] 1 Ch. 270.

**1471.** ———. **Site value—Land immediately in rear of buildings obstructed—Depreciation of whole as building site.**]—Pltf. was the owner of two houses fronting upon a street, & the windows facing the street were ancient lights. He was also the owner of a piece of land immediately at the rear of & adjoining the houses. Defts. erected a building on the opposite side of the street & thereby obstructed pltf.'s ancient lights. In an action for damages it appeared that pltf.'s houses were old & dilapidated & would soon have to be demolished; that the neighbourhood was no longer residential, but adapted for factories & workshops; that the site of the houses, together with

*Held*: the proper remedy would be a decree for damages & not a mandatory injunction to demolish deft.'s new building. —*ANATH NATH DEB v. GALSTAN* (1908), 1 L. R. 35 Cal. 661. —*IND.*

**PART XII. SECT. 2, SUB-SECT. 2.—**  
**D. (b) ii.**

**k. Obstruction to light—Cost of necessary alterations.**]—In an action for obstructing pltf.'s lights, a fair measure of damages is the cost of making such alterations in pltf.'s

the piece of land at the rear, would form a building site suitable for a warehouse or factory; & that the value of this building site as a whole would be diminished by the obstruction to light in the front:—*Held*: the damages recoverable by pltf. were not limited to the depreciation in the value of the houses, but extended to the diminution in value of the whole of pltf.'s premises considered as one building site.—*GRIFFITH v. CLAY (RICHARD) & SONS, LTD.*, [1912] 2 Ch. 291; 81 L. J. Ch. 809; 106 L. T. 963, C. A.

*Annotation*:—*Apld.* *Wills v. May*, [1923] 1 Ch. 317.

**1472. — Site ready for development—Site acquired for future development.**—Pltf. was the owner of a small two-storied house, No. 117, whose windows on the north side were ancient lights; she was also the owner of No. 119, a house similar to & adjoining No. 117 on the south. Deft., who owned No. 115, to the north of & adjoining No. 117, converted it into a shop with offices above it, & so obstructed the access of light to the ancient windows of No. 117. In an action for damages caused by that obstruction, it appeared that the site of No. 117 lent itself to development by the erection of a shop; that the character of the district was in process of changing from a residential to a commercial one; that pltf. bought Nos. 117 & 119 as an investment with a view to developing their sites as a building site for commercial purposes; that the sites could together be formed into a single site suitable for such purposes, though the development thereof might be delayed for a few years owing to the existence of a lease affecting No. 119. It further appeared that the obstruction of light on the north side of No. 117 had rendered the sites of pltf.'s houses less valuable as a building site for commercial purposes:—*Held*: in the circumstances, the ct. was entitled, in estimating the damages caused to pltf. by the obstruction, to take into consideration not only the immediate damage done to the house standing on the site of No. 117, but also the damage to the combined sites of Nos. 117 & 119 treated as a building site adaptable to commercial purposes, notwithstanding that the site of No. 119 might not be immediately ripe for development.—*WILLS v. MAY*, [1923] 1 Ch. 317; 92 L. J. Ch. 253; 128 L. T. 826; 67 Sol. Jo. 350.

### *E. Practice and Procedure.*

#### *(a) The Order.*

**1473. Liberty to defendant to apply—For sanction of scheme of building.**—The ct., though it grant a perpetual injunction to restrain the darkening of ancient lights, will yet, in a proper case, retain the power of sanctioning any proper scheme which may be proposed by deft., & will for this purpose give liberty to apply to the judge in chambers with reference to any such scheme; & will not require the payment of costs as a condition precedent to such application.—*STOKES v. CITY OFFICES CO.* (1865), 2 Hem. & M. 650; 12 L. T. 602; 29 J. P. 708; 11 Jur. N. S. 560; 71 E. R. 616; *affd.*, 13 L. T. 81, L. C.

*Annotations*:—*Foll.* *Yates v. Jack* (1866), 1 Ch. App. 295. *Refd.* *Dent v. Auction Mart Co.*, *Pilgrim v. Same*, *Mercers' Co. v. Same* (1866), L. R. 2 Eq. 238; *Shelfer v. London Electric Lighting Co.*, *Meux's Brewery Co. v. London Electric Lighting Co.* (1895) 1 Ch. 287; *Leeds Industrial Co-op. Soc. v. Slack* (1924), 40 T. L. R. 745.

house as will be necessary to obtain the same quantity of light & air as he had enjoyed before the obstruction.—*RING v. PROSELY* (1878), 2 P. & B. 303.—*CAN.*

1. — *Diminution in value of site to be considered.*—Obstruction of ancient lights admitted, & the question of damages left to the ct.:—*Held*: the diminution in value of the whole

**1474. —**—*YATES v. JACK*, No. 920, *ante*.

**1475. Liberty to plaintiff to apply—For mandatory injunction.**—*COLLS v. HOME & COLONIAL STORES, LTD.*, No. 830, *ante*.

**1476. —**—*ANDERSON v. FRANCIS*, [1906] W. N. 160.

*Annotation*:—*Refd.* *Slack v. Leeds Industrial Co-op. Soc.*, [1923] 1 Ch. 431.

**1477. Declaration of plaintiff's rights—On undertaking by defendant to submit plans of proposed building.**—*SMITH v. BAXTER*, No. 466, *ante*.

#### *(b) Undertaking as to Damages.*

##### *Sec. generally, INJUNCTION.*

**1478. Discretion of court to grant inquiry.**—Where pltf., undertaking to abide by any order as to damages, had obtained an interlocutory injunction to restrain defts. from proceeding with certain erections, but his bill was dismissed at the hearing, the ct. refused an application by defts. at the dismissal of the bill, for an inquiry as to damages sustained by them by reason of their having been restrained by the injunction for the space of a year, but without prejudice to any applications they might make as to damages on pltf.'s undertaking, upon the production of sufficient evidence to justify an inquiry.—*BUTT v. IMPERIAL GAS CO.* (1866), 14 L. T. 349; 14 W. R. 508; *affd.*, 2 Ch. App. 158, L. C.

**1479. —**—(1) An injunction to restrain deft. from building so as to prevent access of light & air to pltf.'s windows was granted *ex p.* on Nov. 4, 1879, & on Nov. 27, was continued until the trial or further order, pltf. giving the usual undertaking as to damages. On Feb. 18, 1880, the Ct. of Appeal discharged the order. On Nov. 11, 1880, a perpetual injunction as to access of air was granted; but on June 21, 1881, the Ct. of Appeal dismissed the action with costs. On Feb. 16, 1882, deft. gave notice of motion for an inquiry as to damages which was refused. The only damage alleged was that deft. had agreed to let part of the property with the new buildings to a tenant, & was prevented from carrying this out by the injunction preventing his building. It was not proved, however, that there was any binding agreement to take a lease, nor did it appear that the injunction interfered with the erection of the buildings to such an extent as would have entitled the intended tenant to throw up the agreement if binding:—*Held*: an inquiry as to damages ought not to be granted. (2) *Qu.*: whether where an interlocutory injunction has been wrongly granted, owing to a mistake of law by the judge, without any misrepresentation, suppression, or other default on the part of pltf., an inquiry as to damages can be directed under the undertaking. (3) The ct. is not bound to grant an inquiry as to damages whenever deft. has sustained some damage by the granting the injunction; but it has a discretion, & may refuse any inquiry if the damage restrained is trivial or remote, or if there has been great delay in making the application. The question considered at what time the application for an inquiry as to damages ought to be made:—*Held*: (4) even if there had been a binding agreement by the proposed tenant to take a lease, & the injunction had so interfered with the building as to entitle the tenant to be

site might be taken into account in assessing pltf.'s loss.—*GRIFFITH v. CLAY & SONS, LTD.* (1912), 40 L. L. T. 275.—*IR.*

*Sect. 2.—Remedies for disturbance: Sub-sect. 2, E. (b) & (c) & F. Part XIII. Sect. 1.]*

off the bargain, damages ought not to be granted in respect of it, for that damages must be confined to the immediate natural consequences of the injunction, under the circumstances which were within the knowledge of the party obtaining the injunction.—*SMITH v. DAY* (1882), 21 Ch. D. 421; 48 L. T. 54; 31 W. R. 187, C. A.

*Annotations:—As to (2) N.F. Griffith v. Blake* (1884), 27 Ch. D. 474; *Hunt v. Hunt* (1884), 54 L. J. Ch. 289. *Consd. Howard v. Press Printers* (1904), 74 L. J. Ch. 100. *N.F. Re Hallstone, Hopkinson v. Carter* (1910), 102 L. T. 877. *Reid. Fenner v. Wilson*, [1893] 2 Ch. 656; *A.-G. v. Albany Hotel Co.*, [1896] 2 Ch. 696. *As to (3) Apld. Re Wood, Ex p. Hall* (1883), 23 Ch. D. 644; *Hunt v. Hunt* (1884), 54 L. J. Ch. 289. *As to (4) Consd. Schlesinger v. Bodford* (1893), 9 T. L. R. 370.

**1480. Interlocutory injunction granted on mistake of law.]—SMITH v. DAY**, No. 1479, *ante*.

(c) *Inspection and Reference.*

**1481. Whether personal inspection by judge advisable.]—JACKSON v. NEWCASTLE (DUKE)**, No. 917, *ante*.

**1482. —.]—COLLS v. HOME & COLONIAL STORES, LTD.**, No. 830, *ante*.

**1483. Power of court to order independent report by expert—Of effect of temporary obstruction.]—LEECH v. SCHWEDER**, No. 834, *ante*.

**1484. —.]—COLLS v. HOME & COLONIAL STORES, LTD.**, No. 830, *ante*.

**1485. —.]—ABBOTT v. HOLLOWAY** (1904), 48 Sol. Jo. 525.

**1486. Reference of questions of fact to official referee.]—PARKS v. EAMES**, [1890] W. N. 143.

*F. Jurisdiction of County Courts.*

*See COUNTY COURTS*, Vol. XIII., pp. 474, 479, 480, Nos. 234, 292, 293, 296.

## Part XIII.—Profits à Prendre.

### SECT. 1.—NATURE AND CHARACTERISTICS.

**1487. Something taken from soil.]—MANNING v. WASDALE**, No. 1131, *ante*.

**1488. — Part or produce thereof.]—RACE v. WARD**, No. 997, *ante*.

**1489. — Belonging to another.]—SUTHERLAND (DUKE) v. HEATCOTE**, No. 1522, *post*.

**1490. Is an incorporeal hereditament.]—**The nature of this right is clearly established. . . . It is an incorporeal hereditament, a property, & an estate capable of being inherited by the heir, & assigned to a purchaser or otherwise conveyed away. It is in truth "a tenement" within the definition of Lord Coke, who says that the word "tenement" includeth not only corporate inheritances but also all inheritances issuing out of them or concerning or annexed to or exercisable within them as rent, estovers, common, or other profits whatever granted out of land" (MARTIN, B.).—*MARTYN v. WILLIAMS* (1857), 1 H. & N. 817; 20 L. J. Ex. 117; 28 L. T. O. S. 321; 5 W. R. 351; 156 E. R. 1430.

*Annotations:—Consd. Hastings v. N. E. Ry.*, [1898] 2 Ch. 674. *Reid. Norval v. Pascoe* (1864), 4 New Rep. 390; *Hooper v. Clark* (1867), L. R. 2 Q. B. 200.

**1491. —.]—**The soil of a town moor was vested in the corp. of the town in fee, but freemen & widows of deceased freemen of the town were under statute entitled to the "full right & benefit to the herbage" of the town moor for two milch cows:—*Held*: this right to the herbage was not "any real or personal property whatsoever" within Malicious Damage Act, 1861 (c. 97), s. 52, which applies only to tangible property & not to a mere incorporeal right.—*LAWS v. ELTRINGHAM* (1881), 8 Q. B. D. 283; 51 L. J. M. C. 13; 40 L. T. 64; 40 J. P. 230; 30 W. R. 245; 15 Cox, C. C. 22, D. C.

*Annotation:—Mentd. Gardner v. Mansbridge* (1887), 19 Q. B. D. 217.

**1492. Inheritable by heir.]—MARTYN v. WILLIAMS**, No. 1490, *ante*.

**1493. Is a tenement.]—MARTYN v. WILLIAMS**, No. 1490, *ante*.

**1494. Is an interest in land—Within Statute of Frauds, s. 4.]—**A grant of a right to shoot over land & to take away a part of the game killed is a

grant of an interest in land & within the above sect.—*WEBBER v. LEE* (1882), 9 Q. B. D. 315; 51 L. J. Q. B. 485; 47 L. T. 215; 47 J. P. 4; 30 W. R. 806, C. A.

*Annotation:—Reid. R. v. Surrey County Court Judge*, [1910] 2 K. B. 410.

**1495. Carries ancillary rights—Necessary to enjoyment of right.]—DARCY (LORD) v. ASKWITH** (1618), Hob. 234; Hut. 19; 80 E. R. 380.

*Annotations:—Mentd. Elwes v. Maw* (1802), 3 East, 38; *Simmons v. Norton* (1831), 9 L. J. O. S. C. P. 185; *Phillips v. Smith* (1845), 14 M. & W. 589; *Jones v. Chappell* (1875), L. T. 20 Eq. 539; *West Ham Central Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. 624.

**1496. Distinguished from licence.]—THOMAS v. SORRELL** (1673), Vaugh. 330; 1 Lev. 217; 1 Freem. K. B. 85, 137; 3 Keb. 204; 124 E. R. 1098, Ex. Ch.

*Annotations:—Reid. Muskett v. Hill* (1839), 5 Bing. N. C. 694; *Wood v. Leadbitter* (1845), 13 M. & W. 838; *Taplin v. Florence* (1851), 10 C. B. 744; *Warr v. L. C. C.*, [1904] 1 K. B. 713; *Smith v. Colbourne*, [1914] 2 Ch. 533; *British Actors Film Co. v. Glover*, [1918] 1 K. B. 299. *Mentd. Jeverson v. Moor* (1699), 12 Mod. Rep. 262; *R. v. Papinian* (1725), 2 Sess. Cas. K. B. 31; *Ex p. Armitage* (1756), Amb. 294; *Washbourne v. Burrows* (1847), 16 L. J. Ex. 266; *Congreve v. Evetts* (1851), 10 Exch. 298; *Bailey v. Stephens* (1862), 12 C. B. N. S. 91; *Nuttall v. Bracewell* (1866), 36 L. J. Ex. 1; *L. C. C. v. Dundas*, [1904] 1 P. 1.

**1497. —.]—**E. granted by deed to plffs. for a term of years "the exclusive right of fishing" in a defined part of the river C., with a proviso that "the right of fishing hereby granted shall only extend to fair rod & line angling, & to netting for the sole purpose of procuring fish-baits." Deft. wrongfully discharged into the stream water loaded with sediment, the effect of which was to drive away the fish & injure the breeding:—*Held*: the grant did not give a mere licence to fish, but a right to fish & carry away the fish caught; this was a *profit à prendre*, & was an incorporeal hereditament; & plffs. had a right of action for an injunction & damages against any one who wrongfully did any act by which the enjoyment of the rights given to them by the deed was prejudicially affected.

The distinction between a licence & a grant is clear, & if you find a person affecting to grant by

**PART XIII. SECT. 1.**  
**1496. 1. Distinguished from licence.]—**Ptff. claimed a prescriptive right of using land belonging to deft.'s mgor.

for raising rice plants to be afterwards transplanted to his own land:—*Held*: such a right, so attached to ptff.'s land, was not a licence, but an ease-

ment of the nature of *profits à prendre*.—*SUNDRAI v. JAYAWANT* (1898), 1 L. R. 23 Bom. 397.—*IND.*  
*m. Searced — Right to pile on*



deed rights in respect of real property which are capable of being so granted, that is a grant & not a licence. . . . A grant by deed creates an incorporeal hereditament where the subject is of such a nature that the law allows an incorporeal hereditament to be granted (RIGBY, L.J.).—*FITZGERALD v. FIRBANK*, [1897] 2 Ch. 96; 60 L. J. Ch. 529; 70 L. T. 584; 13 T. L. R. 390; 41 Sol. Jo. 490, C. A.

*Annotations*:—*Reid*, *Lowe v. Adams*, [1901] 2 Ch. 598. *Mentd.* *Eeroyd v. Coulthard*, [1897] 2 Ch. 554; *Grauby v. Bakewell* U. D. C. (1923), 87 J. P. 105.

**1498. — When licence amounts to a grant—Licence carrying interest.**—The owner of the fee granted to A., his partners, fellow-adventurers, etc., free liberty to dig for tin & all other metals, throughout certain lands therein described, & to raise, make merchantable, & dispose of the same to their own use; & to make adits, etc., necessary for the exercise of that liberty, together with the use of all waters & watercourses, excepting to the grantor liberty for driving any new adit within the lands thereby granted, & to convey any watercourse over the premises granted, *habendum* for 21 years; covenant by the grantee to pay one-eighth share of all ore to the grantor, & all rates, taxes, etc., & to work effectually the mines during the term; & then, in failure of the performance of any of the covenants, a right of re-entry was reserved to the grantor:—*Held*: this deed did not amount to a lease, but contained a mere licence to dig & search for minerals, & the grantee could not maintain an ejectment for mines lying within the limits of the set, but not connected with the workings of the grantee.

[The deed's] words import a grant of such parts thereof only as should upon the licence & power given to search & get, be found within the described limits, which is nothing more than the grant of a licence to search & get, irrevocable, indeed, on account of its carrying an interest; with a grant of such of the ore only as should be found & got, the grantor parting with no estate or interest in the rest (ABBOTT, C.J.).—*DOE d. HANLEY v. WOOD* (1819), 2 B. & Ald. 724; 106 E. R. 529.

*Annotations*:—*Consd.* *Jones v. Reynolds* (1836), 4 Ad. & El. 805; *Muskett v. Hill* (1839), 5 Bing. N. C. 694. *Distd.* *Low Moor Co. v. Stanley Coal Co.* (1876), 34 L. T. 186. *Reid.* *R. v. Trent & Mersey Canal Co.* (1825), 3 L. J. O. S. K. B. 110; *Vice v. Thomas* (1842), 4 Y. & C. Ex. 538; *Rogers v. Brenton* (1847), 10 Q. B. 26; *Re Stroud* (1849), 8 C. B. 502; *Martyn v. Williams* (1857), 1 H. & N. 817; *Lee v. Stevenson* (1858), E. B. & E. 512; *Griffiths v. Jenkins* (1864), 3 New Rep. 489; *Roads v. Trumpton Overseers* (1870), L. R. 6 Q. B. 56; *Sutherland v. Heathcote*, [1892] 1 Ch. 475. *Mentd.* *Pendergast v. Turton* (1841), 11 L. J. Ch. 22; *Watson v. Spratley* (1854), 10 Exch. 222; *Holmes v. Powell* (1856), 8 De G. M. & G. 572.

**1499. — Licence of profit—Not mere personal licence of pleasure.**—(1) W. granted to V. & C., their heirs & assigns, "free liberty, with servants or otherwise, to come into & upon certain lands, & there to hawk, hunt, fish, & fowl":—*Held*: this was a grant, not of a personal licence of pleasure extending only to the individual, but of a licence of profit, which might, therefore, be exercised by the servants of the grantees, or their heirs & assigns, in their absence; & such a liberty was therefore a *profit à prendre*, within Prescription Act, 1832 (c. 71), s. 2.

(2) V. & C. conveyed by deed certain lands to W., who executed the deed, "excepting & always reserving to V., C. & R., their heirs & assigns, liberty to come into & upon the lands so con-

veyed, & there to hawk, hunt, fish, & fowl, etc.:—*Held*: such a liberty was not, in correct legal language, either an exception or a reservation; but, as the indenture was executed by W., the words of reservation & exception operated as a grant by him to the three; therefore, the liberty mentioned in the deed might enure in favour of R. & his heirs, though, as he was not a conveying party to the deed, the reservation or exception would not have been good as regarded him.—*WICKHAM v. HAWKER* (1840), 7 M. & W. 63; 10 L. J. Ex. 153; 151 E. R. 679.

*Annotations*:—*As to (1) Apprvd.* *Ewart v. Graham* (1850), 7 H. L. Cas. 332. *Distd.* *Owen v. Parsons* (1874), 33 J. P. 614. *Consd.* *Goodman v. Saltash Corp.* (1882), 7 App. Cas. 633; *Sutherland v. Heathcote*, [1892] 1 Ch. 475. *Appld.* *Fitzhardinge v. Purcell*, [1908] 3 Ch. 139. *Reid.* *Race v. Ward* (1855), 4 K. & B. 702; *Lonsdale v. Rigg* (1856), 11 Exch. 654; *Musgrave v. Forster* (1871), L. R. 6 Q. B. 590; *Altkood v. Gibson* (1876), 25 W. L. R. 60. *As to (2) Distd.* *Pannell v. Mill* (1846), 3 C. B. 625. *Reid.* *Durham & Sunderland Ry. v. Walker* (1842), 2 Q. B. 940; *Denison v. Holliday* (1857), 1 H. & N. 631; *Gilbertson v. Richards* (1859), 4 H. & N. 277; *Williams v. Hayward* (1859), 1 E. & E. 1040; *Kiddle v. Kayley* (1864), 28 J. P. 805; *Proud v. Bates* (1865), 6 New Rep. 92; *Sowerby v. Smith* (1874), L. R. 9 C. P. 524. *Generally, Mentd.* *Walsh v. Southwell* (1851), 20 L. J. M. C. 165; *Doe d. Croft v. Tildbury* (1853), 2 C. L. R. 347; *Hill v. Tupper* (1863), 32 L. J. Ex. 217; *Dennett v. Atherton* (1872), 20 W. L. R. 412; *Eeroyd v. Coulthard*, [1897] 2 Ch. 554; *Thellusson v. Liddard*, [1900] 2 Ch. 635.

**1500. — — — — —**—A licence to search for & raise metals, & also to carry them away & convert them to the licensee's own use, passes an interest which is capable of being assigned.

The deed in this case operates not merely as a licence but as a grant also . . . & such a grant to a man & his assigns carries an interest which is assignable (TINDAL, C.J.).—*MUSKETT v. HILL* (1839), 5 Bing. N. C. 691; 7 Scott, 855; 9 L. J. C. P. 201; 132 E. R. 1267.

*Annotations*:—*Consd.* *Bailey v. Stephens* (1862), 12 C. B. N. S. 91. *Reid.* *Martyn v. Williams* (1857), 1 H. & N. 817; *Newby v. Harrison* (1861), 1 J. & H. 393; *Heap v. Hartley* (1889), 42 Ch. D. 461; *Smelling Co. of Australia v. I. B. Comrs.*, [1896] 2 Q. B. 179; *British Actors Film Co. v. Glover*, [1918] 1 K. B. 299. *Mentd.* *Wootton v. Woodcock* (1839), 5 M. & W. 587; *Marker v. Kenrick* (1853), 13 C. B. 188; *Watson v. Spratley* (1854), 10 Exch. 222; *McMahon v. Leonard* (1858), 6 H. L. Cas. 970; *Ahearn v. Bellman*, *Sedgwick v. Ahearn* (1879), 48 L. J. Q. B. 681.

**1501. — — — — —**—The right of hunting, shooting, etc., is an interest in the reality, & a grant of it is a licence of a *profit à prendre*.

That right may be granted by the owner of the fee simple, & such a grant is a licence of a *profit à prendre*. Substantially it may be reserved by the owner of the fee simple when he alienates, although it is considered that, technically speaking, in such a case it is a re-grant of the right by the alienor of the fee simple (LORD CAMPBELL, C.).—*EWART v. GRAHAM* (1859), 7 H. L. Cas. 331; 29 L. J. Ex. 88; 33 L. T. O. S. 349; 23 J. P. 483; 5 Jur. N. S. 773; 7 W. R. 621; 11 E. R. 132, H. L.; *affg.* *S. C. sub nom. GRAHAM v. EWART* (1850), 1 H. & N. 550, Ex. Ch.

*Annotations*:—*Mentd.* *Bruce v. Helliwell* (1860), 5 H. & N. 609; *Blades v. Higgs* (1865), 20 C. B. N. S. 214; *Jeffries v. Evans* (1865), 19 C. B. N. S. 246; *Hilton & Walkerfield Overseers v. Bowes Overseers* (1866), L. R. 1 Q. B. 359; *Leconfield v. Dixon* (1867), L. R. 3 Exch. 30; *Musgrave v. Forster* (1871), L. R. 6 Q. B. 590; *Sowerby v. Smith* (1874), L. R. 9 C. P. 524; *Rogers v. St. Germans Union* (1876), 35 L. T. 332; *Devonshire v. O'Connor* (1890), 24 Q. B. D. 468; *Fitzhardinge v. Purcell* (1908), 99 L. T. 151.

**Distinguished from easement.**—See Part II., ante.

**Capable of alienation.**—See Sect. 6, post.

*private land.*—Seaweed deposited by the sea above high water mark, constitutes a *profit à prendre*, & the right

to pile it on the land of another could not become established, either by custom or prescription, in favour of

the inhabitants of a district.—*Ogilvie v. Crowell* (1904), 40 N. S. R. 501.—CAN.

## SECT. 2.—CLASSIFICATION.

**1502. Appendant.—Incident to estate granted.—**Passing with dominant tenement.]—*GUY v. BROWN* (1601), Moore, K. B. 644; 72 E. R. 813.

**1503. ——— Grant prior to Statute Quia Emptores.]—**(1) Where, in a manor, there are many lands & tenements, the tenants whereof, in respect of those lands, have always exercised rights of common on the waste, the declarations of deceased persons, who had been such tenants, & exercised such rights, are inadmissible in an action of trespass upon a question whether the *locus in quo* is parcel of the waste, such rights not being of a sufficiently public nature to justify the reception of hearsay evidence. *Secus*: if all the inhabitants, or all the tenants, of the manor, or of a particular district of it, had been interested.

(2) But the public nature of such rights does not depend upon the number of them.

If this question had been one in which all the inhabitants of the manor, or all the tenants of it, or a particular district of it, had been interested, reputation from any deceased inhabitant or tenant, or even deceased residents in the manor, would have been admissible, such residents having presumably a knowledge of such local customs; & if there had been a common law right for every tenant of the manor to have common on the wastes of a manor, reputation from any deceased tenant as to the extent of those wastes, & therefore as to any particular land being waste of the manor, would have been admissible. But although there are some books which state that common appendant is of common right, & that common appendant is the "common law right" of every free tenant on the lord's wastes, it is not to be understood that every tenant of a manor has by common law such a right, but only that certain tenants have such a right, not by prescription, but as a right by common law, incident to the grant. This right is not a common right of all tenants, but belongs only to each grantee, before the Statute Quia Emptores, of arable land, by virtue of his individual grant, & as an incident thereto; & it is as much a peculiar right of the grantee as one derived by express grant, or by prescription, though it differs in its extent, being limited to such cattle as are kept for ploughing & manuring the arable land granted, & as are of a description fit for that purpose; whereas the right by grant or prescription has no such limits, & depends on the will of the grantor (*PARKE, B.*). —*DUNRAVEN (LORD) v. LLEWELLYN* (1850), 15 Q. B. 701; 19 L. J. Q. B. 388; 15 L. T. O. S. 543; 14 Jur. 1089; 117 E. R. 657, Ex. Ch.

*Annotations*:—As to (2) *Consd. Warrick v. Queen's College, Oxford* (1871), 6 Ch. App. 716; *Evans v. Merthyr Tydfil U. C.*, [1899] 1 Ch. 241. *Reid. Broome v. Wenham* (1893), 68 L. T. 651; *Heath v. Deane*, [1905] 2 Ch. 86. *Generally, Reid. Dendy v. Simpson* (1856), 18 C. B. 831. *Mentd. R. v. Bedfordshire* (1855), 4 E. & B. 535.

—**Rights of common.]—**See COMMONS, Vol. XI., pp. 6-8, 15, 16, Nos. 13-40, 158-159, 172.

**1504. Appurtenant.—To right of office.]—***R. v. TRINITY HOUSE* (1661), 1 Keb. 331; 1 Sid. 86; 83 E. R. 977.

*Annotations*:—*Mentd. Woodward v. Fox* (1691), 2 Vent. 267; *Anon.* (1698), 12 Mod. Rep. 224.

**1505. ——— Passes with dominant tenement.—Right of pasture.]—**By Conveyancing Act, 1881 (c. 41), s. 6, s. 1: "A conveyance of land shall be deemed to include & shall . . . operate to convey, with the land, all . . . commons . . . privileges, easements, rights, & advantages whatsoever, appertaining or reputed to appertain to the land . . . or at the time of conveyance demised, occupied, or enjoyed with, or reputed

or known as part or parcel of or appurtenant to the land."

At the date of the conveyance of an upland farm in North Wales there was appertaining to the farm & exercised & enjoyed therewith & reputed & known as appurtenant thereto a sheep-walk, or right of depasturing sheep, on an adjoining mountain:—*Held*: this right passed with the farm, notwithstanding that it was a *profit à prendre in alieno solo*.—*WHITE v. WILLIAMS*, [1922] 1 K. B. 727; 91 L. J. K. B. 721; 127 L. T. 231; 38 T. L. R. 419; 66 Sol. Jo. 405, C. A. *Annotation*:—*Reid. Long v. Gowllett*, [1923] 2 Ch. 177.

—**Rights of common.]—**See COMMONS, Vol. XI., pp. 8-11, 15, 16, 17, 19, 21, 28, Nos. 41-93, 156, 160, 161, 171, 188-193, 221-229, 243-245, 322-325.

**1506. In gross.]—**It may well be that there can exist in law a right in gross to enter & take, without limitation, or without stint, the profits or proceeds of another's land commercially for the purposes of sale (*BUCKLEY, L.J.*).—*CHESTERFIELD (LORD) v. HARRIS*, [1908] 2 Ch. 397; 77 L. J. Ch. 688; 99 L. T. 558; 24 T. L. R. 763; 52 Sol. Jo. 639, C. A.; *affd. sub nom. HARRIS v. CHESTERFIELD (EARL)*, [1911] A. C. 623, H. L.

*Annotations*:—*Reid. Malvern Hills Conservators v. Whitmore* (1909), 100 L. T. 841; *Staffordshire & Worcestershire Canal Navigation v. Bradley*, [1912] 1 Ch. 91. *Mentd. A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Hodgson v. McCrath* (1923), 92 L. J. Ch. 426.

**1506a. ———.]—**Deft., lord of the manor of B., claimed sporting rights over p'tfs.' freehold farms within the manor, basing his claim on a franchise of free warren appurtenant to the manor granted by the Crown to J., in 1301; alternatively, on a lost grant, presumed from immemorial user:—*Held*: the grant to J. in 1301 was of a franchise in gross, & even if not in gross, it would have passed by J.'s subsequent alienation of the land, or become a franchise in gross by J.'s reserving the franchise upon the occasion of that alienation. There was therefore no title in deft. by the grant of the manor, & there was no evidence supporting his claim by prescription to the presumption of a lost grant.—*HODGSON v. MCCREATH* (1923), 93 L. J. Ch. 339; 131 L. T. 340; 40 T. L. R. 10; 68 Sol. Jo. 58, C. A.

—**Rights of commons.]—**See COMMONS, Vol. XI., pp. 11, 17, 26, Nos. 94-100, 187, 323.

—**Whether within Prescription Act, 1832 (c. 71).]**—See Sect. 4, ss. 2, A., *post*.

## SECT. 3.—SUBJECT-MATTER.

**1507. Must be capable of ownership.—Not water.]—***RACE v. WARD*, No. 997, *ante*.

**1508. Ice from canal.]—**A canal company, in consideration of the lessees' expenditure on certain ice houses on the banks of the canal, granted a lease thereof with licence to take ice from a part of the canal:—*Held*: the licence was not exclusive, but was a grant of sufficient ice to enable the lessee to fill the ice houses; so long as the lessee was able & willing to take this quantity of ice, the lessors could not derogate from their grant by subsequent licences which would interfere with it.—*NEWBY v. HARRISON* (1861), 1 John. & H. 393; 4 L. T. 397; 9 W. R. 849; 70 E. R. 799; *affd.* 4 L. T. 424, L. C.

*Annotations*:—*Distd. Carr v. Benson* (1868), 3 Ch. App. 524. *Reid. Renard v. Levinstein* (1865), 2 Hem. & M. 628; *Sutherland v. Heathcote*, [1891] 3 Ch. 504. *Mentd. Heap v. Hartley* (1889), 42 Ch. D. 461; *Smelting Co. of Australia v. I. R. Comrs.*, [1896] 2 Q. B. 179; *British Actors Film Co. v. Glover*, [1918] 1 K. B. 299.

**Rights of common.—Pasture.]—**See COMMONS, Vol. XI., pp. 5-15, 22, 23, 26, Nos. 2-151, 264-269, 317-320.

— **Foldage & foldcourse.**]—See COMMONS, Vol. XI., pp. 14–16, Nos. 152–165.

— **Turbary.**]—See COMMONS, Vol. XI., pp. 16, 17, Nos. 171–186.

— **Piscary.**]—See COMMONS, Vol. XI., pp. 10, 20, Nos. 220–242.

— **Estovers.**]—See COMMONS, Vol. XI., pp. 17, 18, Nos. 187–219.

— **In the soil.**]—See COMMONS, Vol. XI., pp. 21, 22, Nos. 243–263.

— **Pannage.**]—See COMMONS, Vol. XI., p. 24, Nos. 276–278.

— **Right of free warren.**]—See COMMONS, Vol. XI., pp. 26–28, Nos. 322–350.

— **Loppings off trees.**]—See AGRICULTURE, Vol. II., p. 101, Nos. 812, 813; COMMONS, Vol. XI., p. 23, Nos. 271–273.

— **Fishing rights.**]—See FISHERIES.

— **Gaming rights.**]—See GAME.

— **Mining rights.**]—See MINES.

— **Tithes.**—Claim by lord of manor.]—See COPYHOLDS, Vol. XIII., p. 26, No. 208.

— **Water.**]—See Part VIII., *ante*; WATERS & WATERCOURSES

#### SECT. 4.—CREATION OF PROFITS À PRENDRE.

##### SUB-SECT. 1.—BY GRANT.

###### A. In General.

Creation of easement by grant.]—See Part III., s. 1, *ante*.

1509. **Necessity for deed.**]—HAYWARD v. KILBURN (PRIORRESS) (1307), Sel. Soc. Y. B., Vol. I., p. 4.

1510. —.]—Where a subject is owner of a several fishery, in a navigable river where the tide flows & reflows, granted to him (as must be presumed) before Magna Carta by the description of *separatam piscariam*, that is an incorporeal not a territorial hereditament & a term for years in it cannot be created without deed.—SOMERSET (DUKE) v. FOGWELL (1826), 5 B. & C. 875; 8 Dow. & Ry. K. B. 747; 5 L. J. O. S. K. B. 49; 108 E. R. 325.

*Annotations.*—**Refd.** Holford v. Bailey (1849), 13 Jur. 278; Marshall v. Ulleswater Steam Navigation Co. (1863), 3 B. & S. 732; Hindson v. Ashby, [1896] 2 Ch. 1. **Mentd.** Whitstable Free Fishers & Dredgers v. Gunn, Gann v. Johnson (1861), 11 C. B. N. S. 387; Bridgewater v. Bootle (1866), 7 B. & S. 348; A.-G. v. Emerson, [1891] A. C. 649; Keroyd v. Coulthard (1897), 77 L. T. 357; Beaufort v. Aird (1904), 20 T. L. R. 602.

1511. — **Demise not under seal insufficient.**]—A demise in writing, but not under seal, of a messuage, & full & free & exclusive licence & leave for the lessee, his friends, game-keepers, etc., to hunt, hawk, course, shoot, & sport, in, over, & upon a manor of the lessor, & to fish in the ponds & waters thereof, from Aug. to Feb. following, at an entire rent, is altogether void.

*Semble*: where a count in *assumpsit* to recover a rent reserved by parol demise, by pltf. to deft., of an incorporeal hereditament, states that deft. actually occupied under such demise, pltf. may recover for the use & occupation.—BIRD v. HIGGINSON (1835), 2 Ad. & El. 696; 1 Har. & W. 61; 4 Nev. & M. K. B. 505; 4 L. J. K. B. 124; 111 E. R. 267; *on appeal* (1837), 6 Ad. & El. 824, Ex. Ch.

*Annotations.*—**Consd.** Thomas v. Fredricks (1817), 10 Q. B.

775. **Refd.** Hayselden v. Staff (1836), 6 Nev. & M. K. B. 659; R. v. Hookworthy (1837), 7 Ad. & El. 492; Doo d. Morgan v. Powell (1844), 7 Man. & G. 980; Thames Haven Dock Co. v. Brymer (1850), 5 Exch. 696; Brown v. Peto, [1900] 2 Q. B. 653. **Mentd.** Worley v. Harrison (1835), 3 Ad. & El. 669; Upward v. Knight (1839), 7 Scott, 311; Ratton v. Davis (1841), 1 Gal. & Dav. 21.

1512. —.]—WOOD v. LEADBITTER, No. 115, *ante*.

1513. **Words must amount to grant—General words of conveyance insufficient.**]—The lessee of a farm had liberty reserved to him by the lease “to take the seaware or drift, along with the other tenants, for manuring the land.” In 1814 the farm was sold, & the lands were described in the conveyance as “the same is presently possessed by the tenant.” There was no express grant of the right to take the seaware, but the conveyance contained the usual general words, “together with all the appurtenances.” The purchaser claimed the right to take the seaware:—**Held**: the general words of the conveyance did not pass the right, nor was there an easement by prescription. Words amounting to a grant must be used to pass rights which are not properly servitudes.—BAIRD v. FORTUNE (1861), 5 L. T. 2; 25 J. P. 691; 7 Jur. N. S. 926; 10 W. R. 2; 4 Macq. 127, 11. 1.

*Annotations.*—**Consd.** Francis v. Hayward (1882), 20 Ch. D. 773. **Mentd.** Martyn v. Lawrence (1864), 10 L. T. 188; Magee v. Lavoll (1874), L. R. 9 C. P. 107; Mowata v. Hudson (1911), 105 L. T. 400.

1514. **Evidence of claim—Whether user necessary—In addition to production of grant.**]—*Prima facie* this is a case of trespass in search of game, & the only answer to the charge is a claim under a charter from the Crown, but that alone is not sufficient, without proof that the charter has been acted on; the charter standing alone is not enough to establish the right (LORD CAMPBELL, C.J.).—POTTER v. BERKE (1857), 6 W. R. 71; 21 J. P. Jo. 756.

By copy.—In favour of copyhold tenants.]—See COPYHOLDS, Vol. XIII., p. 57, Nos. 681–686.

Royal grants.]—See CONSTITUTIONAL LAW, Vol. XI., pp. 557–581, Nos. 572–829.

Rights of common.]—See COMMONS, Vol. XI., pp. 28, 29, Nos. 351–366.

###### B. For what Estate.

1515. **Term of years.**]—SOMERSET (DUKE) v. FOGWELL, No. 1510, *ante*.

1516. —.]—C. demised to deft., for a term of years, the exclusive right & licence to shoot, kill, & take game upon certain of his lands, together with the use of a cottage for the occupation of a keeper. There was also a covenant by deft. that he would leave the estate as well stocked with game in all respects, as the same was at the time of the commencement of the term. Deft. entered upon the occupation & occupied for the term, during which C. assigned his reversion to pltf. Pltf. having brought an action against deft. in respect of a breach of the above covenant to leave the estate well stocked with game:—**Held**: the demise was a demise of an incorporeal hereditament; the covenant was one which would pass to the assignee of the reversion & the action would lie at the suit of the pltf.—HOOPER v. CLARK (1867), L. R. 2 Q. B.

#### PART XIII. SECT. 4, SUB-SECT. 1.—A.

1509 i. **Necessity for deed.**]—Although a *profit à prendre* can at common law be created only by deed, an agreement for valuable consideration to create such a right will be recognised & enforced by equity & specific performance of the agreement may be granted.—TEMPLETON (OFFICIAL ASSIGNEE IN

BANKRUPTCY) v. MATHERSON (1915), 34 N. Z. L. R. 813.—N.Z.

n. **Words amounting to grant.**]—Dft. by written lease gave pltf. exclusive right to drill on oil lands for five years:—**Held**: the legal effect of the instrument was more than a licence; it conferred a *profit à prendre*, an incorporeal right to be exercised in land comprised in it.—MCINTOSH

v. LECKIE (1906), 13 O. L. R. 54; 8 O. W. R. 490.—CAN.

o. **Capable grantee necessary.**]—There cannot be a grant of a *profit à prendre* without a capable grantee. A series of residents in a house are not capable grantees.—WESTHOPE v. CONQUEST DISTRICT BOARD, [1919] 1 J. R. 224.—IR.



the right. Where deft. justified under a right of common of pasture, by showing a demise from a freehold for life of the land in respect of which he claimed, & averred that he, deft., & all those whose estate he then had, & his landlord, from time, etc., had common of pasture in respect of the demised premises:—*Held*: the plea was bad.—*A.-G. v. GAUNTLETT* (1829), 3 Y. & J. 93.

*Annotations*:—*Refd.* *A.-G. v. Reynolds*, [1911] 2 K. B. 888. *Mentd.* *Salisbury v. Gladstone* (1860), 6 Jur. N. S. 1209.

**1527. Must be connected with dominant tenement.**—*A.-G. v. MATHIAS*, No. 1500, *post*.

**1528.** ———.]—A claim of a prescriptive right in the owners or occupiers of close A. to enter close B., belonging to a third person, & to cut down & carry away & convert to their own use all the trees & wood growing & being thereon, "as to close A. appertaining" is void, as being too large.

This is a *profit à prendre*, in which a man may have an inheritable estate; it is in no way connected with the enjoyment of the dominant tenement. There is really no more connection here, than if the owner of an estate in Northumberland were to grant a right of way to the owner of another estate in Kent; because, as has been stated, an incident of this nature cannot, even by express words in an existing deed, be connected with the estate by the mere act of the parties. It must, in addition to that, have some natural connection with the estate, as being for its benefit, or, as has been expressed, it must inhere in the estate. Therefore, if an express grant to this effect had been produced between the grantee & grantor, & going as between the heirs of the grantee & grantor, it cannot run with the estate (*BYLES, J.*).—*BAILEY v. STEPHENS* (1862), 12 C. B. N. S. 91; 31 L. J. C. P. 226; 6 L. T. 356; 8 Jur. N. S. 1063; 10 W. R. 868; 142 E. R. 1077.

*Annotations*:—*Apld.* *Chesterfield v. Harris*, [1908] 2 Ch. 397. *Refd.* *Constable v. Nicholson* (1863), 14 C. B. N. S. 230; *Kills v. Bridgnorth Corp.* (1863), 15 C. B. N. S. 52; *Hill v. Tupper* (1863), 8 L. T. 792; *Shuttleworth v. Le Fleming* (1865), 19 C. B. N. S. 687; *Edgar v. English Fisheries Special Comrs.* (1870), 23 L. T. 732; *Johnson v. Barnes* (1872), L. R. 7 C. P. 592; *Whitmores (Edenbridge) v. Stanford*, [1909] 1 Ch. 427; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. *Mentd.* *Sutherland v. Heathcote*, [1891] 3 Ch. 504.

**1529. Claim under Prescription Act, 1832 (c. 71), s. 1.—Application of section.**—*HANMER v. CHANCE*, No. 307, *ante*.

**1530. Profits in gross—Not within Prescription Act, 1832 (c. 71).**—*WELCOME v. UPTON*, No. 1551, *post*.

**1531.** ———.]—Prescription Act, 1832 (c. 71), does not apply to easements or *profits à prendre* in gross, *e.g.* to a claim of "a free-fishery" in the waters of another.—*SHUTTLEWORTH v. LE FLEMING* (1865), 19 C. B. N. S. 687; 34 L. J. C. P. 309; 11 Jur. N. S. 841; 14 W. R. 13; 144 E. R. 956.

*Annotations*:—*Foll.* *Warwick v. Gonville & Calus College* (1890), 6 T. L. R. 447. *Consd.* *Mercer v. Denne*, [1905] 2 Ch. 538. *Foll.* *Ramsgate Corp. v. Debling* (1906), 70 J. P. 132.

was permitted by the lessor, as his agent believed that the right existed under the lease:—*Held*: a lost grant should be presumed.—*DAWSON v. M'GROGAN*, [1903] 1 I. R. 92, 105.—*IR.*

*t. Full period of continuous & exclusive enjoyment essential.*—Plff. claimed land in dispute under a deed from P. O. of one-half or moiety of the farm lot on which he resided, & also one full half or moiety of all the woods, etc., thereunto in anywise belonging or appertaining. The land in dispute was a wood lot situated about two miles from the farm lot & separated from it by lands of other proprietors, & upon which P. O. was shown to have cut

from time to time, but as to which there was no general user as part & parcel of the farm, there being another wood lot connected with the farm which was generally used for that purpose:—*Held*: in the absence of 20 years' continuous & exclusive enjoyment by plff. occasional acts of cutting must be regarded as acts of trespass or, at the highest, as having been done with the consent of the owner.—*OGILVIE v. GRANT* (1906), 41 N. S. R. 1. —*CAN.*

#### PART XIII. SECT. 4, SUB-SECT. 2.—B.

*a. Inhabitants of a village.*—The rule that a claim to a *profit à prendre* cannot be acquired by the inhabitants of a village, either by custom or pre-

**1532.** ———.]—*WARWICK v. GONVILLE & CALUS COLLEGE*, No. 1512, *post*.

**1533. Abandonment of claim by prescription—Evidence of origin in grant—Form of action not changed.**—Plff. in trespass at first sought to prove his title by prescription to a several fishery, in the absence of a lost grant, but at the adjourned hearing of the case tendered evidence to prove a grant from the Crown. Such evidence having been rejected on the ground that in relying upon it plff. had changed the form of his action:—*Held*: the evidence had been admissible & in relying upon the grant & not on his title by prescription plff. had not changed his form of action.—*FOSTER v. COTGROVE* (1885), 2 T. L. R. 110.

**Rights of common.**—*See* COMMONS, Vol. XI., pp. 30, 31, Nos. 372–389.

— **Presumption of lost modern grant.**—*See* COMMONS, Vol. XI., pp. 31, 35, Nos. 444–450.

— **Prescription & custom distinguished.**—*See* COMMONS, Vol. XI., pp. 29, 30, Nos. 367–371.

**Proof of user.**—*See* Sub-sect. 2, C., *post*.

#### B. Who may Prescribe.

**1534. Not inhabitants as such.**—*MILLS v. COLCHESTER CORPN.*, No. 1501, *post*.

**1535. Not fluctuating & uncertain body.**—*GOODMAN v. SALTASH CORPN.*, No. 322, *ante*.

**1536. Not the public.**—*NEILL v. DEVONSHIRE (DUKE)*, No. 1500, *post*.

**Rights of common.**—*See* COMMONS, Vol. XI., pp. 31, 32, Nos. 390–421.

#### C. Proof of User.

##### (a) In General.

*See* Prescription Act, 1832 (c. 71).

**1537. At common law—User proved must accord with prescription pleaded.**—*R. v. HERMITAGE (INHABITANTS)* (1692), *Carth.* 239; 1 Show. 106; 90 E. R. 743.

*Annotations*:—*Refd.* *Byam v. Booth, etc.* (1816), 2 Price, 231. *Mentd.* *R. v. Glastonby* (1736), *Leo temp. Hard.* 355; *A.-G. v. Plymouth Corp.* (1751), *Wight.* 131; *Vickery v. L. B. & S. C. Ry.* (1870), L. R. 5 C. P. 165.

**1538.** ———.]—*MICHELL v. MORTIMER* (1617), *Hob.* 209; 80 E. R. 350.

*Annotation*:—*Refd.* *Byam v. Booth, etc.* (1816), 2 Price, 231.

**1539.** ———.] If a prescription at law is not fully proved it fails: it is therefore not a matter of form. If a partial right be claimed, the evidence must be confined to that part. If a general right be claimed, a partial proof will not support it, for evidence in part is not good, if the claim be general (*WOOD, B.*).—*BYAM v. BOOTH, etc.* (1816), 2 Price, 231; 3 Eag. & Y. 716; 146 E. R. 79.

*Annotations*:—*Mentd.* *Scott v. Lawson* (1819), 7 Price, 267; *Evans v. Rowe* (1825), *McCle. & Yo.* 577; *Willis v. Farrer* (1828), 2 Y. & J. 217; *Willis v. Farrer* (1829), 3 Y. & J. 261; *Masters v. Fletcher* (1830), *Yout.* 25; *Salkeld v. Johnston* (1842), 1 Hare, 196.

**1540.** ———.]—To a declaration in trespass *quare clausum fregit*, defts. pleaded a justification under a prescription in the Crown, to enter the

scription, does not apply to a right of pasturage claimed by a village in the Presidency of Bombay as against the Govt. The right of free pasturage has always been recognised as a right belonging to certain villages, & must have been acquired by custom or prescription. But the right of free pasturage which certain villages enjoy according to the recognised custom of the country does not necessarily confer the right of pasturage on any particular piece of land, although it may confer the right of having sufficient land set apart for the purposes of the village.—*SECRETARY OF STATE FOR INDIA v. MATHURABHAI* (1889), L. L. R. 11 Bom. 213.—*IND.*

*Sect. 4.—Creation of profits à prendre: Sub-sect. 2, C. (a) & (b).]*

lands for the purpose of getting coals, ironstone, & other minerals, & to carry away the same, doing no more damage than necessary for the purpose. Traverse of the prescription, & issue thereon. They also pleaded a justification under a prescription in the same terms as above, with the addition of the qualification, "making compensation to the tenant for all damage occasioned to the surface of the lands thereby." This conditional prescription was admitted by the pleadings, & no evidence of any other prescription was given at the trial:—*Held*: evidence of such qualified or conditional prescription did not support the prescription as first alleged, & the issue joined on the traverse of the unconditional prescription must be found for pltf.—*PADDOCK v. FOURRESTER* (1842), 3 Man. & G. 903; 1 Dowl. N. S. 527; 3 Scott, N. R. 715; 11 L. J. C. P. 107; 133 E. R. 1404.

*Annotations:—Mentd.* *Hilton v. Granville* (1844), 5 Q. B. 701; *Walker v. Wilsheer* (1889), 23 Q. B. D. 335.

**1541. — Sufficiency of evidence.—Not impaired by user by unauthorised persons.**—This was an action of trespass, brought to try a right of common claimed by deft. over a piece of land called C., in the parish of E., as appurtenant to a farm held by him. From the evidence, it appeared that deft. & his predecessors in estate had, for thirty years previously, pastured their cattle on the land: but it was shown on behalf of pltf. that all the inhabitants of the parish of E. had been in the habit of turning animals of various kinds on to the land, whether they were possessed of any land to which right of common could be attached or not; that the land had been leased, as part of the manor of S., since the reign of Hen. VIII., & no mention appeared in any of the leases or other documents of any rights of common prior to 1795; that in that year an Act was passed authorising an extension of the G. canal, by which it was provided that when any part of a common was taken by the co., they should pay compensation for the common rights, to the churchwardens of the parish in which the common was situated. It was also proved that a considerable compensation had been paid about the year 1805, under this section, to the churchwardens of the parish of E., in respect of a part of the *locus in quo* which had been taken by the co., & which was then lying waste, & that subsequently to that time the parish had demanded and received compensation in respect of common rights from railway cos. for other parts of the common:—*Held*: the exercise of rights of common by other persons who could not have had such rights would not have prevented the thirty years' user by deft. from being sufficient evidence of his right by prescription at common law; but pltf. having shown that the user originated in consequence of the passing of the G. Canal Act, the presumption arising from the subsequent user was rebutted.—*CHURCH v. TAME* (1867), L. R. 2 C. P. 480, n.

**1542. — Open continuous user.**—The appts. claimed under above Act, but it had been decided so long ago as 1865, that the Act did not apply to easements or *profits à prendre* in gross, & there was nothing to show that this right was appurtenant. It was merely a right in gross. Was there any right by prescription at common law? One must look at all the circumstances of the case, bearing in mind that no claim could be made if it were shown how the acts of user originated. In his opinion

the user arose from a mistake in the construction of the deed of 1792. It was said that a lost grant ought to be presumed, but that was expressly excluded by a statute of Elizabeth relating to Caius College as regards all grants after that time, & if there had been any such grant it would have been mentioned in some way or other in the earlier title (COTTON, L.J.).—*WARWICK v. GONVILLE & CAIUS COLLEGE* (1890), 6 T. L. R. 447, C. A.

**1543. — Immemorial user.—Rebuttal.—User originating in statute.**—*CHURCH v. TAME*, No. 1541, *ante*.

**1544. — How established.**—*WARWICK v. GONVILLE & CAIUS COLLEGE*, No. 1542, *ante*.

**Easements.**—See Part III., Sect. 3, sub-sect. 6, *ante*.

**1545. Under Prescription Act, 1832 (c. 71).—Period of enjoyment.—Interruption of Life estate.**—

(1) Under above Act, where a deft. justified in trespass under a *profit à prendre*, as enjoyed 30 years "next before the commencement of the suit," a life estate, which had existed during part of that time, was to be excluded from the computation. Therefore, where pltf. replied to such a plea, that a life estate existed during part of the 30 years, which allegation was traversed by deft.:—*Held*: on this issue deft. was entitled to succeed, it appearing that the life estate existed during part of the 30 years, but that deft. enjoyed the right claimed for 25 years before its commencement, & 5 years after its termination.

(2) A plea of enjoyment of a *profit à prendre* for 60 years, is defeated by showing unity of possession during part of the time; & unity of title is *prima facie* evidence of unity of possession.—*CLAYTON v. CORBY* (1842), 2 Q. B. 813; 2 Gal. & Dav. 174; 11 L. J. Q. B. 239; 114 E. R. 310; *subsequent proceedings* (1843), 5 Q. B. 415.

*Annotations:—As to (1) Refd.* *Pye v. Mumford* (1848), 11 Q. B. 666; *Hyman v. Van Den Bergh*, [1907] 2 Ch. 516.

**1546. — For sixty years.—How defeated.**—*CLAYTON v. CORBY*, No. 1515, *ante*.

**1547. — What acts of user need be shown.—Occasional or regular.**—Trespass for breaking & entering a close of pltf., & digging up & removing clay, sand, etc. Plea, that deft. was the occupier of a tenement & premises, to wit, a brick-kiln, & that he, as such occupier, & all the occupiers for the time being of the tenement, for the full period of thirty years, had had & enjoyed, as of right & without interruption, a right to dig, take, & carry away from the place in question as much of the clay of the close as was at any time required by him or them for the purpose of making bricks at his kiln in every year, & at all times of the year. Replication, taking issue thereon:—*Held*: this plea was bad, as setting up an indefinite claim to take clay from & out of the close of pltf.—*CLAYTON v. CORBY* (1843), 5 Q. B. 415; *Dav. & Mer.* 440; 14 L. J. Q. B. 364; 8 Jur. 212; 114 E. R. 1306; *sub nom.* *DOE d. CLAYTON v. CORBY*, 2 L. T. O. S. 207.

*Annotations:—Appld.* *A.-G. v. Mathias* (1858), 4 K. & J. 579. *Distd.* *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633. *Appld.* *Chesterfield v. Harris*, [1908] 2 Ch. 397. *Refd.* *Wilkinson v. Haygarth* (1847), 12 Q. B. 837; *Carlyon v. Lovering* (1857), 1 H. & N. 784; *Salisbury v. Gladstone* (1860), 6 Jur. N. S. 1209; *Bailey v. Stephens* (1862), 12 C. B. N. S. 91; *Constable v. Nicholson* (1863), 32 L. J. C. P. 240; *Mitcham Common Conservators v. Banks* (1912), 76 J. P. 413.

**Not applicable to profits in gross.**—See Sect. 4, sub-sect. 2, A., *ante*.

**Easements.**—See Part III., Sect. 3, sub-sect. 6, *ante*.

**Rights of common.**—See COMMONS, Vol. XI., pp. 32–34, Nos. 426–443.

*(b) Admissibility of Evidence.*

**1548. Reputation.]—Qu.:** whether general evidence of reputation as to a prescriptive right of digging stones on the lord's waste, annexed to a particular estate, be admissible. Two judges against two. But one of those who held the affirmative thought it required other evidence of right to be first laid as a foundation. *Semble:* such evidence may be given as to a particular custom, though not as to a private prescription.—**MOREWOOD v. WOOD** (1791), 14 East, 327; 104 E. R. 626.

*Annotations:—***Refd.** R. v. Antrobus (1835), 2 Ad. & El. 788. **Mentd.** Doe d. Mudd v. Suckmore (1836), 5 Ad. & El. 703.

**1549. —.**—(1) In an action by the lord of a manor against a copyholder, for trespassing on the free warren of pltf., a judgment on a *quo warranto* against a former owner of the manor, in which the A.-G. confessed a prescriptive title to the franchise of free warren, as appurtenant to the manor, is evidence for pltf. in support of a prescriptive right of a free warren.

(2) Where the information charged an usurpation of the franchise over the lands of tenants as well as demesne lands, & the ct. gave judgment for deft. as to both:—**Held:** the record was evidence of a prescriptive right over both, although the plea set forth a title over demesne lands only, & the A.-G. confessed the title as pleaded.

(3) Reputation is admissible evidence of a claim of free warren, by prescription, over an entire manor. Therefore, a private Act for the inclosure of common lands within the manor, in which the interest of copyholders appeared by the recital, & which contained a proviso expressly saving the rights of the lord to free warren in the manor, in as ample a manner as the lord as theretofore enjoyed it, is admissible evidence to prove the right as against a copyholder.

(4) On the same ground, the declarations of deceased copyholders as to the existence of the franchise over all the copyholders, is admissible for the like purpose.

(5) A judgment in a former action against another copyholder, for a trespass on pltf.'s free warren, is also admissible.

(6) A bishop who had free warren, by prescription over the demesne & tenemental lands of a manor whereof he was seized *jure ecclesie*, accepted a grant from the Crown, to himself & his successors, of free warren over the demesne lands of all his manors in England:—**Held:** if the grant could have the effect of extinguishing the prescription as to the demesne lands, it could not effect it over the other lands of the manor. *Qu.:* whether a franchise by the Crown within time of memory determines a prescriptive claim to the same franchise.—**CARNARVON (EARL) v. VILLEBOIS** (1844), 13 M. & W. 313; 14 L. J. Ex. 233; 153 E. R. 130.

*Annotations:—***As to (3)** **Refd.** Doe d. William IV. v. Roberts (1844), 13 M. & W. 520; R. v. Bedfordshire (1855), 4 E. & B. 535.

**1550. Manorial documents—Licences granted by lord.]—**To prove a prescriptive right of fishery as appurtenant to a manor old licences of the ct. rolls granted by the lords of the manor in consideration of certain rents to fish in the *locus in quo* are evidence, without proof of rents being paid if it appears that such rents have been paid in modern times or that the lords of the manor have exercised other acts of ownership over the fishery.—**ROGERS v. ALLEN** (1808), 1 Camp. 309.

*Annotations:—***Refd.** Pigott v. Bayley (1826), 6 B. & C. 16; Bassett v. Mitchell (1831), 2 B. & Ad. 99; Malcomson v.

O'Dea (1863), 10 H. L. Cas. 593; Bristow v. Cormican (1878), 3 App. Cas. 641; Blandy-Jenkins v. Dunraven (1899), 81 L. T. 209.

**1551. Recitals in deed—Showing ancestry of owner.]—**In an action of trespass, for taking & impounding pltf.'s cattle, in P. & G. field, deft. pleaded, first, that T. B. & his ancestors had been immemorially used to have, for themselves, & their heirs & assigns, the sole & several pasturage in 217 acres of the P. & G. field, in gross, for all his & their cattle, from Sept. 4, in one year, to Apr. 5, in the following year; that T. B. in 1755, by indenture granted the pasturage to S. B. his heirs & assigns for ever; that J. R. F. B., who claimed by descent from S. B. in 1830, demised the pasturage to deft. (not saying by deed), who seized pltf.'s cattle, because they were depasturing the land in question. Deft. pleaded, secondly, that for 30 years before suit commenced, J. R. F. B. & his ancestors had enjoyed of right without interruption, for himself & themselves, his & their heirs & assigns, the sole pasturage in the field in question, in gross, stating a demise, but not by deed, to deft., & concluding as in the first plea. It appeared at the trial, that within the last twenty years, encroachments had been made upon the 217 acres, by buildings & inclosures, & that about forty acres had in this way been appropriated by individuals, but no encroachments had been made upon that part of the 217 acres, on which the alleged trespass took place:—**Held:** (1) these interruptions, being of modern date, did not prove that T. B. had no right to the pasturage in 1755; (2) the interruptions not having been made upon that part of the land where pltf.'s cattle were depasturing, they were not conclusive evidence of an interruption of deft.'s enjoyment of that part; (3) the recitals in a deed-poll of 1800, made by one of the ancestors of the present owner of the pasturage, & relating to the pasturage, were admissible to prove the marriages & deaths of the ancestors of that owner; (4) a lease & agreement made by the ancestors of the present owner, by which they demised the pasturage in question to one U., were admissible in evidence, as proving the seisin of T. B. the original grantor of the pasturage, by showing the enjoyment of parties who claimed under him; (5) the right of pasturage in question was capable of being conveyed, & did not necessarily descend to the heir, & pltf. was not entitled to judgment *non obstante veredicto* which he had contended for, on the ground that the plea, after stating a prescriptive right in the pasturage in T. B., which was descendible to the heir, alleged that T. B. granted the pasturage to S. B.

*Qu.:* (6) whether the right of pasturage in question was within the provisions of Prescription Act, 1832 (c. 71), s. 5; (7) whether a right of common in gross is within the equity of that sect.

(8) *Semble:* the statement that T. B. demised the right of pasturage in question, without stating that he demised it by deed, was good after verdict. —**WELCOME v. UPTON** (1840), 6 M. & W. 536; 9 L. J. Ex. 154; 151 E. R. 524.

*Annotations:—***As to (2)** **Apud.** Davies v. Williams (1851), 16 Q. B. 546. **Refd.** Saunders v. Latham (1855), 4 W. R. 97. **As to (7)** **Consd.** Shuttleworth v. Le Fleming (1865), 19 C. B. N. S. 687. **Refd.** Bailey v. Stephens (1862), 12 C. B. N. S. 91; Mounsey v. Ismay (1865), 3 H. & C. 486.

**1552. Lease—Showing seisin of grantor.]—****WELCOME v. UPTON**, No. 1551, *ante*.

**1553. Declaration of deceased person.]—****CARNARVON (EARL) v. VILLEBOIS**, No. 1549, *ante*.

**1554. Previous judgment—In proceedings for**



*Sect. 4.—Creation of profits à prendre: Sub-sect. 2, C. (b); sub-sect. 3 & 4.]*

**infringement of right.]—CARNARVON (EARL) v. VILLEBOIS, No. 1549, ante.**

**1555. —[—]—NEILL v. DEVONSHIRE (DUKE), No. 1506, post.**

**Rights of common.]—See COMMONS, Vol. XI., pp. 36, 37, Nos. 490–506.**

#### SUB-SECT. 3.—BY CUSTOM.

*See, generally, CUSTOM AND USAGES.*

**1556. Cannot be claimed by custom.]—(1) There cannot be a custom for inhabitants, as such, to have profit à prendre in the soil of another.**

**(2) There may be a custom for every inhabitant to have a discharge in his own land or an easement in the land of another.—GATEWARD'S CASE (1607), 6 Co. Rep. 59 b; 77 E. R. 344; sub nom. SMITH v. GATEWOOD, Cro. Jac. 152.**

*Annotations:—As to (1) Apld. A.-G. v. Mathias (1858), 4 K. & J. 579. Consd. Austin v. Amhurst (1877), 7 Ch. D. 689. Follid. Rivers v. Adams (1878), 3 Ex. D. 361. Apprd. Goodman v. Saltash Corp'n. (1882), 7 App. Cas. 633. Follid. Tilbury v. Silva (1890), 45 Ch. D. 98. Refld. Ordway v. Orme (1612), 1 Bulst. 183; Day v. Savadge (1614), Hob. 85; Baker v. Broerman (1635), Cro. Car. 418; Bond's Case (1639), March, 16; North v. Coe (1668), Vaugh. 251; Miller v. Spateman (1669), 2 Keb. 570; Weekly v. Wildman (1698), 1 Ld. Raym. 405; Drake v. Wiglesworth (1753), Willes, 654; Grimstead v. Marlowe (1792), 4 Term Rep. 717; Lockwood v. Wood (1844), 6 Q. B. 50; Jones v. Robin (1847), 10 Q. B. 620; Rogers v. Brenton (1847), 10 Q. B. 26; Lloyd v. Jones (1848), 6 C. B. 81; Constable v. Nicholson (1863), 14 C. B. N. S. 230; Mounsey v. Ismay (1863), 11 W. R. 270; Murphy v. Ityan (1868), 16 W. R. 678; London City Sewers Commr. v. Glasco (1872), 7 Ch. App. 456; It. v. Rollett (1875), 1 L. R. 10 Q. B. 469; Chilton v. London Corp'n. (1878), 7 Ch. D. 735; Re Christchurch Inclosure Act (1887), 35 Ch. D. 355; Chesterfield v. Harris (1908) 2 Ch. 397; Miteham Common Conservators v. Banks (1912), 76 J. P. 413. As to (2) Refld. Payne v. Partridge (1691), 1 Show. 255; Lockwood v. Wood (1844), 6 Q. B. 50; Brocklebank v. Thompson, [1903] 2 Ch. 344. Generally. Mentd. St. Albans Corp'n. v. Dobbins (1672), Freem. K. B. 36; Osbuston v. James (1686), 2 Lut. 1377; English v. Burnell (1765), 2 Wils. 258; R. v. Keesfield (1818), 1 B. & Ald. 348; Re St. Stephen, Coleman Street, Re St. Mary the Virgin, Alderbury (1888), 39 Ch. D. 492.*

**1557. —[—]—WEEKLY v. WILDMAN (1698), 1 Ld. Raym. 405; 91 E. R. 1169.**

*Annotations:—Refld. Race v. Ward (1855), 4 E. & B. 702. Mentd. Ackroyd v. Smith (1850), 10 C. B. 164; Hill v. Tupper (1863), 2 New Rep. 201.*

**1558. —[—]—HARDY v. HOLLYDAY (1705), cited in 4 Term Rep. 718; 100 E. R. 1264.**

*Annotation:—Follid. Grimstead v. Marlowe (1792), 4 Term Rep. 717.*

**1559. —[—]—A custom to take a profit in alieno solo is bad; such a right can only be claimed by prescription.—GRIMSTEAD v. MARLOWE (1792), 4 Term Rep. 717; 100 E. R. 1263.**

*Annotations:—Refld. Austin v. Amhurst (1877), 47 L. J. Ch. 467; Grimstead v. Marlowe was overruled by Constable v. Nicholson (1863), 14 C. B. N. S. 230 (Ex. J.). Mentd. A.-G. v. Gauntlett (1829), 3 Y. & J. 93.*

**1560. —[—]—(1) A profit à prendre in another's soil cannot be claimed by custom, however ancient, uniform, & clear the exercise of that custom may be.**

**(2) A right to carry away the soil of another, without stint, cannot be claimed by prescription; nor can the claim be sustained by evidence of a lost grant.—A.-G. v. MATTHIAS (1858), 4 K. & J.**

**579; 27 L. J. Ch. 761; 31 L. T. O. S. 367; 4 Jur. N. S. 628; 6 W. R. 780; 70 E. R. 241.**

*Annotations:—As to (1) Refld. De La Warr v. Miles (1881), 17 Ch. D. 535; Smith v. Andrews, [1891] 2 Ch. 678. As to (2) Follid. Hough v. Clark & Hall (1907), 23 T. L. R. 682. Refld. Johnson v. Barnes (1873), L. R. 7 C. P. 592; Saltash Corp'n. v. Goodman (1880), 5 C. P. D. 431. Generally. Mentd. A.-G. v. Hammer (1859), 33 L. T. O. S. 178.*

**1561. —[—]—GOODMAN v. SALTASH CORPN., No. 322, ante.**

**1562. —Right to take drifted sand.]—A custom for the inhabitants of a parish to take from a private close, which adjoins the sea, sand drifted there, for manure, amounts to a custom to take profits in alieno solo, & is bad.—BLEWETT v. TREGONNING (1835), 3 Ad. & El. 554; 1 Har. & W. 431; 5 Nev. & M. K. B. 234; 4 L. J. K. B. 223; 111 E. R. 524.**

*Annotations:—Distd. Race v. Ward (1855), 4 E. & B. 702. Refld. Clayton v. Corby (1843), 14 L. J. Q. B. 364; Rogers v. Brenton (1847), 10 Q. B. 26; A.-G. v. Mathias (1858), 4 K. & J. 579; Sowerby v. Coleman (1867), L. R. 2 Exch. 96; De La Warr v. Miles (1881), 17 Ch. D. 535; Brocklebank v. Thompson, [1903] 2 Ch. 344.*

**1563. —Right to fish.]—We must act upon that salutary law which distinguishes between a mere easement & the right to take a profit. It is a good custom for all the inhabitants of a parish to dance in a particular spot, or the like; but a custom to take as a profit what is valuable would be very injurious to the owner & of but little benefit to the inhabitants, & is bad. Such being the settled law, we are to apply it to this case. It is clear to me that the custom claimed on this plea is to angle for, catch & carry away the fish; but, supposing it were limited to a claim to angle for & catch the fish without claiming a right to carry them away, I think it would be equally destructive of the subject-matter, & bad (LORD CAMPBELL, C. J.).—BLAND v. LIPSCOMBE (1854), 4 E. & B. 713, n.; 3 C. L. R. 261; 24 L. J. Q. B. 155, n.; 24 L. T. O. S. 92; 19 J. P. 562; 1 Jur. N. S. 705, n.; 3 W. R. 57; 119 E. R. 263, n.**

*Annotations:—Distd. Goodman v. Saltash Corp'n. (1882), 7 App. Cas. 633. Refld. Race v. Ward (1855), 4 E. & B. 702; Mounsey v. Ismay (1865), 3 H. & C. 486; Hall v. Nottingham (1875), 45 L. J. Q. B. 50.*

**1564. —Oyster fishery.]—(1) Pltf., an oyster dredger, sued the corp'n. of C., as owners in fee of an oyster fishery, for refusing to grant him a licence to dredge therein, alleging a custom for defts. & their predecessors to hold annual courts, & thereat to grant licences to dredge oysters in the fishery for the ensuing season, according to rules & orders from time to time, made by them & their predecessors, to every oyster dredger inhabiting the borough or certain parishes adjoining the fishery, who had served a seven years' apprenticeship to any oyster dredger so licenced, & who applied for such licence on payment of a reasonable fee to defts. & their predecessors, & that every oyster dredgerman so qualified had of right been used to demand & have such licence on payment of such fee. Pltf. was a licensed dredgerman residing in one of the parishes adjoining the fishery & applied for a licence for four dredges, tendering £2 2s. in payment. Defts. refused to grant the licence except at the fee of £3 3s. The evidence showed that a fee of 10s. for each dredge had been paid, with a few exceptions, for 150 years. Pltf. refused to pay the fee of**

#### PART XIII. SECT. 4, SUB-SECT. 3.

**1556 1. Cannot be claimed by custom.]**

**—To a plaintiff alleging that defts. entered lands of pltf., & carried off sand therefrom, defts. pleaded that the lands were the soil & freehold of the Queen, & that they have from time immemorial**

**had, & used, & enjoyed the easement of entering on so much of the said lands as lie between high & low water-marks of ordinary tides, & then & there to raise the soil & sand, & to carry same away for the purpose of manure:—Held: such defence was bad, as alleging a custom for occupiers of land**

**in a barony to an easement thereon. There is no distinction in this respect between lands the property of the Crown, & lands the property of the subject.—MACNAMARA v. HIGGINS (1854), 4 I. C. L. R. 326; 7 Ir. Jur. 39.—IR.**

**23 3s.** :—*Held* : the claim could not be supported by custom, being a claim to a *profit à prendre in alieno solo*, & the inhabitants of the borough & parishes adjoining the fishery could not claim such a right by prescription. (2) *Qu.* : whether the claim could be founded upon a lost grant by the Crown to the corpn. with a condition attached that the corpn. should grant fishing licences upon payment of a reasonable fee. Assuming such grant to be good, & supported by the evidence, *pltf.* could only be entitled to the licence upon the payment or tender of a reasonable fee, & the fee of £3 3s. was reasonable.—*MILLS v. COLCHESTER CORPN.* (1868), L. R. 3 C. P. 575; 37 L. J. C. P. 278; 16 W. R. 987, Ex. Ch.

*Annotations* :—As to (2) *Refd.* *Bryant v. Foot* (1868), L. R. 3 Q. B. 497; *Lawrence v. Hitch* (1868), L. R. 3 Q. B. 521.

**1565.** ———.]—A custom for the commoners, copyholders & ancient freeholders of a manor & their tenants, & the dwellers in the parish & manor to have common of fishery over the lord's waters on the waste of the manor, & to take & carry away fish as a *profit à prendre*, is unreasonable & bad.—*ALLGOOD v. GIBSON* (1876), 34 L. T. 883; 25 W. R. 60.

**1566.** ———.]—A complaint was preferred against S. for unlawfully fishing in a river at a place above the flow of the tide, & where it was admitted by both parties that the river was a public navigable river & highway for the public to pass & repass in coracles & such light craft as were suitable for such navigation. S. contended that the fishing at this place belonged to the public, or that it had been enjoyed by the public as of right without interruption for so many years that it could not now be taken away :—*Held* : the right of fishing did not belong to the public, & they could not acquire it by custom because it was a *profit à prendre*.—*PEARCE v. SCOTCHER* (1882), 9 Q. B. D. 162; 46 L. T. 312; 46 J. P. 248, D. C.

*Annotations* :—*Refd.* *Roece v. Miller* (1882), 47 J. P. 37; *Smith v. Andrews*, [1891] 2 Ch. 678. *Mentd.* *Ilchester v. Raleigh* (1889), 61 L. T. 477.

**1567.** ———.]—*SMITH v. ANDREWS*, No. 79, ante.

*See, generally*, FISHERIES.

**1568.** ———.]—*Right to take underwood.* — (1) Defts. to an action for taking underwood for fuel from the waste of *pltf.*'s manor of T. justified as inhabitants of the parish of T., & proved immemorial user by some inhabitants as such, but they did not prove user by the inhabitants generally as such, & exclusive right was claimed by the tenants of the manor :—*Held* : the justification could not stand either upon custom, as the custom would be for the inhabitants to have a *profit à prendre*, in the soil of another, or upon a lost grant from a private person, inhabitants being incapable of taking under a grant which does not incorporate them, or upon a lost grant from the Crown, user by the inhabitants generally as such being necessary for supposing a grant to the inhabitants, other considerations against supposing the grant being the absence of evidence of even a *de facto* corpn. of the inhabitants, the claim by the tenants of the manor, & the unreasonableness & repugnancy to law of the supposed right.

(2) Defts. justified also as occupiers of certain cottages, relying upon user by the occupiers as inhabitants of the parish :—*Held* : a prescriptive claim as occupier of a certain house or the like could not be founded upon user in a different character such as inhabitant of a parish.

(3) The result of the decisions in the year-books

upon the effect of a royal grant to the inhabitants of a parish or village appears to be that, if the grant is for a specified purpose, the grant incorporates the inhabitants so as to effectuate that purpose, but otherwise is inoperative. Therefore, when a ct. or jury is called upon to presume a lost royal grant to inhabitants, it has to presume a royal grant such as to incorporate them.—*RIVERS (LORD) v. ADAMS* (1878), 3 Ex. D. 361; 48 L. J. Q. B. 47; 39 L. T. 39; 42 J. P. 728; 27 W. R. 381.

*Annotations* :—As to (1) *Consd.* *Saltash Corpn. v. Goodman* (1880), 5 C. P. D. 431. *Refd.* *De La Warr v. Miles* (1881), 17 Ch. D. 535; *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633; *Smith v. Andrews*, [1891] 2 Ch. 678. As to (2) *Refd.* *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. As to (3) *Consd.* *Harris v. Chosterfield*, [1911] A. C. 623. *Refd.* *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633. *Generally, Mentd.* *Turner v. Salmon* (1885), 1 T. L. R. 482; *A.-G. v. Antrobus* (1905), 2 Ch. 188; *A.-G. v. Reynolds*, [1911] 2 K. B. 888.

**1569.** ———.]—*Right to shoot game.*—*NORFOLK ESTUARY CO. v. FLANDERS* (1903), 47 Sol. Jo. 749.

**1570.** ———.]—Action brought by the lord of certain manors adjoining the Severn, a tidal & navigable river, for trespass on the foreshore, parcel of the manors, in a boat & on foot for the purpose of shooting wild duck. Deft. denied that the foreshore was parcel of the manors & even if it were, he claimed the right to go upon the foreshore & shoot & carry away wild duck on the ground of immemorial user, in four alternative ways : as a member of the public in exercise of a general right of all the King's subjects in & over the foreshore of a tidal navigable river; as one of the inhabitants of the manors by virtue of a trust or reservation in their favour which the ct. would presume to have been created by the original grant of the manors to *pltf.*'s predecessors in title; as an inhabitant of the manors, being a wild-fowler by occupation, by virtue of a custom of the manors; by prescription as a right in gross enjoyed by him & his ancestors. On the evidence :—*Held* : (1) *pltf.* had proved his title to the foreshore as part of the manors, & also to a several fishery in the Severn; (2) the public had no rights over the foreshore of a tidal navigable river, when not covered by the tide, except such as were ancillary to their rights of fishing & navigation in the sea. When covered by the tide the foreshore was part of the sea, & the only rights of the public in or over it were the rights of navigation & fishing & rights ancillary thereto; (3) the right claimed to kill & carry away wild duck was—whether wild fowl were birds of warren or mere wild birds in which there was no property—a *profit à prendre* & could not be claimed by custom; (4) there was not sufficient evidence of user to enable the ct. to presume the existence of a trust, or to establish a prescriptive right.—*FITZHAIRDING (LORD) v. PURCELL*, [1908] 2 Ch. 139; 77 L. J. Ch. 529; 99 L. T. 154; 72 J. P. 276; 24 T. L. R. 564.

*Annotation* :—As to (2) *Refd.* *Secretary of State for India v. Chelikani Ramu Rao* (1916), 85 L. J. P. C. 222.

*See, generally*, GAME.

*Rights of common.*—*See* COMMONS, Vol. XI., pp. 21, 22, 35, 36, Nos. 243, 244, 247, 462–489.

*Custom & prescription distinguished.*—*See* COMMONS, Vol. XI., pp. 29, 30, Nos. 367–371.

*Manorial rights.*—*See* COPYHOLDS, Vol. XIII., pp. 80, 81, Nos. 1012, 1014, 1018, 1021–1027.

#### SUB-SECT. 4.—BY STATUTE.

*By Inclosure Acts.*—*See* COMMONS, Vol. XI., pp. 60, 61, Nos. 884–887.

## SECT. 5.—ENJOYMENT OF PROFITS À PRENDRE.

## SUB-SECT. 1.—WHO MAY ENJOY.

1571. *Grantee—Or his servants.*—*WICKHAM v. HAWKER*, No. 1499, *ante*.

1572. ———— *Goodman v. SALTASH CORPN.*, No. 322, *ante*.

1573. *Revived corporation—Vested with right of former body.*—(1) A right of free fishery was granted to the burgesses of the borough of C., by a charter of Richard I., which recited a previous enjoyment of the franchise by the borough. In the year 1740, by reason of judgments of ouster against all the existing members of the corp., it became incapable of continuing itself, & there were no mayor or alderman till 1763, when a new charter of incorporation was granted to the borough, by which all the former rights, liberties, & "fisheries," were ratified, confirmed, & restored to the new corp.:—*Held*: the corp. were, under the new charter, entitled to the fishery.

(2) The corp. exercised their right by granting to persons called dredgers, not being members of the corp., licenses to dredge, & take oysters within the limits of the fishery. In an action on the case for injury to the fishery, the declaration stated the possession of the fishery, oyster-beds, & oyster-grounds, which was traversed by the third & seventh pleas, & the jury found for plaintiffs on these issues:—*Held*: the above licenses did not operate as demises of the fishery, so as to entitle defendant to a verdict on these issues.—*COTCHESTER CORPN. v. BROOKE* (1846), 7 Q. B. 339, 379; 15 L. J. Q. B. 173; 10 Jur. 10; 115 E. R. 518.

*Annotation*:—As to (1) *Reid. Potter v. Berry* (1857), 21 J. P. Jo. 756.

*Rights of common—Common of pasture in gross.*—*See* COMMONS, Vol. XI., p. 12, Nos. 101, 102.

## PART XIII. SECT. 5, SUB-SECT. 1.

1571 i. *Grantee—Or his servants.*—A., by indenture of lease demised several denominations of land to B., & in said indenture was a covenant that it should be lawful for the lessor, his heirs & assigns, his & their servants, labourers, etc., to bore, dig, & search for mines, minerals, coals, & quarries or marble, etc., & such turf as the lessor, his heirs & assigns, should give liberty to cut:—*Held*: such reserved right in the lessor was one to be exercised by him, his heirs or assigns, by means of his own servants or labourers, & not one which he could delegate to a stranger not an owner of the estate.—*MOORE v. ORR* (1855), 8 I. C. L. R. 347; 11 Ir. Jur. 61.—IR.

b. ———— *Or his tenants.*—A. granted land to B. to hold in as large a manner as the same had been enjoyed by B. & his undertenants. He then covenanted that B., his heirs, etc., should have liberty to cut away from the bog of K. a sufficient quantity of turf for the use of his & their undertenants.—*Held*: B. & his heirs were entitled to turbary for all persons who might become his tenants.—*HILL v. BARRY* (1834), 10 C. B. 688.—IR.

c. ———— A. demised lands to B., in as full a manner as B. was then in possession thereof, & he covenanted that he would during the continuance of the demise, give to B. free liberty to cut & carry away as much turf of & on the bog of M., as the said B., his heirs or assigns, or his or their undertenants, should have occasion for, to be cut in such places & in such manner as A., his heirs, etc., should appoint:—*Held*: a person who subsequently became an undertenant was entitled to turbary on M.—*DRUGAN v. CANEY* (1858), 8 I. C. L. R. 210.—IR.

d. ———— A. lease was granted to J. "of all that part of the lands of M., together with a right of commonage & turbary for the use of the said farm, as now in the possession of the said J." At the time of the lease J. was in possession of a right of commonage on the adjoining mountain, for the use of said farm:—*Held*: the lease gave to J. the same commonage & turbary which he then enjoyed.

J. demised to F. & others a portion of the land by the following description: "All that part of the lands of M. now in the possession of the said F. & partners, together with a right of commonage & turbary, for the use of the said farm."—*Held*: the lessees of the portion acquired by the sublease, as against the head landlord, a proportional share of the common appurtenant to the land.—*O'HARE v. KERRY* (1859), 10 I. C. L. R. 318.—IR.

e. *Cannot be unlimited.*—A farm was burdened with a servitude of free grazing for an undefined number of cattle:—*Held*: the owner of the dominant tenement was not entitled to graze an unlimited number of cattle or so many as to make the servient tenement useless to the owner.—*BADENKOOT v. JOUBERT* (1920), T. P. D. 100.—S. AF.

f. *Cannot be curtailed.*—When a lease contained a covenant by the landlord, that the tenant might, at all times during the grant, raise, cut, & carry away from off the bogs of A. & B., the landlord's property, turf sufficient to be expended on the premises demised by the lease:—*Held*: the landlord was not at liberty to confine the tenant to a particular portion of the bog allocated to him, though it was sufficient & convenient.—*HARBOVE v. CONGLETON* (1861), 12

Common of turbary.]—*See* COMMONS, Vol. XI., pp. 16, 17, Nos. 176-179.

Common of estovers.]—*See* COMMONS, Vol. XI., p. 18, Nos. 198-203.

Common of piscary.]—*See* COMMONS, Vol. XI., p. 20, Nos. 231-237.

Common in the soil.]—*See* COMMONS, Vol. XI., pp. 21, 22, Nos. 246-252.

In commonable lands.]—*See* COMMONS, Vol. XI., p. 25, Nos. 302-306.

Persons able to prescribe.]—*See* Sect. 4, subsect. 2, B., *ante*.

## SUB-SECT. 2.—EXTENT OF ENJOYMENT.

1574. *General rule.*—By a grant to a ranger of a forest of all wood blown or thrown down by the wind, & all dead wood, & the boughs & branches of trees & wood in the forest cut off or thrown down, branches cut from trees felled for His Majesty's use do not pass.

The nature of defendant's interest in the profits of the forest is marked by the letters-patent where they describe it as an office to be held by him. This, *vi termini*, imports that it is held by him, not for his own benefit, but for that of the Crown. He has a certain salary & emoluments allowed him, for which he is to pay the salaries of all the inferior officers & to keep the premises in repair. It is clear that the grantee can be entitled to no other benefit than what the grant expressly gives or can be clearly inferred from it. It is not a demise of the forest & therefore the right of the tenant on a demise of land does not apply to the case (*MACDONALD, (C.B.) v. A.-G. v. STAVELL (LORD)* (1795), 2 Anst. 592; 145 E. R. 976).

1575. *Cannot be unlimited—Claim to dig clay.*—*CLAYTON v. CORBY*, No. 1517, *ante*.

1576. ———— *Claim to take gravel.*—An alleged

1. C. L. R. 368.—IR.

g. *Must be reasonable.*—Where people have a right of turbary they cannot do as they like on the bog; they must cut in a reasonable manner, & cannot cut down to the very clay.—*DAILY v. GILLMAN* (1897), 31 I. L. T. 429.—IR.

h. ———— A person who has a right of turbary on the land of another is entitled to continue to cut turf so long as he does not render the land incapable of such reclamation as, according to its nature, it is capable of.—*WALSH v. JOHNSTON* (1913), 47 I. L. T. Jo. 231.—IR.

i. *Duty of owner of servient tenement.*—The owner of a servient tenement must use it in a reasonable manner so as not to detract from the value of a *profit à prendre* belonging to the owner of the dominant tenement.—*CHONIN v. CONNER*, [1913] 2 I. L. T. 119.—IR.

j. "For general use"—*Interpretation of term.*—The grant of a farm to plaintiff contained the condition, "the firewood on this land shall be for general use."—*Held*: (1) any person *bona fide* requiring firewood in that neighbourhood had a right to take it for his own use from plaintiff's farm; (2) any such person had a right to drive a waggon & horses over the farm to fetch the wood, but plaintiff had the right to define a reasonable track to be so used; (3) any such person had a right to outspan his horses at certain spots on the farm which plaintiff had the right to fix in like manner as in (2), but there was no right to graze the horses; (4) no one could take the trees or firewood for purposes of sale.—*MEYER v. OBERHOLZER* (1859), 3 S. 265.—S. AF.

right in the inhabitants of a parish to take gravel without stint from the bed of a river, the property in which was in pltf. :—*Held*: to be bad in law.—*HOUGH v. CLARK & HALL* (1907), 23 T. L. R. 682; 5 L. G. R. 1195.

1577. — & for commercial purposes—Claim to fish.]—A prescription in a que estate for a *profit à prendre in alieno solo* without stint & for commercial purposes is unknown to the law.

Freeholders in parishes adjoining the river W. had been in the habit of fishing a non-tidal portion of the river for centuries, not by stealth or indulgence, but openly, continuously, as of right & without interruption, not merely for sport or pleasure, but commercially, in order to sell the fish and make a living by it. Riparian proprietors claiming to be owners of the bed of the river brought an action for trespass against the freeholders for fishing :—*Held*: a legal origin for the right claimed by the freeholders could not be presumed, & the action lay.—*HARRIS v. CHESTERFIELD (EARL)*, [1911] A. C. 623; 80 L. J. Ch. 626; 105 L. T. 453; 27 T. L. R. 548; 55 Sol. Jo. 686, 11. L.; *affy.* S. C. *sub nom.* *CHESTERFIELD (LORD) v. HARRIS*, [1908] 2 Ch. 397, C. A.

*Annotations*:—*Fold.* Staffordshire & Worcestershire Canal Navigation v. Bradley, [1912] 1 Ch. 91. *Refd.* Malvern Hills Conservators v. Whitmore (1909), 100 L. T. 841; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140; Hodgson v. McCrough (1923), 92 L. J. Ch. 426.

1578. Owner cannot enjoy as against himself.]—In the year 1790 S. was seised in fee of a certain farm & also of an estate for life in a certain moor. In 1822, S. & the tenant in remainder joined in a conveyance of the moor to G. in fee, that he might be tenant to the *præcipe* for the purpose of suffering a recovery, in order to create a mtgee. term, but no recovery was suffered. In 1827 S. became bkpt., & by subsequent conveyances his interest in the moor vested in deft., & his interest in the farm vested in pltf. S. always occupied the farm by his tenants who had enjoyed without interruption the right of depasturing their cattle on the moor. In the year 1856, deft. distrained pltf.'s cattle damage feasant when pltf. claimed the right of common by enjoyment as of right for the respective periods of sixty & thirty years mentioned in Prescription Act, 1832 (c. 71).

*Held*: (1) there was no unity of seisin to extinguish the easement or prevent its existence; (2) the title to the tenements was such that there could not, in point of law, have been an enjoyment of the right of common for the period of sixty years, as of right; for S. being owner in fee of the farm & also tenant for life & occupier of the common, the rights of the tenants of the farm over the common were derived from him, & as he could not have an enjoyment as of a right against himself within the meaning of the statute, so neither could his tenants; (3) the conveyance by S. in 1822 to make a tenant to the *præcipe*, made no difference, & consequently the thirty years' claim could not be supported.—*WARBURTON v. PARKE* (1857), 2 H. & N. 64; 26 L. J. Ex. 298; 29 L. T. O. S. 127.

*Annotation*:—*As to* (2) *Refd.* Gardner v. Hodgson's Kingston Breweries Co., [1900] 1 Ch. 592.

1579. Whether exclusive of grantor.]—A. being mtgee. in fee of certain lands, & B. the mtgor. entitled to the equity of redemption, by lease & release, A. conveys & B. releases the lands to C. in fee, who by the same instrument covenants with & grants to B. that it shall be lawful for B., his heirs & assigns at all times to enter upon the lands to search & dig for coal & to take & carry away the same to his & their own use. This is only a licence, & conveys no interest in the soil so

as to exclude C. & those claiming under him from getting coal there; nor could it operate as an exception or reservation out of the grant in respect to B. who had not the legal title in him at the time.—*CHETHAM v. WILLIAMSON* (1804), 4 East, 460; 102 E. R. 910.

*Annotations*:—*Fold.* Doe d. Hanley v. Wood (1819), 2 B. & Ald. 724; Denison v. Holliday (1857), 1 H. & N. 631. *Consd.* Sutherland v. Heathcote, [1892] 1 Ch. 475. *Refd.* R. v. Trent & Mersey Canal (1825), 6 Dow. & Ry. K. B. 47; Lee v. Stevenson (1858), E. R. & E. 512; Gilbertson v. Richards (1859), 4 H. & N. 277.

1580. —.]—*NEWBY v. HARRISON*, No. 1508, *ante*.

1581. —.]—Where the licensee's licence was not an exclusive licence, the licensor had still a right to deal with the property comprised in that licence in any manner not inconsistent therewith.—*CARR v. BENSON* (1808), 3 Ch. App. 524; 18 L. T. 696; 16 W. R. 744, L. J.

*Annotation*:—*Refd.* Sutherland v. Heathcote, [1892] 1 Ch. 475.

1582. — Exclusion must be explicit.]—*SUTHERLAND (DUKE) v. HEATHCOTE*, No. 1522, *ante*.

— On conveyance of Manor.]—*See* COPYHOLDS, Vol. XIII., p. 15, No. 74.

1583. All profits for part of year—Part of profits for all the year.]—*KEMP v. CAPON* (1731), Porter. Rep. 340; 92 E. R. 881.

For what estate.]—*See* Sect. 4, sub-sect. 1, B., *ante*.

Rights of common—Common of pasture.]—*See* COMMONS, Vol. XI., pp. 6, 7, 8–11, 12, 13, Nos. 21–40, 51–93, 103–108, 114–125.

— Common of turbary.]—*See* COMMONS, Vol. XI., p. 17, Nos. 180–186.

— Common of estovers.]—*See* COMMONS, Vol. XI., pp. 18–19, Nos. 194–197, 204–219.

— Common of piscary.]—*See* COMMONS, Vol. XI., pp. 20–21, Nos. 238–242.

— Common in the soil.]—*See* COMMONS, Vol. XI., p. 22, Nos. 253–263.

— Right of free warren.]—*See* COMMONS, Vol. XI., p. 27, Nos. 327–342.

#### SECT. 6.—ALIENATION OF PROFITS À PRENDRE.

Transfer & assignment of easements.]—*See* Part IV., *ante*.

1584. General rule—According to ordinary rules of property.]—*WELCOME v. UPTON*, No. 1551, *ante*.

1585. —.]—*MARTYN v. WILLIAMS*, No. 1490, *ante*.

1586. —.]—*GOODMAN v. SALTASH CORPN.*, No. 322, *ante*.

1587. By assignment.]—*CHURCHILL v. EVANS* (1809), 1 Taunt. 529; 127 E. R. 939.

*Annotation*:—*Mentd.* Rickells v. East & West India Dock Co. (1852), 12 C. B. 160.

1588. —.]—*MUSKETT v. HILL*, No. 1500, *ante*.

1589. — Condition restraining assignment.]—*GROVE v. PORTAL*, [1902] 1 Ch. 727; 71 L. J. Ch. 299; 86 L. T. 350; 18 T. L. R. 319; 46 Sol. Jo. 296.

*Annotation*:—*Mentd.* Jackson v. Simons, [1923] 1 Ch. 373.

Passing with dominant tenement.]—*See* Sect. 2, *ante*.

Rights of common.]—*See* COMMONS, Vol. XI., pp. 37–38, Nos. 511–529.

#### SECT. 7.—DISTURBANCE—REMEDIES.

Disturbance of easements.]—*See* Part XII., *ante*.

1590. Remedies—Action of trespass—Right of

## Sect. 7.—Disturbance—remedies. Sect. 8.]

**free warren—Against all but owner of soil.]—**(1) Trespass lies for fishing in *libera piscaria* & taking fish. (2) H., who hath free warren may bring trespass against any but the owner of the soil for hunting there.—**SMITH v. KEMP** (1693), 2 Salk. 637; Holt, K. B. 322; Carth. 285; 4 Mod. Rep. 186; Skin. 342; 90 E. R. 1078.

**Annotations:—**As to (1) **Consd.** *Holford v. Bailey* (1849), 13 Q. B. 426. **Apprvd.** *Fitzgerald v. Firbank*, [1897] 2 Ch. 96. **Refd.** *Glipps v. Woollicot* (1697), Skin. 677; *Anon.* (1774), Loft. 364; *Hindson v. Ashby*, [1896] 2 Ch. 1; *Ecroyd v. Coulthard* (1897), 77 L. T. 357. As to (2) **Refd.** *Lonsdale v. Higg* (1856), 11 Exch. 654. **Generally, Mentd.** *Holmes v. Wood* (1729), 1 Barn. K. B. 249.

**1591. — Right of free fishery.]—SMITH v. KEMP, No. 1590, ante.**

**1592. — Right of several fishery—Necessity for showing seisin of locus in quo.]—**A declaration, reciting that deft. had been summoned to answer pltf. in an action of trespass, charged that deft., with force & arms, broke & entered a fishery, the sole & exclusive fishery of pltf., in a certain part of a river then flowing & being over the soil of F. & there fished in the fishery of pltf. —**Held:** (1) trespass lies for breaking & entering a several fishery, though no fish are taken; (2) although the declaration stated the soil to be in a third person, it was not necessary for pltf. to show a title to the several fishery by grant or prescription, because it did not appear that deft. claimed under or acted by any authority from the owner of the soil; (3) the words "sole & exclusive" were equivalent to several fishery; (4) a valid licence for a time certain must be by deed. To give pltf. a sole & exclusive right even for an hour, a deed is necessary; & that would be a grant (**PARKE, B.**). — **HOLFORD v. BAILEY** (1849), 13 Q. B. 426; 18 L. J. Q. B. 109; 13 L. T. O. S. 261; 13 Jur. 278; 116 E. R. 1325, Ex. Ch.

**Annotations:—**As to (1) **Fold.** *Hindson v. Ashby*, [1896] 2 Ch. 1. **Consd.** *Fitzgerald v. Firbank*, [1897] 2 Ch. 96. As to (2) **Fold.** *Marshall v. Ulleswater Steam Navigation Co., Ltd.* (1863), 3 B. & S. 732. **Consd.** *A.-G. v. Emerson*, [1891] A. C. 649. **Refd.** *Ecroyd v. Coulthard*, [1897] 2 Ch. 554; *Beaufort v. Aird* (1904), 20 T. L. R. 602. As to (3) **Consd.** *Malcolmson v. O'Dea* (1863), 10 H. L. Cas. 593. **Refd.** *Hanbury v. Jenkins*, [1901] 2 Ch. 401. **Generally, Mentd.** *H. v. Gray* (1864), Le & Ca. 365; *Stacey v. Whitehurst* (1865), 18 C. B. N. S. 344.

**1593. — — — — —.]—**The allegation of a several fishing *prima facie* imports ownership of the soil.—**MARSHALL v. ULLESWATER STEAM NAVIGATION CO., LTD.** (1863), 3 B. & S. 732; 1 New Rep. 519; 32 L. J. Q. B. 139; 8 L. T. 416; 27 J. P. 516; 9 Jur. N. S. 988; 11 W. R. 489; 122 E. R. 274; **affd.** (1865), 6 B. & S. 570; 122 E. R. 1306, Ex. Ch.

**Annotations:—****Consd.** *Moffat v. Power* (1889), 5 T. L. R. 655. **Apld.** *A.-G. v. Emerson*, [1891] A. C. 649. **Fold.** *Hindson v. Ashby*, [1896] 2 Ch. 1. **Refd.** *Bristow v. Cornican* (1878), 3 App. Cas. 641; *Foster v. Wright* (1879), 44 J. P. 7; *Devonshire v. Pattinson & Carlisle Corp.* (1887), 3 T. L. R. 293; *Ecroyd v. Coulthard*, [1897] 2 Ch. 554; *Beaufort v. Aird* (1904), 20 T. L. R. 602.

**1594. — Injunction — Damages.] — FITZGERALD v. FIRBANK, No. 1497, ante.**

**Rights of common.]—**See COMMONS, Vol. XI., pp. 45, 46-52, Nos. 620-638, 642-764.

## PART XIII. SECT. 8.

**m. Effusion of time.]—**Pltfs., bought from R. "the right to cut all soft wood on certain lots to make the necessary roads & buildings for such purpose, the cutting to be done within twenty years":—**Held:** if the trees

remained standing at the end of twenty years the right ceased.—**LAURENTIDE v. BAPTIST** (1908), 6 E. L. R. 105.—**CAN.**

**n. Cancellation.]—**Deft. received a permit to cut hay on certain lands, provisional on its cancellation by sale

## SECT. 8.—SUSPENSION AND EXTINGUISHMENT.

**Extinguishment of easements.]—**See Part VI., ante.

**1595. By unity of ownership—Whether right extinguished—Right to shoot game.]—**The king was seised of a chase; & A. being lieutenant thereof in fee, prescribed to hunt stray deer into the manor of S. as a purlieu; the manor came to the king, who granted it to B. *ita quod* none should enter without the leave of B. This unity of possession & grant did not destroy the prescriptive right of A.—**ANON.** (1572), 3 Dyer, 326 b; 73 E. R. 738.

—**See** COMMONS, Vol. XI., pp. 52, 53, Nos. 765-784.

**1596. By abandonment—Right to several fishery.]**

—In an action for trespass to a several fishery in a navigable tidal river in Ireland defts. justified on the ground that the public had the right of fishing. Pltf.'s paper title (if the possession & enjoyment were consistent with it) afforded irresistible ground for a presumption that the fishery was put in defence before Magna Carta. As evidence of possession & user pltf. tendered, *inter alia*, the proceedings & decree in 1867 in a "possessory suit" brought in the Ct. of Ch. in Ireland by C., pltf.'s predecessor in title, against strangers to the present action; by which decree an injunction was awarded to quiet C., & his undertenants in such possession of their fishing as they had at the time of exhibiting the bill & three years before, to continue until evicted by due course of law, both parties being at liberty to take proceedings at law against each other for ascertaining their titles:—**Held:** (1) as the decree was a final adjudication, not collusive, & as it could not have been made except upon proof of unbroken user & enjoyment for at least three years before the bill, inconsistent with any actual exercise at that time of a public right of fishing, the proceedings & decree were admissible; the effect of this evidence (not being met by any counter evidence applicable to the same period) was extremely strong to establish possession & enjoyment of the fishery in the latter part of the 17th century, consistent with the paper title & exclusive of the public; (2) a judgment obtained by pltf. in 1826 in an action against a stranger for trespass by fishing in the *locus in quo*, in which action deft. appeared, but allowed judgment to go by default of pleading, was evidence in the present action of possession of 1826.

Defts. proved that cot-fishing had been carried on in the *locus in quo* with the knowledge of pltf. or his agents & without interruption by them, as far back as living memory extended:—**Held:** (3) if pltf.'s right to a several fishery were once proved, the exercise of cot-fishing could not take it away or confer any right on the public, for the public cannot in law prescribe for a *profit à prendre in alieno solo*, nor acquire any right adversely to the owner under any statute of limitation; & an incorporeal hereditament such as a several fishery, which can only pass by deed, cannot be "abandoned."—**NEILL v. DEVONSHIRE (DUKE)** (1882), 8 App. Cas. 135; 31 W. R. 622, H. L.

**Annotations:—**As to (1) **Consd.** *Blount v. Layard*, [1891]

or lease. The owners, while permit in force, granted pltf. a grazing lease over the northern half of the lands:—**Held:** deft.'s permit was not cancelled. There must be a sale or lease of the whole land before cancellation operates.—**DYCKOCK v. BARRAGER** (1909), 10 W. L. R. 709.—**CAN.**

2 Ch. 681, n. *Reid. Johnston v. O'Neill*, [1911] A. C. 552. *As to* (3) *Appl. Smith v. Andrews*, [1891] 2 Ch. 678. *Reid. Hanbury v. Jenkins*, [1901] 2 Ch. 401. *Generally, Mentd. A.-G. v. Newcastle-upon-Tyne Corpn.*, [1897] 2 Q. B. 384; *A.-G. for British Columbia v. A.-G. for Canada*, [1914] A. C. 153.

—.]—*See* COMMONS, Vol. XI., p. 53, Nos. 785–789.

*By release.*]—*See* COMMONS, Vol. XI., pp. 53–54, Nos. 790–801.

*By exhaustion or destruction of product.*]—*See* COMMONS, Vol. XI., p. 54, No. 802.

*By alteration of commoner's estate.*]—*See* COMMONS, Vol. XI., pp. 54, 55, Nos. 803–817.

*By agreement.*]—*See* COMMONS, Vol. XI., p. 55, Nos. 818–821.

*By encroachment.*]—*See* COMMONS, Vol. XI., p. 55, Nos. 825–828.

*By severance.*]—*See* COMMONS, Vol. XI., pp. 37, 38, Nos. 511–520.

*Common of vicinage.*]—*See* COMMONS, Vol. XI., p. 13, Nos. 129–136.

*Right of free warren.*]—*See* COMMONS, Vol. XI., pp. 27, 28, Nos. 343–350.

*By statute.*]—*See* COMMONS, Vol. XI., pp. 57–87, Nos. 856–1050.

*Disafforestation—Land parcel of forest.*]—*See* COMMONS, Vol. XI., p. 24, Nos. 280–282.

## EASTER OFFERINGS.

*See* ECCLESIASTICAL LAW.

## ECCLESIASTICAL CHARITIES.

*See* CHARITIES; ECCLESIASTICAL LAW.

## ECCLESIASTICAL CORPORATIONS.

*See* CORPORATIONS; ECCLESIASTICAL LAW.

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<i>Blasphemy</i> . . . . .	<i>See</i> CRIMINAL LAW.
<i>Cemeteries</i> . . . . .	„ BURIAL.
<i>Charities</i> . . . . .	„ CHARITIES.
<i>Churchyards, Disused</i> . . . . .	„ BURIAL.
<i>Civil Parishes</i> . . . . .	„ LOCAL GOVERNMENT.
<i>Collegiate Bodies</i> . . . . .	„ CHARITIES; EDUCA- TION.
<i>Corporation</i> . . . . .	„ CORPORATIONS.
<i>Cremation</i> . . . . .	„ BURIAL.
<i>Marriage, Generally</i> . . . . .	„ HUSBAND AND WIFE.
<i>Notaries</i> . . . . .	„ NOTARIES.

<i>Rating of Ecclesiastical Property</i> . . . . .	<i>See</i> RATES AND RATING.
<i>Registration</i> . . . . .	„ BURIAL; HUSBAND AND WIFE; REGIS- TRATION OF BIRTHS, MARRIAGES AND DEATHS.
<i>Sacrilege</i> . . . . .	„ CRIMINAL LAW.
<i>Sunday Entertainments</i> . . . . .	„ CRIMINAL LAW.
<i>Sunday Observance</i> . . . . .	„ TIME.

## Part I.—In General.

## 1. Church—Religious community—Identity.]—

(1) The identity of a religious community described as a Church consists in the identity of its doctrines, creeds, confessions, formularies & tests.

(2) The bond of union of a Christian assocn. may contain a power in some recognised body to control, alter or modify the tenets or principles at one time professed by the assocn., but the existence of such a power must be proved.—FREE

CHURCH OF SCOTLAND (GENERAL ASSEMBLY) v. OVERTOUN (LORD), MACALISTER v. YOUNG, [1904] A. C. 515; 91 L. T. 394; 20 T. L. R. 730, H. L.  
Annotation:—As to (1) *Apld.* Hawkes v. Moxey (1917), 86 L. J. K. B. 1530.

## 2. Power of modification of tenets.]—FREE

CHURCH OF SCOTLAND (GENERAL ASSEMBLY) v. OVERTOUN (LORD), MACALISTER v. YOUNG, No. 1, ante.

## Part II.—Doctrine and Membership of the Church of England.

3. Doctrine—Evidence of.]—The 39 Articles & the liturgy contain the doctrine of the Church of England, & are to be construed by the same rules as are by law applicable to all written instruments.—GORHAM v. EXETER (BP.) (1850), Brod. & F. 64; 7 Notes of Cases 413; Cripps' Church Cas. 260; Moore's Special Rep. 402; 14 L. T. O. S. 521; 14 Jur. 443, P. C.

Annotations:—*Apld.* Burder v. Heath (1861), 5 L. T. 257 (See (1862), 15 Moo. P. C. C. 1); Salisbury, Bp. v. Williams (1862), 1 New Rep. 196; Williams v. Salisbury, Bp., (1864), 2 Moo. P. C. C. N. S. 375; Sheppard v. Bennett (Second Appeal) (1872), L. R. 4 P. C. 371. *Reid.* Re Denison (1856), 27 L. T. O. S. 300; Merriman v. Williams (1882), 7 App. Cas. 484. *Mentd.* Re Beloved Wilkes's Charity (1851), 3 Mac. & G. 440; Liddell v. Westerton, Liddell v. Beale (1857), 29 L. T. O. S. 64; Exeter, Bp. v. Marshall (1868), L. R. 3, H. L. 17; Walsh v. Lincoln, Bp. (1874), L. R. 4 A. & E. 242; Willis v. Oxford, Bp.

(1877), 2 P. D. 192; R. v. West Riding of Yorkshire County Council, [1906] 2 K. B. 676.

—Offences against.]—See Part V., Sect. 13, sub-sect. 1, post.

4. Membership—What constitutes.]—Whatever difficulty there may be in giving a strict legal definition of what constitutes membership of the Church of England, I think that a person who has been baptised, has been confirmed, or is ready & desirous to be confirmed & is an actual communicant does hold the status of a member of that Church & would be ordinarily regarded & spoken of as such (STIRLING, J.).—*Re* PERRY ALMSHOUSES, [1898] 1 Ch. 391; 67 L. J. Ch. 206; 78 L. T. 103; 63 J. P. 52; 46 W. R. 360; 14 T. L. R. 232; on appeal, sub nom. *Re* PERRY ALMSHOUSES, *Re* ROSS' CHARITY, [1899] 1 Ch. 21, C. A.

## Part III.—Constitution of the Church of England.

## SECT. 1.—CONSTITUTIONAL STATUS.

5. Continuity of Church—Identity unchanged since Reformation.]—At the foundation of this school [in 1548] the Church of England was in existence as a Protestant Church, & its identity from that time to the present cannot be questioned, whatever changes may have since been made in its discipline by the united action of Parliament & Convocation (LORD WESTBURY, C.).—BAKER v. LEE (1860), 8 H. L. Cas. 405; 30 L. J. Ch. 625; 11 E. R. 522; sub nom. BAKER v. LEE, *Re* ILMINSTER SCHOOL, 2 L. T. 701; 7 Jur. N. S. 1, H. L.

Annotations:—*Mentd.* A-G. v. St. John's Hospital, Bath (1876), 2 Ch. D. 554; *Re* Hodgson's School (1878), 3 App. Cas. 857.

6. —.]—No argument for the continuity of the Church of England can be stronger than that which is derived from the structure, order & contents of the prayer-book (SIR ROBERT PHILLIMORE).—MARTIN v. MACKONCHIE, FLAMANK v. SIMPSON (1868), L. R. 2 A. & E. 116; 37 L. J. Eccl. 17; 18 L. T. 245; 16 W. R. 604; on appeal, L. R. 2 P. C. 365, P. C.

Annotations:—*Reid.* Marshall v. Graham, Bell v. Graham, [1907] 2 K. B. 112. *Mentd.* Martin v. Mackonochie (1869), L. R. 3 P. C. 52; Sumner v. Wix (1870), L. R. 3 A. & E. 58; Hebbert v. Purchas (1871), L. R. 3 P. C. 605; Sheppard v. Bennett (Second Appeal) (1872), L. R. 4 P. C. 371; *Ex p.* Edwards (1873), 29 L. T. 529; White v. Howron (1873), L. R. 4 A. & E. 207; Boyd v. Phillpotts (1874), L. R. 4 A. & E. 297; Martin v. Mackonochie (Second Suit) (1874), L. R. 4 A. & E. 279; Hudson v. Tooth (1877), 2 P. D. 125; Ridsdale v. Clifton (1877), 2

P. D. 276; Martin v. Mackonochie (1879), 49 L. J. Q. B. 9; R. v. Oxford, Bp. (1879), 4 Q. B. D. 525; Heywood v. Manchester, Bp. (1884), 12 Q. B. D. 404; Read v. Lincoln, Bp. [1892] A. C. 644; St. Paul, Camden Square (1897), 14 T. L. R. 156; Kennell v. St. Ethelburga, Bishopsgate Ward, [1900] P. 80; Davey v. Hinde, [1903] P. 221; St. Paul, Bow Common (Vicar & Churchwardens) v. Sarno (Inhabitants), [1909] P. 245; Gore-Booth v. Manchester, Bp., [1920] 2 K. B. 412.

7. — From Saxon times—Relationship to the State.]—A Church which is established is not thereby made a department of the State. The process of establishment means that the State has accepted the Church as the religious body in its opinion truly teaching the Christian faith, & given to it a certain legal position, & to its decrees, if rendered under certain legal conditions, certain civil sanctions. We are sitting in a ct. of law & I propose to confine myself entirely to legal considerations. I say that the accepted legal doctrine is that the Church of England is a continuous body from its earliest establishment in Saxon times. Those who wish to find an index to this legal doctrine, will find it in a portion of SIR ROBERT PHILLIMORE's judgment in *Martin v. Mackonochie*, No. 6, ante, which he devotes to the identity in law of the Church of England before & after the Reformation, & long as that portion of that judgment is, it is by no means exhaustive of the argument (PHILLIMORE, J.).—MARSHALL v. GRAHAM, BELL v. GRAHAM, [1907] 2 K. B. 112; 76 L. J. K. B. 690; 97 L. T. 52; 71 J. P. 270; 23 T. L. R. 435; 5 L. G. R. 738; 21 Cox, C. C. 461, D. C.

*Sect. 1.—Constitutional status. Sect. 2: Sub-sects. 1 & 2, A.]*

**8. Established Church—Position of.]—MARSHALL v. GRAHAM, BELL v. GRAHAM, No. 7, ante.**

**9. ——— In colony where not established.]**—The Church of England, when not established in the colonies, is in the same position there as any other religious body, & rules of discipline adopted by members will be binding on all who expressly or by implication have assented to them. If the religious body constitute a tribunal to determine disputes as to such rules, the decision of such tribunal will be binding, when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, & if not, has proceeded in a manner consonant with the principles of justice. But such tribunal is not in any sense a ct., & the civil cts. will give effect to its decisions as they give effect to the decisions of arbitrators, whose jurisdiction rests entirely upon the agreement of the parties.—*LONG v. CAPE TOWN (Bp.) (1863), 1 Moo. P. C. C. N. S. 411; Brod. & F. 293; 2 New Rep. 405; 8 L. T. 738; 11 W. R. 900; 15 E. R. 756; sub nom. LONG v. GRAY (LORD Bp. OF CAPE TOWN), 9 Jur. N. S. 805, P. C.*

*Annotations:—Consd. Natal, Bp. v. Gladstone (1866), L. R. 3 Eq. 1. Apld. Brown v. Montreal Curé (1874), L. R. 6 P. C. 157. Consd. Merriman v. Williams (1882), 7 App. Cas. 484. Mentd. Re Natal (Lord Bp.) (1865), 3 Moo. P. C. C. N. S. 115; Ex p. Jenkins (1868), L. R. 2 P. C. 258; Cape Town, Bp. v. Natal, Bp. (1869), L. R. 3 P. C. 1; The Parlement Belge (1879), 4 P. D. 129; Read v. Lincoln, Bp. (1889), 14 P. D. 88; Free Church of Scotland (General Assembly) v. Overton, Macalister v. Young, [1904] A. C. 515.*

*See, generally, Sect. 8, post; DEPENDENCIES, Vol. XVII., pp. 467 et seq.*

**10. "The Church of both clergy & laity."]**—The Church is not the Church of the clergy or of the laity, but of both (FARWELL, L.J.).

The privilege of partaking of Holy Communion is in the eyes of many the highest privilege of a member of the Church of England, & it is not in accordance with the practice of our Legislature that the rights of the laity in matters of such importance should be made dependent on the views of a particular clergyman or even of the Church itself, except so far as those views are by law made binding on the laity (FLETCHER MOULTON, L.J.).—*R. v. DIBDIN, [1910] P. 57; sub nom. R. v. DIBDIN, Ex p. THOMPSON, 79 L. J. K. B. 517; 101 L. T. 722; 26 T. L. R. 150, C. A.; on appeal, sub nom. THOMPSON v. DIBDIN, [1912] A. C. 533, H. L.*

## SECT. 2.—THE LAW OF THE CHURCH.

### SUB-SECT. 1.—IN GENERAL.

**11. Construction of statute affecting ecclesiastical persons.]—Qu.:** whether 1 Will. & Mar., c. 8, which requires any archbishop, bishop, or other person having ecclesiastical dignity, benefice, or promotion, to take the oaths by the space of six months, shall be construed to mean lunar or calendar months.—*BURTON v. WOODWARD (1692), 4 Mod. Rep. 95; Comb. 191; 1 Show. 368; 87 E. R. 282; sub nom. WOODWARD v. HAMERSLY SKIN. 313.*

**12. Ecclesiastical law—What is.]—(1)** Upon special verdict it appeared that one C. was deprived for preaching against the common prayer:—*Held:* though there was another punishment appointed by the statute, & not deprivation until the second offence, the Bishop of London & his colleagues by virtue of the high commission to them & others directed, might proceed by the

ecclesiastical law, & deprive him for the first; it being against the duty of his office as a minister. & they having power to purge their body of all scandalous members. (2) The form of the sentence was, "that the said bishop by & with the consent of others of the said comrs., his companions," etc.:—*Held:* the sentence was good.

(3) Albeit the Kings of England derived their ecclesiastical laws from others, yet so many as were proved, approved & allowed here, by & with a general consent, are aptly & rightly called the King's Ecclesiastical Laws of England (*per CUR.*).

—*CAUDREY'S CASE (1591), 5 Co. Rep. 1a; 77 E. R. 1; sub nom. CAUDRY v. ATTON, Poph. 59.*

*Annotations:—As to (1) Consd. Sanders v. Head (1843), 3 Curt. 565. Apld. Coombe v. Edwards (1878), 3 P. D. 103; Combe v. De La Bere (1881), 6 P. D. 157; Chester, Bp.'s Case (1698), 5 Mod. Rep. 433; St. David's, Bp. v. Lucy (1698), 1 Ld. Raym. 447. Refd. Martin v. Mackonochie (1882), 7 P. D. 94; St. Alban's, Bp. v. Fillingham, [1906] P. 163. As to (3) Refd. Premunire Case (1607), 12 Co. Rep. 37; Evans v. Ascuthe (1628), Palm. 457; Phillips v. Bury (1694), Skin. 447; Middleton v. Crofts (1736), 2 Atk. 650; R. v. Mellis, R. v. Carroll (1843), 1 L. T. O. S. 382; R. v. Mills (1844), 10 Cl. & Fin. 534; R. v. Shouldham (1872), 37 J. P. 310; Mackonochie v. Penzance (1881), 6 App. Cas. 424; Reichel v. Oxford, Bp. (1889), 14 App. Cas. 259. Generally, Mentd. Kenn's Case (1607), 7 Co. Rep. 42 b; Manby v. Scot (1663), 1 Keb. 383; R. v. Patrick (1667), 2 Keb. 164; Shatter v. Friend (1690), 1 Show. 172; Woodward v. Fox (1691), 2 Vent. 207; How v. Prince (1702), 2 Ld. Raym. 812; Escott v. Mastin (1842), 4 Moo. P. C. C. 104; Hope v. Hope (1858), 1 Sw. & Tr. 94; Exeter, Bp. v. Marshall (1868), L. R. 3, H. L. 17; Martin v. Mackonochie, Flanck v. Simpson (1868), L. R. 2, A. & E. 116; Heywood v. Manchester, Bp. (1884), 12 Q. B. D. 404.*

**13. ———.]—MIDDLETON v. CROFTS, No. 39, post.**

**14. ———.]—(1)** A minister of the Established Church cannot refuse to bury the child of a dissenter.

(2) Excommunication, in the meaning of the law of the English Church, is not merely an expulsion from the Church of England, but from the Christian Church generally (SIR J. NICHOLL).

(3) Though regular baptism was by a bishop or priest, yet, if administered by a laic, or by a heretic or schismatic, it was valid baptism; & so valid that it was not to be repeated (SIR J. NICHOLL).

(4) The Law of the Church of England, & its history, are to be deduced from the ancient general Canon Law—from the particular constitutions made in this country to regulate the English Church—from our own Canons—from the Rubric, & from any Acts of Parliament that may have passed upon the subject: & the whole may be illustrated, also, by the writings of eminent persons (SIR J. NICHOLL).—*KEMP v. WICKES (1809), 3 Phillim. 264.*

*Annotations:—As to (3) Folld. Escott v. Mastin (1842), 4 Moo. P. C. C. 104. As to (4) Refd. Martin v. Mackonochie, Flanck v. Simpson (1868), L. R. 2, A. & E. 116. Generally, Mentd. Titchmarsh v. Chapman (1844), 3 Curt. 840; Read v. Lincoln, Bp. (1889), 14 P. D. 88.*

**15. ———.]—R. v. MILLIS, No. 20, post.**

**16. ———.]—A** beneficed clerk was found guilty in the Arches Ct. of ecclesiastical offences & suspended *ab officio* for a certain time, & a monition was appended to the sentence requiring him not to offend again in like manner. He disobeyed the monition, & a second monition was thereupon issued by the Dean of the Arches, which he also disobeyed. An application was then made to the ct. by motion for his suspension. He was served with notice of the motion, but did not appear, & the ct. suspended him *ab officio et a beneficio* for three years. The clerk applied for a prohibition:—*Held:* (1) a monition could be appended to a definitive sentence; (2) disobedience to such a monition could be punished as contumacy by suspension *ab officio et a beneficio*;

(3) in order so to punish such disobedience it is not necessary to institute a fresh suit, but suspension was properly awarded upon motion in the original suit.

(4) The ecclesiastical law of England is not a foreign law. It is a part of the general law of England—of the common law—in that wider sense which embraces all the ancient & approved customs of England which form law, including not only that law administered in the Cts. of Queen's Bench, Common Pleas, & Exchequer, to which the term Common Law is sometimes in a narrower sense confined, but also that law administered in Chancery & commonly called Equity, & also that law administered in the Cts. Ecclesiastical, that last law consisting of such canons & constitutions ecclesiastical as have been allowed by general consent & custom within the realm—and form, the King's ecclesiastical law. All these laws may be, & are, altered by statutes.

(5) When the question arises what is the English ecclesiastical law, it is not ascertained by calling witnesses to prove it, as if it were a foreign law, but taking judicial notice of what the law is, it is ascertained, by argument founded on legal principles & authorities, what the law is on the particular point. In determining this question I think great weight should be given to the principles of the ecclesiastical law, laid down by those ancient writers on the ecclesiastical law of England whose treatises have been accepted by the judges in the ecclesiastical cts. as of authority. Some weight is to be given to foreign jurists who treat of the law ecclesiastical as practised in foreign countries, but much less weight, for it may well be that they are treating of ecclesiastical constitutions which have never been accepted & received in England. Very little weight should, in my opinion, be given to treatises so modern as not to have yet been sanctioned by the judges of the ecclesiastical cts. I think great weight is to be attributed to the practice of the cts. ecclesiastical, & I think the forms of the writs in use are very strong evidence of what that practice is. I do not think these forms conclusive, for no doubt the forms of pleadings & writs sometimes only indicate what was, at a former time, the received law, but which may have now become antiquated & fallen into disuse, the law having in process of time insensibly changed. But most weight of all is, in my opinion, to be attributed to judicial decisions (LORD BLACKBURN).—MACKONCHIE v. PENZANCE (LORD) (1881), 6 App. Cas. 424; 50 L. J. Q. B. 611; 44 L. T. 479; 45 J. P. 584; *sub nom.* MACONCHIE v. PENZANCE (LORD), 29 W. R. 633, H. L.; *affg.* S. C. *sub nom.* MARTIN v. MACKONCHIE (1879), 4 Q. B. D. 697, C. A.

*Annotations*:—*As to* (2) *Reid*, *Enraght v. Penzance* (1882), 7 App. Cas. 240. *As to* (3) *Reid*, *Green v. Penzance* (1881), 6 App. Cas. 657; *Martin v. Mackonchie* (1882), 7 P. D. 94. *As to* (4) *Reid*, *R. v. Dibdin*, [1910] P. 57. *As to* (5) *Reid*, *Collins v. Collins* (1884), 9 App. Cas. 205; *Noble v. Adler* (1880), 11 P. D. 158. *Generally*, *Reid*, *Combe v. De la Bere* (1882), 22 Ch. D. 316; *R. v. Tristram*, [1901] 2 K. B. 141; *St. Magnus, etc. Parochial Church Council v. London Diocese Chancellor*, [1923] P. 38. *Mentid*, *R. v. Marylebone County Court Judge* (1883), 50 L. T. 97; *Re London Scottish Permanent Bldg. Soc.* (1893), 63 L. J. Q. B. 112; *Re Clifford & O'Sullivan*, [1921] 2 A. C. 570.

17. — Part of general English law.]—MACKONCHIE v. PENZANCE (LORD), No. 16, *ante*.

*See, also*, No. 20, *post*.

18. — How proved.]—MACKONCHIE v. PENZANCE (LORD), No. 16, *ante*.

19. How far political.]—The abolition of religious tests, the disestablishment of the Church, J.—VOL. XIX.

the secularisation of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath, are purely political objects. Equity has always refused to recognise such objects as charitable. It is true that a gift to an assocn. formed for their attainment may, if the assocn. be unincorporated, be upheld as an absolute gift to its members, or, if the assocn. be incorporated, as an absolute gift to the corporate body; but a trust for the attainment of political objects has always been held invalid (LORD PARKER).—BOWMAN v. SECULAR SOCIETY, LTD., [1917] A. C. 406; 86 L. J. Ch. 568; 117 L. T. 161; 33 T. L. R. 376; 61 Sol. Jo. 478, H. L.; *affg.* *sub nom.* *Re* BOWMAN, SECULAR SOCIETY, LTD. v. BOWMAN, [1915] 2 Ch. 447, C. A.

*Annotations*:—*Reid*, *Re Tetley National Provincial & Union Bank of England v. Tetley*, [1923] 1 Ch. 258. *Mentid*, *Cotman v. Brougham*, [1918] A. C. 514; *Bourne v. Keane*, [1919] A. C. 815.

## SUB-SECT. 2.—CANON LAW.

### A. In General.

#### 20. What is—Whether canon law of Europe.]

—(1) That the canon law of Europe does not, & never did, as a body of laws, form part of the law of England, has been long settled & established law. . . . It is not by the Roman canon law that our judges in the spiritual cts. decide questions within their jurisdiction, but by the King's ecclesiastical law . . . Sir John Davies, in *Le Case de Commendams* (Sir J. Dav. 69 b, 70–72 b), shows how the canon law was first introduced into England, & fixes the time of such introduction about the year 1290, & lays it down thus: "Those canons which were received, allowed, & used in England, were made by such allowance & usage part of the King's ecclesiastical laws of England; whereby the interpretation, dispensation, or execution of those canons, having become laws of England, belong solely to the King of England & his magistrates within his dominions" (TINDAL, C.J.).

I take that part only of the foreign law to be the ecclesiastical law of England which has been adopted by Parliament or the cts. of this country from the decretals of popes & the authority of councils on the Continent (LORD ABINGER).

It is quite certain that the civil & canon law never had, as such, any authority in this country; but, in the language of 25 Hen. 8, c. 21: "Such laws had effect only so far as the sovereign & people of this realm had taken them at their free liberty, at their own consent to be used among them, & had bound themselves by long use & custom to the observance of the same." In illustration of which, Markstone, following the example of Sir Matthew Hale, classes the civil & canon law in use in this country as part of the common or unwritten law (LORD COTTENHAM).

(2) A question has been raised as to the celebration of the marriage ceremony by a deacon; & it has been asked, if it was formerly required that the ceremony should be performed by a person in priest's orders, by what authority this change was introduced. It appears, by reference to the ancient rituals, that formerly the sacrament was administered before the nuptial benediction was pronounced, & that, as this could only be administered by a priest, his presence was necessary. Marriage itself was also, by the mere nature & force of the contract, considered to be a sacrament; & the solemnisation, therefore, by a priest might

**Sect. 2.—The law of the Church : Sub-sect. 2, A., B. & C.]**

on this ground have been thought necessary ; but when, at the Reformation, it ceased to be considered as a sacrament, & when it was no longer required that the sacrament should be administered at the time of the marriage, there was no reason why the ceremony should not be performed by a person in holy orders as a deacon (LORD LYNDEHURST, C.).—*R. v. MILLIS* (1844), 10 Cl. & Fin. 534 ; 1 L. T. O. S. 502 ; 8 Jur. 717 ; 8 E. R. 844, H. L.

**Annotations:—***As to* (1) *Reid. R. v. Canterbury, Archbp.* (1848), 11 Q. B. 483 ; *Hopo v. Hope* (1858), 1 Sw. & Tr. 94 ; *Exeter, Bp. v. Marshall* (1868), L. R. 3 H. L. 17 ; *MacKnochie v. Penzance* (1881), 6 App. Cas. 424 ; *R. v. Canterbury, Archbp.* (No. 1) (1902), 71 L. J. K. B. 894. *As to* (2) *Consd. Catterall v. Catterall* (1847), 11 Jur. 914 ; *Bennish v. Bennish* (1861), 9 H. L. Cas. 274 ; *Lightbody v. West* (1902), 87 L. T. 138. *Reid. Catherwood v. Caston* (1844), 13 M. & W. 261 ; *Bevan v. McMahon* (1861), 30 L. J. P. M. & A. 61 ; *Culling v. Culling*, [1896] L. 116 ; *Moss v. Moss*, [1897] P. 263. *Generally, Mentd. O'Connell v. R.* (1844), 11 Cl. & Fin. 155 ; *Catterall v. Sweetman* (1845), 4 Notes of Cases, 222 ; *R. v. Chadwick* (1846), 11 J. P. 140 ; *Maclean v. Cristall* (1849), 7 Notes of Cases, Supp. 17 ; *R. v. Manwaring* (1850), Dears. & B. 132 ; *Prince of Wales Assoc. v. Harding* (1858), E. B. & E. 183 ; *A. v. Windsor (Dean & Canons)* (1860), 8 H. L. Cas. 369 ; *Beachey v. Brown* (1860), E. B. & E. 798 ; *Sichel v. Lambeth* (1864), 15 C. B. N. S. 781 ; *R. v. Fanning* (1866), 10 Cox. C. C. 411 ; *Phillips v. Myre* (1870), L. R. 6 Q. B. 1 ; *Thompson v. Ward, Ellis v. Burch* (1871), 24 L. T. 679 ; *R. v. Allen* (1872), L. R. 1 C. C. R. 367 ; *Anderson v. Morice* (1876), 1 App. Cas. 713 ; *London Street Tram. Co. v. L. C. C.* [1898] A. C. 375 ; *Re De Wilton, De Wilton v. Montefiore*, [1900] 2 Ch. 481 ; *Usher's Wiltshire Brewery v. Bruce*, [1915] A. C. 433.

**21. Subject to common law.]—**CANDICT & PLOMER'S CASE (1610), Godb. 163 ; 78 E. R. 99. **Annotation:—***Mentd. Peak v. Bourne* (1732), 2 Stra. 942.

**22. —.]—**CASE OF CONVOCATIONS (1611), 12 Co. Rep. 72 ; 77 E. R. 1350.

**Annotation:—***Reid. Middleton v. Crofts* (1736), 2 Atk. 650.

**23. Declaratory of the common law—Not authority for action at law.]—**HARRIS v. BULLER (1798), 1 Hag. Con. 463, n.

**24. Effect of adoption by legislature.]—**(1) A child baptised with water in the name of the Trinity by a Wesleyan minister not authorised to administer the rite of baptism is not unbaptised within the rubric in the Burial Service, & a refusal to bury a child so baptised is an ecclesiastical offence under the 68th Canon of 1603, punishable with suspension for three months. The validity of lay baptism was recognised by the common law of the Church, & the rubrics of Edward VI. & Elizabeth & by the statute law, & this was not altered by the rubric of 1603, nor by the Act of Uniformity nor by the rubric of 1661.

(2) When the legislature has adopted a rubric & given it statutory force, no other authority than a declaratory Act can give it a new meaning.—*ESCOTT v. MASTIN* (1842), 4 Moo. P. C. C. 104 ; *Brod. & P. 4* ; 1 Notes of Cases 552 ; 6 Jur. 765 ; 13 E. R. 241, P. C.

**Annotations:—***As to* (1) *Appl. Titchmarsh v. Chapman* (1844), 3 Curt. 840. *Reid. Gorham v. Exeter, Bp.* (1849), 2 Rob. Eccl. 1 ; *Re Perry Almshouses*, [1898] 1 Ch. 391. *Generally, Mentd. Sanders v. Head* (1843), 3 Curt. 565 ; *Cooper v. Dodd* (1850), 2 Rob. Eccl. 270 ; *Martin v. MacKnochie, Farnack v. Simpson* (1868), L. R. 2 A. & E. 116 ; *Jenkins v. Cook* (1875), L. R. 4 A. & E. 463.

**25. Whether appeal lies under.]—**By the canon law an appeal is admitted from all grievances in general.—*BLOUNT'S CASE* (1737), 1 Atk. 295 ; 26 E. R. 189 ; *sub nom. Ex p. BLUNT, Ex p. HENCHMAN, West temp. Hard.* 25.

**Annotations:—***Reid. Re Clifford & O'Sullivan*, [1921] 2 A. C. 570. *Mentd. The Dictator*, [1892] P. 304.

**B. Whether Binding on Laity.**

**26. Apart from adoption—Canons made by**

**convocation.]—***BIRD v. SMITH* (1606), Moore K. B. 781 ; 72 E. R. 902.

**Annotations:—***Consd. Middleton v. Crofts* (1736), 2 Atk. 650 ; *R. v. York, Archbp.* (1888), 20 Q. B. D. 740. *Reid. Phillips v. Bury* (1694), 2 Term Rep. 346 ; *R. v. Chadwick, R. v. St. Giles in the Fields, St. Giles in the Fields v. St. Mary, Lambeth* (1847), 11 Q. B. 173.

**27. —.]—***As to* the canons of 8 James certainly they are of force though never confirmed by Act of Parliament ; yet they are laws which bind & govern in ecclesiastical affairs. The Convocation, with the licence & assent of the King under the Great Seal may make canons for regulation of the Church & that as well concerning laics as ecclesiastics (VAUGHAN, C.J.).—*GROVE v. ELLIOT* (1670), 2 Vent. 41 ; 86 E. R. 206.

**Annotations:—***Consd. Middleton v. Crofts* (1736), 2 Atk. 650. *Reid. Marshall v. Exeter, Bp.* (1860), 7 C. B. N. S. 653. *Mentd. Hubbard v. Penrice* (1746), 2 Stra. 1246.

**28. —.]—**(1) No fees due for christening or burial, unless by custom. (2) *As for* the canon law, it is of no authority in itself, but only so much as has been through custom received here. The Convocation cannot by their canons take money out of people's pockets (HOLT, C.J.).—*BURDEAUX v. LANCASTER* (1698), 12 Mod. Rep. 171 ; 1 Salk. 332 ; *Holt, K. B.* 317 ; 88 E. R. 1242.

**Annotations:—***As to* (1) *Reid. Naylor v. Scot* (1729), 1 Barn. K. B. 159 ; *Andrews v. Cawthorne* (1744), Willes, 536 ; *Richards v. Dovey* (1747), Willes, 622 ; *Patten v. Castleman* (1753), 1 Lew. 387 ; *Spry v. St. Marylebone Directors & Grdnrs.* (1839), 2 Curt. 5 ; *Kirtou v. Dean* (1869), 18 W. R. 144.

**29. —.]—**Necessity for royal assent.]—CASE OF CONVOCATIONS (1611), 12 Co. Rep. 72 ; 77 E. R. 1350.

**Annotation:—***Consd. Middleton v. Crofts* (1736), 2 Atk. 650.

**30. Necessity for adoption.]—**EVANS & KIFFINS v. ASKWITH (1627), W. Jo. 158 ; *Palm.* 457 ; *Noy*, 93 ; *Lat.* 31, 233 ; 82 E. R. 84.

**Annotations:—***Reid. Alston v. Atlay* (1837), 7 Ad. & El. 289. *Mentd. Berry v. White* (1662), O. Bridge. 82 ; *Threadneedle v. Latham* (1674), *Freem.* K. B. 179 ; *R. v. London, Bp.* (1694), 1 Ld. Raym. 23 ; *R. v. Leighton* (1708), *Fortes.* Rep. 173 ; *Holt v. Ward* (1732), 2 Barn. K. B. 173 ; *Grocers' Co. v. Canterbury, Archbp.* (1771), 2 Wm. Bl. 770 ; *Jewison v. Dyson* (1842), 6 State Tr. N. S. 1 ; *R. v. Canterbury, Archbp.* (1848), 11 Q. B. 483 ; *R. v. Eton College & Clarke* (1857), 27 L. J. Q. B. 132 ; *R. v. Canterbury, Archbp.*, [1902] 2 K. B. 503.

**31. —.]—**By legislation.]—Canons oblige not the laity without the consent of the civil legislative power.—*MATTHEW v. BURDETT* (1703), 2 Salk. 412, 672 ; 3 Salk. 318 ; 91 E. R. 357, 571, 846.

**Annotations:—***Reid. Middleton v. Crofts* (1736), 2 Atk. 650. *Mentd. R. v. Litchfield, Bp.* (1734), 7 Mod. Rep. 217 ; *Wynn v. Davies & Weaver* (1835), 1 Curt. 69 ; *Shepherd v. Payne* (1863), 9 Jur. N. S. 354.

**32. —.]—**MIDDLETON v. CROFTS, No. 39, *post*.

**33. —.]—**The canons which have not the authority of an Act of Parliament are not binding on laymen.—*MORE v. MORE* (1741), 2 Atk. 157 ; 26 E. R. 400 ; *sub nom. MOOR v. MOOR*, Barn. Ch. 404.

**Annotations:—***Reid. Wynn v. Davies & Weaver* (1835), 1 Curt. 69 ; *Marshall v. Exeter, Bp.* (1860), 7 C. B. N. S. 653.

**34. —.]—**By usage.]—*BURDEAUX v. LANCASTER*, No. 28, *ante*.

**35. —.]—**Canonical constitutions of ecclesiastical synods have no binding force or authority in this Kingdom in questions of tithes between the clergy & laity in cts. of law, without acquiescence evidenced by usage.—*EVANS v. GEORGE & ROWE* (1825), 12 Price, 76 ; *M'Cle. & Yo.* 577 ; 147 E. R. 660, Ex. Ch.

**Annotation:—***Mentd. Loxon v. Pryse* (1840), 4 My. & Cr. 600. *See, further*, Nos. 12, 10, 20, *ante*, Nos. 30, 698, *post*.



## C. Canons of 1603.

**36. Construction—With Act of Uniformity, 1562 (c. 4).—**Construction of the notice termed 'The Ornaments-Rubric' prefixed to "The Order for Morning & Evening Prayer," which provides "That such Ornaments of the Church, & of the Ministers thereof, at all Times of their Ministration, shall be retained, & be in use, as were in this Church of England, by the Authority of Parliament, in the Second Year of the Reign of King Edward VI.;" & of the rubric prefixed to 'The Order of the Administration of the Lord's Supper, or Holy Communion, which describes the Priest standing at the North side of the Table,' with that which precedes the Prayer of Consecration, & enjoins, "When the Priest, standing before the Table, hath so ordered the Bread & Wine that he may with more readiness & decency break the Bread before the People, & take the cup into his hands, he shall say the Prayer of Consecration," as well as that appended to the same service, regarding the sacred elements; & of the rubric appended to the service for the Holy Communion; that 'To take away all occasion of dissension, & superstition, which any person hath or might have concerning the Bread & Wine, it shall suffice that the Bread be such as is usual to be eaten; but the best & purest Wheat Bread that conveniently may be gotten':—*Held*: (1) as regards the vestments of the minister whilst officiating in the administration of the Holy Communion, or in other ministrations, the "Ornaments-Rubric," as explained by the Injunctions of Queen Elizabeth, 1559, & the Advertisements of Elizabeth, 1564, made pursuant to Act of Uniformity, 1558 (c. 2), & explained by subsequent visitation articles; when construed with the Canons of 1603-4; & the above Act does not permit the use by the minister while officiating at the Holy Communion of the chasuble, the alb, or the tunicle, but allows of the cope being worn in ministering the Holy Communion on high feast days, in cathedrals & collegiate churches, & requires the use of the surplice in all other ministrations. The use of the chasuble, alb, & tunicle by the celebrant while officiating in the communion service, is illegal; (2) the rubrics regarding the position of the minister during the communion service designate the north side of the communion table as the proper place for the minister throughout the communion service, & also, whilst reading the prayer of consecration, his proper position therefore is on the north side, or the north end of the table, if it is placed east & west, facing the south, & not at that part of the west side of the table which is nearest to the north; the object being that the people may see him break the bread & take the cup into his hands, which they cannot do if he stand with his back to the people, & between the people & the holy table; (3) the rubric regarding the elements requires that the bread to be used at the Holy Communion be pure wheat bread, as is directed by the Canons of 1603-4, & not wafer bread, which is illegal; & does not allow the administering of wine mixed with water, instead of wine only, to the communicants at the Lord's Supper: whether the water be mingled with wine before or during the communion service.

(4) *Semble*: the use of a biretta, or cap, as a vestment in the service of the Church is illegal.

(5) *Semble*: the provisions of the Canons of 1603-4 & Prayer Book must be read together as far as possible, & the Canons 17, 25, & 58, upon the vestments of the ministers are an exposition & imitation of the "Ornaments-Rubric." Such

ornaments are to be limited, as to the vestments, by the special provision of the Canons themselves, which were not repealed by 1662 Act.—*HEBBERT v. PURCHAS* (1871), L. R. 3 P. C. 605; 7 Moo. P. C. C. N. S. 468; Bro. Ecc. Rep. 102; 40 L. J. Eccl. 33; 25 J. P. 452; 19 W. R. 898; 17 E. R. 177, P. C.; *reusg.* S. C. *sub nom.* *ELPHIN STONE v. PURCHAS* (1870), L. R. 3 A. & E. 60; *subsequent proceedings, sub nom.* *HEBBERT v. PURCHAS* (1872), L. R. 4 P. C. 301, P. C.

*Innotations*:—As to (1) *Consd.* Martin v. Mackonochie (Second Suit) (1874), L. R. 4 A. & E. 279. *Fold.* Ridsdale v. Clifton (1877), 2 P. D. 276. *Reid.* Heywood v. Manchester, Bp. (1884), 12 Q. B. D. 404; *Re* Robinson, Wright v. Tugwell, [1897] 1 Ch. 85; *Gore-Booth v. Manchester, Bp.*, [1920] 2 K. B. 412. As to (2) *Consd.* Ridsdale v. Clifton (1877), 2 P. D. 276; *Read v. Lincoln, Bp.*, [1892] A. C. 644. As to (3) *Consd.* Ridsdale v. Clifton (1877), 2 P. D. 276; *Read v. Lincoln, Bp.*, [1892] A. C. 644. As to (4) *Appl.* Serjeant v. Dale (1870), 43 J. P. 220. As to (5) *Reid.* Boyd v. Phillpotts (1874), L. R. 4 A. & E. 297. *Generally, Reid.* Hudson v. Tooth (1877), 2 P. D. 125. *Mentd.* Sheppard v. Bonnett (1870), 23 L. T. 399; St. John the Evangelist, Clevedon, v. All Havill Interest, [1909] P. 6; Lord Advocate v. Walker Trustees, [1912] A. C. 95; Bourne v. Keane, [1910] A. C. 815; Rhondda's Claim, [1922] 2 A. C. 339.

—Canon 89.]—See Nos. 529, 608, *post*.

**37. Whether binding on laity.**—*GROVE v. ELLIOT*, No. 27, *ante*.

**38.** —.]—How far the Canons of 1603 do not bind the laity.—*ANON.* (1733), 2 Barn. K. B. 367; 94 E. R. 557; *subsequent proceedings, sub nom.* *DODDRIDGE v. RAND*, 2 Barn. K. B. 373.

**39.** —.]—(1) The canons of 1603, not having been confirmed by Parliament, do not *proprio vigore* bind the laity.

(2) Every man may be said to be party to, & the consent of every subject is included in an Act of Parliament; but in canons made in convocation, & confirmed by the Crown only, all these are wanting, except the royal assent.

(3) In the convocation, the whole clergy of the province are either present in person, or by representation.

(4) Ever since the Reformation, the rule has been, that when any ordinances have been made to bind the laity, as well as clergy, in matters merely ecclesiastical, they have been either enacted or confirmed by Parliament.

(5) It is clear from 25 Hen. 8, c. 19, that both the King & the clergy thought it necessary to have the authority of Parliament for abrogating part of the ancient canons, & establishing such part as was to remain in force.

(6) Canons that have been allowed by general consent within this realm, & are not repugnant to the laws thereof, are still in force as the King's ecclesiastical laws.

(7) The clergy are bound by canons confirmed only by the King; but to bind the laity they must be confirmed by Parliament.

(8) Lord Hale, in a manuscript treatise, lays it down that external discipline of the church could not bind any man to submit to it, but either by force of the supreme civil power where the governors received it, or by the voluntary submission of the particular persons who did receive it.

(9) Where the ecclesiastical censures & temporal punishment are both levied against the identical offence, the rule of *Nemo bis puniri debet pro eodem delicto* is strong against allowing a double proceeding.—*MIDDLETON v. CROFTS* (1736), 2 Atk. 650; *Ridg. temp.* H. 109; 2 Stra. 1056; *Cunn.* 55, 114; *Lee temp.* Hard. 57, 326; 2 Barn. K. B. 351; *Kel. W.* 118; 20 E. R. 788.

*Annotations*:—As to (1) *Apprd.* Exeter, Bp. v. Marshall (1868), L. R. 3 H. L. 17. *Consd.* Jenkins v. Cook (1875), L. R. 4 A. & E. 463; *Re* York, Archbp. (1888), 20 Q. B. D. 740. *Reid.* *It. v. Allen* (1872), L. R. 8 Q. B. 69;

**Sect. 2.—The law of the Church: Sub-sect. 2, C. & D. Sect. 3: Sub-sects. 1 & 2.]**

*R. v. Morton* (1873), 42 L. J. M. C. 58; *Marshall v. Graham*, *Bell v. Graham*, [1907] 2 K. B. 112; *R. v. Dibdin*, [1910] P. 57. *As to* (5) *Refd. Ex p. Brinckman* (1895), 11 T. L. R. 387. *As to* (8) *Consd. Exeter, Bp. v. Marshall* (1868), L. R. 3 H. L. 17. *Generally, Mentd. R. v. York, Archbp.* (1795), 6 Term Rep. 490; *Wynn v. Davies & Weaver* (1835), 1 Curt. 69; *Dakins v. Seaman* (1842), 9 M. & W. 777; *R. v. Chadwick* (1846), 11 J. P. 140; *Shepherd v. Payne* (1863), 9 Jur. N. S. 354; *Macconochie v. Penzance* (1881), 6 App. Cas. 424; *Kutner v. Phillips*, [1891] 2 Q. B. 267.

40. —[The canon of 1603 although not binding *proprio vigore*, on the laity, bind the clergy. The Canons of 1640 have never had any binding authority in these cts. Under Clergy Discipline Act, 1840 (c. 80), the Bishop of Ely has a discretion to hear matters arising in his diocese himself or to send it to this ct., & he having exercised that discretion, & letters of request having been sent & accepted, the ct. is duly in possession of a cause. A general power is given to the bishop to send a case here by letters of request; the bishop is not required to give the Archbishop the discretion of proceeding to hear the case, or to send it here by letters of request; it is his own discretion he is to exercise.—*COOPER v. DODD* (1850), as reported in 7 Notes of Cases, 514.

41. —[—(1) The Canons of 1603 have not been allowed & received so as to form part of the law of England, & bind the laity as well as clergy.

(2) The right of a patron to present to a benefice is a legal right, subject in its exercise to the bishop's right to examine into the fitness of the presentee, & to reject him for sufficient ground. A clerk who has held preferment in one bishopric is not, on being presented to a living in another bishopric, bound, as a condition precedent to his examination, on the question of fitness, to produce letters, testimonial & commendatory from his former bishop.—*EXETER (Bp.) v. MARSHALL* (1808), L. R. 3 H. L. 17; 37 L. J. C. P. 331; 18 L. T. 376; 32 J. P. 419, H. L.; *affg. S. C. sub nom. MARSHALL v. EXETER (Bp.)* (1802), 13 C. B. N. S. 820, Ex. Ch. *Annotations:—As to* (1) *Refd. Re Dale, R. v. Penzance, Re Enright, R. v. Penzance* (1880), 50 L. J. Q. B. 234; *Macconochie v. Penzance* (1881), 6 App. Cas. 424; *R. v. York, Archbp.* (1888), 20 Q. B. D. 740. *As to* (2) *Consd. Heywood v. Manchester, Bp.* (1884), 12 Q. B. D. 404. *Refd. Walsh v. Lincoln, Bp.* (1875), L. R. 10 C. P. 518. *Generally, Mentd. Morris v. Ogden* (1869), 38 L. J. C. P. 329; *R. v. Morton* (1873), L. R. 2 C. C. R. 22; *Willis v. Oxford, Bp.* (1877), 2 P. D. 192.

*See, generally, Sub-sect. 2, B., ante, & No. 698, post.*

**D. Canons of 1640.**

42. **Whether binding.]—COOPER v. DODD**, No 40, *ante*.

43. — **Subversive of constitution.]—R. v. TRISTRAM**, [1902] 1 K. B. 816; 71 L. J. K. B. 418; 86 L. T. 515; 50 W. R. 477; 18 T. L. R. 406, C. A. *Annotations:—Mentd. Smythe v. Wiles*, [1921] 2 K. B. 66; *St. Magnus, etc. Parochial Church Council v. London Diocese Chancellor*, [1923] 1 P. 38.

**SECT. 3.—THE CROWN IN RELATION TO THE CHURCH.**

**SUB-SECT. 1.—IN GENERAL.**

44. **Powers to make orders for Church government—Without parliamentary confirmation.]—The King, as supreme head of the Church, may make constitutions for the govt. of the clergy, &**

**if they do not conform it will be cause of deprivation.—MEMORANDUM** (1604), Cro. Jac. 37; 79 E. R. 30.

*Annotations:—Consd. Combe v. De La Bere* (1881), 6 P. D. 157. *Refd. Middleton v. Croft* (1736), Cun. 114; *Heywood v. Manchester, Bp.* (1884), 12 Q. B. D. 404.

45. **Power of punishment—For disobedience to royal orders—Deprivation.]—MEMORANDUM**, No. 44, *ante*.

46. **Power of pardon—In ecclesiastical suits.]**

—Suits in the Ecclesiastical Court *pro salute animæ*, or for reformation of manners between party & party, may be pardoned by the King; but not suits where ptfr. has an interest & property in the thing in demand. All proceedings in the Ecclesiastical Ct. *ex officio*, are for the King, & therefore the King may pardon them. Although the suit be for the King, yet when sentence is given & the costs taxed, the King cannot pardon them, notwithstanding an appeal from the sentence.—*HALL'S CASE* (1604), 5 Co. Rep. 51 a; 77 E. R. 132. *Annotation:—Refd. Watt's Case* (1614), Cro. Jac. 335.

47. **Right of appointing bishop—Without congé d'élire.]—OSSERIES (Bp.) CASE**, No. 125, *post*.

48. **Power to create bishopric.]—(1) The right of the Crown to present to an English benefice upon the appointment of the incumbent by the Crown to a bishopric is not barred by the Crown having, before such appointment, granted the advowson to a subject. (2) But no such right exists in the case of an appointment to the bishopric to Christchurch in New Zealand.**

(3) We do not question the power of the Queen to create a bishopric in any part of the Dominions, except where, as in Scotland, such an exercise of prerogative is forbidden (LORD CAMPBELL, C.J.).

*Qu.:* whether the prerogative of the Crown extends to a benefice in England which becomes vacant by the promotion of the incumbent to a bishopric in Ireland, or to a colonial bishopric constituted under the powers of an Act of Parliament.—*R. v. KTON COLLEGE* (1857), 8 E. & B. 610; 27 L. J. Q. B. 132; 30 L. T. O. S. 186; 4 Jur. N. S. 335; 6 W. R. 72; 120 E. R. 228.

49. **Power of granting dispensations—Whether restrained by 25 Hen. 8, c. 21.]—COMMENDAM CASE, COLT & GLOVER v. COVENTRY & LICHFIELD (Bp.)** (1617), Hob. 140; Moore, K. B. 898; 80 E. R. 290; *sub nom. COLT v. GLOVER*, 1 Roll. Rep. 451; *sub nom. COLT'S CASE*, Jenk. 300, Ex. Ch.

*Annotations:—Refd. Edes v. Oxford, Bp.* (1667), Vaugh. 18; *R. v. London, Bp.* (1694), Comb. 300. *Mentd. Manby v. Scott* (1662), O'Bridge. 229; *R. v. Worcester, Bp.* (1670), 1 Mod. Rep. 276; *Thomas v. Sorrell* (1673), Freem. K. B. 85; *R. v. Hornbee* (1691), Freem. K. B. 331; *Harcourt v. Fox* (1692), 4 Mod. Rep. 167; *Owen v. Saunders* (1696), 1 Ld. Raym. 158; *Reynoldson v. Blake* (1697), 1 Ld. Raym. 192; *Cole v. Hawkins* (1717), 1 Stra. 21; *Thornby v. Fleetwood* (1720), 1 Stra. 318; *Bellamy v. Burrow* (1735), Cas. temp. Talb. 97; *Wolfenden v. Lincoln, Bp.* (1763), 2 Wils. 174; *Roe d. Berkeley v. York, Archbp.* (1805), 6 East. 86; *Denn d. Nowell v. Hoake* (1826), 5 B. & C. 720; *Mitrohouse v. Rennell* (1833), 7 Bl. N. S. 241; *Osgood v. Nelson* (1869), 10 B. & S. 119; *Rumsey v. Nicholl* (1877), 2 C. P. D. 179; *Roberts v. London Corp.* (1882), 30 W. R. 637.

50. **As to convocation—Assent to assembly—Whether necessary.]—CASE OF CONVOCATIONS** (1611), 12 Co. Rep. 72; 77 E. R. 1350.

*Annotation:—Refd. Middleton v. Crofts* (1736), 2 Atk. 650.

51. — **How given.]—CASE OF CONVOCATIONS** (1611), 12 Co. Rep. 72; 77 E. R. 1350.

*Annotation:—Refd. Middleton v. Crofts* (1736), 2 Atk. 650.

52. — **Assent to deliberations.]—CASE OF**

**PART III. SECT. 3, SUB-SECT. 1.**  
**a. Right of appointing bishop.]—**

The Crown has the power of appointing bishops in colonies enjoying representative government, though it does not exercise that power.—*MERRIMAN v. WILLIAMS* (1880), F. 135.—S. AF.

CONVOCACTIONS (1611), 12 Co. Rep. 72; 77 E. R. 350.

*Annotation*.—*Reid*. Middleton v. Crofts (1736), 2 Atk. 650.

*Approval of canons*.—*See* Nos. 26, 29, *ante*.

#### SUB-SECT. 2.—RIGHT OF PRESENTATION.

**53. Avoidance by cession—Incumbent created bishop.**—If an incumbent be made a bishop, the church becomes void, & the King shall present by virtue of his prerogative, although the patron be subject.—*WENTWORTH v. WRIGHT* (1596), Cro. Eliz. 526; Owen, 144; 78 E. R. 774; *sub nom. WRIGHT'S CASE*, Moore, K. B. 399.

*Annotation*.—*Folld*. R. v. London, Bp. (1693), 1 Show. 441.

**54. ———.**—(1) If an incumbent be made a bishop, by which the church becomes void, the King by his prerogative shall present, though he subject be the patron.

(2) The grantee of the next avoidance loses his presentation, if the incumbent be made a bishop, & the King grant him a *commendam* or present to another.—*WOODLEY v. EXETER* (Bp.) (1624), Cro. Jac. 691; 79 E. R. 600; *sub nom. COMMENDAM'S CASE*, *WOODLEY v. EXETER* (Bp.) & *MANNERING*, Vin. 94; *sub nom. WOODWARD & MANWARING'S CASE*, 2 Dyer, 233 a., n.

*Annotations*.—*As to* (1) *Reid*. R. v. London, Bp. (1693), 1 Show. 441. *As to* (2) *Consd*. Calland v. Troward (1794), 2 Hy. Bl. 324. *Distd*. Troward v. Calland (1795), 6 Term Rep. 439. *Reid*. Grocers' Co. v. Canterbury, Archbp. & Backhouse (1771), 2 Wm. Bl. 770. *Generally, Mentd*. Evans & Kiffin v. Askwith (1627), W. Jo. 161; R. v. London, Bp. (1695), 1 Show. 493.

**55. ———.**—*EDDES v. OXFORD* (Bp.) (1667), Vaugh. 18; 124 E. R. 949.

*Annotations*.—*Folld*. R. v. London, Bp. (1693), 1 Show. 441. *Reid*. Alston v. Atlay (1837), 7 Ad. & El. 289. *Mentd*. Rennell v. Lincoln, Bp. (1825), 3 Blug. 223.

**56. ———.**—A parson made a bishop, the King to present to the benefice.—*R. v. LONDON* (Bp.) & *LANCASTER* (1693), Carth. 313; Comb. 300; 1 Show. 441; Holt, K. B. 585; 4 Mod. Rep. 190; 3 Lev. 377; 90 E. R. 784.

*Annotation*.—*Reid*. Grocers' Co. v. Canterbury, Archbp. (1771), 2 Wm. Bl. 770.

**57. ———.**—It is the prerogative of the Crown to present to a benefice which is vacant owing to the promotion of the last incumbent by the Crown to a bishopric.—*LONDON* (Bp.) v. A.-G. (1694), Show. Parl. Cas. 164; 1 E. R. 12; *sub nom. R. v. LONDON* (Bp.), 1 Show. 501, H. L.; *affy*. S. C. *sub nom. R. v. LONDON* (Bp.) & *BIRCH*, Comb. 301.

*Annotations*.—*Reid*. Grocers' Co. v. Canterbury, Archbp. (1771), 2 Wm. Bl. 770. *Mentd*. A.-G. v. Allgood (1743), Park. 1.

**58. ———.**—*R. v. ETON COLLEGE*, No. 8, *ante*.

*See, also*, No. 2074, *post*.

**59. ———.**—Incumbent created Irish bishop.—Creating an incumbent a bishop of Ireland makes the church void, & gives the presentation to the King; but the prerogative is lost if he suffers a stranger to present.—*BASSET v. GEE* (1600), Cro. Eliz. 790; 78 E. R. 1019.

*Annotation*.—*Folld*. A.-G. v. London, Bp., Lancaster & Birch (1693), 4 Mod. Rep. 200.

**60. ———.**—*R. v. ETON COLLEGE*, No. 8, *ante*.

**61. ———.**—Incumbent created colonial bishop—Bishopric constituted by royal prerogative.—*R. v. ETON COLLEGE*, No. 48, *ante*.

**62. ———.**—Bishopric constituted by legislation.—*R. v. ETON COLLEGE*, No. 48, *ante*.

**63. ———.**—Loss of right—By suffering stranger to present.—*BASSET v. GEE*, No. 59, *ante*.

**64. ———.**—Failure to present during lifetime of late incumbent.—The King by his prerogative has a right to present to a church which becomes vacant by his promoting the incumbent to a bishopric, but this right must be exercised in the lifetime of the person promoted, otherwise the King's turn is lost.—*ARMAGH* (ARCHBP.) v. A.-G. (1730), 3 Bro. Parl. Cas. 514, n.; 1 Barn. K. B. 329; 1 E. R. 1403, H. L.

**65. By lapse—Grant of advowson by Crown during avoidance—No express grant of present avoidance—Presentation by Crown valid.**—(1) If a benefice avoid by acceptance of another, no subsequent dispensation under 28 Hen. 8, c. 10, can restore without a new presentation.

(2) If the King have two titles, as patron of the fee, & by lapse, when the church is void his grant of the advowson without express mention of the immediate presentation, does not pass that.

(3) When the church avoids by resignation, the King can have no advantage of a lapse until after notice given to the patron.—*WESTON'S CASE* (1570), 3 Dyer, 347 a.; 73 E. R. 780.

*Annotations*.—*As to* (1) *Reid*. R. v. Canterbury, Archbp. (1634), Cro. Car. 354. *As to* (2) *Reid*. Mirehouse v. Rennell (1833), 1 Cl. & Fin. 527. *Generally, Mentd*. Porter & Rochester's Case (1608), 13 Co. Rep. 4.

**66. ———.**—What amounts to lapse.—*LEWES v. PREDRETH* (1581), Sav. 17; 123 E. R. 988.

**67. ———.**—Presentation as supreme patron.—*THORNTON v. SAVILL* (1622), Palm. 306; 81 E. R. 1095; *sub nom. SAVILE v. THORNTON*, Cro. Jac. 650; W. Jo. 11.

*Annotations*.—*Mentd*. R. v. Chester, Bp. (1697), 1 Ld. Raym. 292; R. v. Whaley (1729), 1 Barn. K. B. 170.

**68. ———.**—Right of presentation in bishop—Subsequent deprivation of bishop.—*Qu.*: whether the King or Metropolitan shall have the presentation, upon the deprivation of a bishop, to a church devolved to the bishop by lapse.—*MERTON COLLEGE, OXFORD CASE* (1553), 1 Dyer, 87 b; 73 E. R. 180.

*Annotations*.—*Reid*. Colt & Glover v. Coventry & Lichfield, Bp. (1617), Hob. 140; Mirehouse v. Rennell (1833), 1 Cl. & Fin. 527.

**69. ———.**—Subsequent death of bishop.—*COMMENDAM CASE*, *COLT & GLOVER v. COVENTRY & LICHFIELD* (Bp.) (1617), Hob. 140; Moore, K. B. 898; 80 E. R. 290; *sub nom. COLT v. GLOVER*, 1 Roll. Rep. 451; *sub nom. COLT'S CASE*, Jenk. 300, Ex. Ch.

*Annotations*.—*Reid*. Mirehouse v. Rennell (1833), 1 Cl. & Fin. 527. *Mentd*. Manby v. Scott (1662), O. Bridg. 229; Edes v. Oxford, Bp. (1667), Vaugh. 18; R. v. Worcester, Bp., Jervason & Hinkley (1670), 1 Mod. Rep. 276; Thomas v. Sorrell (1673), Freem. K. B. 85; Hornbee, Williamson, Smith & Stone's Petition (1691), Freem. K. B. 331; Shatter v. Friend (1691), 1 Show. 172; Harcourt v. Fox (1693), 4 Mod. Rep. 167; R. v. London, Bp. (1694), Comb. 300; Owen v. Saunders (1697), 1 Ld. Raym. 158; Reynoldson v. Blake (1697), 1 Ld. Raym. 192; Cole v. Hawkins (1717), 1 Stra. 21; Thornby v. Fleetwood (1720), 1 Stra. 318; Bellamy v. Burrow (1735), Cas. temp. Talb. 97; Roe d. Berkerley v. York, Archbp. (1805), 6 East. 86; Denn v. Roake (1820), 5 B. & C. 720; Rennell v. Lincoln, Bp. (1827), 7 B. & C. 113; Osgood v. Nelson (1869), 10 B. & S. 119; Itumsey v. Nicholl (1877), 2 C. P. D. 179; Roberts v. London Corp. (1882), 30 W. R. 637.

**70. ———.**—Bishop patron in right of his see.—(1) When an advowson attached to a prebend falls vacant, & before filling it up the prebendary

#### PART III. SECT. 3, SUB-SECT. 2.

b. When patron is a lunatic.—The Crown has a right to present to a benefice of which the patron is a lunatic.—*IRIZORRALD* (1805), 2 Sch. & Lef. 432.—*IR*.

*the Church: Sub-*  
**Sect. 3.—The Crown in relation to sub-sect. 1, A. & B.]**  
**sects. 2, 3 & 4. Sect. 4: S.**

dies, the presentation belongs to the administratrix & not to the successor, nor is a bishop & entitled

(2) Where the payment of his see, if the bishop to the living in vacancy & before it is filled up, dies after the death of the exors. of the bishop shall the King & GASELEE, J.).

present if the vacancy remains unfilled, not only

(3) After the consecration of the new bishop, without after restitution of the temporalities, the vacancy is still to be supplied by the King or his grantee & not by the new bishop (GASELEE, J.).

—MIREHOUSE v. RENNELL (1833), 1 Cl. & Fin. 527; 7 Bl. N. S. 241; 8 Bing. 490; 1 Moo. & S. 683; 6 E. R. 1015, H. L.; *affg.* S. C. *sub nom.* RENNELL v. LINCOLN (Bp.) (1827), 7 B. & C. 113.

*Annotations:—As to (3) Consl.* Alston v. Atlay (1837), 7 Ad. & El. 289. *Refd.* Edwards v. Exeter, Bp. (1839), 7 Scott, 652; Howley v. Knight (1849), 19 L. J. Q. B. 3; Ford v. Harrington (1869), L. R. 5 C. P. 282; Walsh v. Lincoln, Bp. (1875), L. R. 10 C. P. 518. *Generally, Mentd.* Bradburne v. Botfield (1845), 14 M. & W. 559.

**71. — Consecration of new bishop & restitution of temporalities.]**—MIREHOUSE v. RENNELL, No. 70, *ante*.

**72. — Benefice becoming void while bishopric vacant.]**—The temporalities of a vacant Bishopric are in the hands of the King, till the Bishop sues his writ of restitution of the temporalities; & if a benefice become void in the meantime, the Crown may present to it.—*Ex p.* TARRANT (1783), Rom. 119.

**73. — Patronage in bishop's grantee—Death of bishop after vacancy.]**—(1) An archbishop devised his options to trustees, regard being had in the disposition of them according to their discretion, to his eldest son, the husbands of his daughters, his present & former chaplains, etc.:—*Held*: this was a personal trust, & the trusteeship of C. being vacant, one of the trustees might present the other, he being within the description in the will.

(2) In no case does the ct. grant injunction of course, till hearing.

(3) A surviving trustee can not present himself.

(4) If the bishop, from whom the Archbishop takes the option, dies or is translated before vacancy, the option is lost.

(5) The exors. of the Archbishop cannot present after the death of the bishop, though the vacancy happened in his lifetime; but the presentation falls to the Crown.—POTTER v. CHAPMAN (1750), Amb. 98; 27 E. R. 61, L. C.

*Annotations:—As to (1) Refd.* Brown v. Higgs (1803), 8 Ves. 561; Mirehouse v. Rennell (1833), 7 Bl. N. S. 241. *As to (3) Refd.* Walsh v. Lincoln, Bp. (1875), L. R. 10, C. P. 518.

**74. — Effect of presentation by stranger—Death or resignation of presentee.]**—RINDELTON v. THORNEWELL (prior to 1588), cited in Moore, K. B. 260; 72 E. R. 567.

**75. — Effect of presentation by patron before Crown.]**—BEVERLEY v. CANTERBURY (ARCHBP.) (1584), Owen, 2; Moore, K. B. 224; 74 E. R. 850.

*Annotation:—Refd.* Barker v. London, Bp. (1790), 1 Hy. Bl. 412.

**76. — Death of presentee.]**—Title to present by lapse devolved on the Queen. The patron presented one A., who was admitted, instituted, & inducted, & died:—*Held*: the Queen had lost her title to present by lapse.—BASKERVILLE'S CASE (1585), 7 Co. Rep. 28 a; 77 E. R. 452.

*Annotations:—Refd.* Winchcombe v. Winchester, Bp. &

Pulleston (1616), Hob. 165; Comendam's Case, Woodley v. Exeter, Bp. & Manning (1624), Win. 94 R. v. Canterbury, Archbp. (1634), Cro. Car. 354.

**77. — R. v. LINCOLN & LIGH (1588), Cro. Eliz. 119; 78 E. R. 377; sub nom. LINCOLNE'S (Bp.) CASE, Owen, 89; sub nom. R. v. CLARKE, BLOWER & AUSTIN, 2 Lut. 1078.**

**78. — Effect of death of presentee before induction.]**—WRIGHT & NORWICHES (Bp.) CASE (1590), 1 Leon. 156; 74 E. R. 144.

*Annotation:—Refd.* A.-G. v. London Bp. & Lancaster & Birch (1693), 4 Mod. Rep. 200.

**79. — Within what time Crown must present.]**—(1) If title of lapse accrue to the King & the patron present, yet the King may present at any time as long as that presentee is parson; but if the presentee die or resign before the King has presented, the King has now lost his presentment, except the resignation be by covin with an intent to take away the King's title; for the King shall not lose it thereby (*per CUR.*).

(2) If the King has title by lapse because a parson has taken a second benefice; if the parson die or resign the first benefice & the patron present, whose presentee resigns upon covin, or dies, the King has lost that presentment for lapse is but *unica et proxima vice* (*per CUR.*).—CUMBER v. CHICHESTER (Bp.) & GREEN (1609), Cro. Jac. 216; 79 E. R. 188; *sub nom.* COMBER v. CHICHESTER (Bp.), 1 Brownl. 161.

**80. — Presentation by Crown without title of lapse—Recovery by stranger.]**—RUD v. LINCOLN (Bp.) (1623), Hut. 66; 123 E. R. 1105.

*Annotations:—Mentd.* Cornwallis v. Hood (1665), Cart. 33; Alston v. Atlay (1837), 7 Ad. & El. 289.

**81. — Death of King—Right of successor.]**—R. v. CANTERBURY (ARCHBP.), No. 2421, *post*.

**82. By turn—Advowson held in common.]**—GROGERS' Co. v. CANTERBURY (ARCHBP.), No. 1958, *post*.

**83. How effected.]**—(1) A presentation by the King of a church in right of a ward may be either under the Great Seal or the seal of the Ct. of Wards; but if it be not in right of a ward, it must be under the Great Seal.

(2) A lease from the Crown is not void, but voidable only, for non-payment of the rent according to the reservation.—STEPHENS v. POTTER (1627), Cro. Car. 99; 79 E. R. 688.

*Annotation:—As to (2) Refd.* Doe d. Hayne v. Redfern (1810), 12 East, 96.

**84. — Church in right of ward.]**—STEPHENS v. POTTER, No. 83, *ante*.

**85. In Duchy of Lancaster.]**—ASTILL v. CLARKE (1697), 2 Lut. 1233; 125 E. R. 684.

**Right of presentation where advowson vested in Roman Catholic & Protestant jointly.]**—See No. 1959, *post*.

#### SUB-SECT. 3.—VISITATORIAL POWER.

**86. Effect of—Whether jurisdiction of courts ousted.]**—The French Protestant Church in London was founded in 1550 by letters patent of the Crown. The pastor, when elected, was presented to, & approved & instituted by the Crown. The governing body had, apart from the charter of incorporation, funds impressed with a trust in favour of the pastor. The governing body dismissed the pastor:—*Held*: this ct. notwithstanding the rights of the Crown as visitor, had jurisdiction to see to the performance of the trust, & to determine on the validity of the dismissal, & the ct., having come to the conclusion that it was not justifiable, should grant an injunction

to restrain the governing body from hindering the pastor in the exercise of his office.

The visitatorial power of the Crown does not remove the jurisdiction of the *et.*, or prevent it from exercising its functions in respect of an existing trust.—*DAUGARS v. RIVAZ* (1860), 28 Beav. 233; 29 L. J. Ch. 685; 3 L. T. 109; 24 J. P. 373; 6 Jur. N. S. 854; 8 W. R. 225; 54 E. R. 355.

*Annotations*:—*Refd.* *Hayman v. Rugby School* (1874), L. R. 18 Eq. 28. *Mentd.* *A.-G. v. Daugars* (1864), 33 Beav. 621.

#### SUB-SECT. 4.—ROYAL PECULIARS.

87. Royal foundation—Priory translated into deanery—No prejudice to founder—Presentation & visitation.]—*TRINITY CHAPEL, DUBLIN (DEAN) v. DUBLIN (ARCHBP.)* (1723), 8 Mod. Rep. 183; *Fortes. Rep.* 329; 88 E. R. 134, II. L.

88. — Monastery converted into deanery.]—*COMBE v. DE LA BERE*, No. 1543, *post*.

89. Subject only to the Crown—Independent of Archbishop.]—A Royal Peculiar is in no degree subject to the Archbishop; it is independent of him: it is out of his province in point of jurisdiction as much as the province of York or of Dublin: it is co-ordinate (*SIR JOHN NICHOLL*).—(*CROWLEY v. CROWLEY* (1744), 3 Hag. Ecc. 758, n.; 102 E. R. 1335.

90. —.]—*COMBE v. DE LA BERE*, No. 1513, *post*.

### SECT. 4.—CONSTITUTION OF THE CHURCH INTO PROVINCES.

#### SUB-SECT. 1.—ARCHBISHOPS.

##### A. In General.

91. Dignitaries of the church.]—*BOUGHTON v. GOUSLEY* (1599), Cro. Eliz. 603; 78 E. R. 902.

92. Power of dispensation—Compared with papal power.]—*COMMENDAM CASE, COLT & GLOVER v. COVENTRY & LICHFIELD (BP.)* (1617), Hob. 140; Moore, K. B. 898; 80 E. R. 290; *sub nom.* *COLT v. GLOVER*, 1 Roll. Rep. 451; *sub nom.* *COLT'S CASE*, Jenk. 300, Ex. Ch.

*Annotations*:—*Refd.* *Edos v. Oxford*, Bp. (1667), Vaugh. 18; *Thomas v. Sorrell* (1673), Freem. K. B. 85; *It. v. London, Bp. & Lancaster* (1694), Comb. 300; *Heynoldson v. Blake* (1697), 1 Ld. Raym. 192. *Mentd.* *Manby v. Scott* (1662), O. Bridg. 229; *It. v. Worcester, Bp.*, *Jervason & Hinkley* (1670), 1 Mod. Rep. 276; *Shatter v. Friend* (1690), 1 Show. 172; *Hornbee's Petn.* (1691), Freem. K. B. 331; *Harcourt v. Fox* (1693), 4 Mod. Rep. 167; *Owen v. Saunders* (1697), 1 Ld. Raym. 153; *Thoraby v. Fleetwood* (1720), 1 Stu. 318; *Bellamy v. Burrow* (1736), Cas. temp. Taib. 97; *Roe d. Berkeley v. York, Archbp.* (1805), 6 East. 86; *Donn d. Nowell v. Roake* (1826), 5 B. & C. 720; *Mirhouse v. Rennell* (1832), 8 Bing. 490; *It. Gibbs* (1845), 5 L. T. O. S. 475; *Osgood v. Nelson* (1869), 10 B. & S. 119; *Rumsey v. Nicholl* (1877), 2 C. P. D. 179; *Robarts v. London Corp.* (1882), 30 W. R. 637.

93. Rights in respect of peculiars—On death of intestate owning property therein.]—*TULL v. OSBERSON* (1662), 1 Sid. 90; 82 E. R. 989.

94. Jurisdiction—Provincial & diocesan.]—*GRANGE v. DENNY*, No. 204, *post*.

95. — Whether acts void or voidable.]—*WRIGHTON v. BROWNE* (1685), 3 Lev. 211; 83 E. R. 655.

96. — Exercise of diocesan jurisdiction sede vacante.]—*GRANGE v. DENNY*, No. 204, *post*.

97. — Over bishops of province.]—(*CHESTER'S (BP.) CASE*, No. 99, *post*.

Election of bishop—Confirmation.]—*See Sect. 5*, sub-sect. 1, *post*.

#### B. Judicial Jurisdiction.

98. Proceeding against bishop—In matter of lay cause.]—The bishop of Durham imprisoned one for a lay cause; whereupon the Archbishop of York, as his sovereign, cited him to appear before him to answer for that imprisonment; whereupon complaint being made to the King in Parliament, the matter was heard there, & the Archbishop submitted himself to the King's grace, & was fined 4,000 marks.—*ANON.* (prior to 1590), Cro. Eliz. 484; 78 E. R. 730.

99. — Offence cognisable by temporal court.]—(1) The Archbishop has a power over his suffragans, & may deprive them for an offence committed against the spiritual duties of their office; (2) but if the libel also contain charges of a nature cognisable by the Temporal Courts, a prohibition shall go as to those charges.—*CHESTER'S (BP.) CASE* (1699), 5 Mod. Rep. 433; 87 E. R. 749; *sub nom.* *St. David's (BP.) v. Lucy*, Carth. 484; Holt, K. B. 651; 1 Ld. Raym. 447; 1 Salk. 134.

*Annotations*:—*As to* (1) *Folld. Read v. Lincoln, Bp.* (1889), 14 P. D. 88. *As to* (2) *Conad. It. York, Dean* (1841), 2 Q. B. 1. *Refd.* *It. Tristram*, [1902] 1 K. B. 816. *Generally, Mentd.* *Middleton v. Crofts* (1730), 2 Atk. 650; *Marsden v. Wardle* (1854), 2 W. R. 455; *Shepherd v. Payne* (1863), 9 Jur. N. S. 354; *Blane v. Geraghty* (1866), 15 W. R. 133; *McGeath v. Geraghty* (1866), 15 W. R. 127; *Boyd v. Philipotts* (1874), L. R. 4 A. & E. 297; *Combe v. De La Bere* (1881), 6 P. D. 157; *It. Haigh with Aspull, New Parish*, [1919] P. 143.

100. — Ecclesiastical offence.]—*CHESTER'S (BP.) CASE*, No. 99, *ante*.

101. —.]—The Bishop of Lincoln was cited to appear before the Archbishop of Canterbury to answer the charge of having been guilty of illegal practices in the conduct of divine service. The bishop appeared under protest denying that the archbishop had jurisdiction to try a bishop of the Province of Canterbury, & affirming that the proper tribunal was the archbishop & other bishops of the province assembled in Convocation or otherwise:—*Held*: the archbishop sitting alone or with assessors had jurisdiction to entertain the charge.—*READ v. LINCOLN (BP.)* (1889), 14 P. D. 88; 61 L. T. 403; *Roscoe's Rep.* 1.

*Annotation*:—*Mentd.* *Marshall v. Graham*, Bell v. Graham, [1907] 2 K. B. 112.

102. Refusal to exercise—Whether appeal lies.]

—The archbishop has jurisdiction to cite a bishop in respect of ecclesiastical offences, & an appeal lies to Her Majesty in Council from his refusal to exercise such jurisdiction.—*Ex p. READ* (1888), 13 P. D. 221; 58 L. J. P. C. 32; *sub nom.* *READ v. CANTERBURY (ARCHBP.)*, 59 L. T. 909; 4 T. L. R. 741, P. C.

103. Power of deprivation—Common law power.]—*CHESTER'S (BP.) CASE*, No. 99, *ante*.

104. To determine lecturer's right to place—Though licence necessary.]—The Archbishop or bishop must license a lecturer; but they cannot determine his right to the place.—*ST. BARTHOLOMEW'S (CHURCHWARDENS) CASE* (1700), 3 Salk.

#### PART III. SECT. 4, SUB-SECT. 1.—A.

a. "Lord Primate of All Ireland"

—Title held by Archbishop of Armagh.]

—A settlement made in 1849 for the benefit of the Church of Ireland gave

a power of appointing new trustees to the "Lord Primate of All Ireland" for the time being:—*Held*: the power of appointment was still exercisable by the Archbishop of Armagh, as the title of Lord Primate of All Ireland was not,

by the Irish Church Act, 1869, taken away from the Archbishops of Armagh. —*See MARSHAL BERSFORD'S TRUST FUND, ALDENHAM (LORD) v. ARMAUGH (ARCHBP.)* (1917), 33 T. L. R. 208, 1R.

*the Church: Sub-*  
**Sect. 3.—The Crown in relation to sub-sect. 1, A. & B.]**  
**sects. 2, 3 & 4. Sect. 4: S.**

dies, the presentation belongs to the administratrix & not to the successor, nor is a bishop & entitled

(2) Where the p<sup>re</sup>sent of his see, if the bishop to the living in p<sup>re</sup>vacancy & before it is filled up, dies after the p<sup>re</sup>sent the exors. of the bishop shall the King & GASELEE, J.).

present (if the vacancy remains unfilled, not only

(3) After the consecration of the new bishop, without after restitution of the temporalities, the vacancy is still to be supplied by the King or his grantee & not by the new bishop (GASELEE, J.).

—MIREHOUSE v. RENNELL (1833), 1 Cl. & Fin. 527; 7 Bli. N. S. 241; 8 Bing. 490; 1 Moo. & S. 683; 6 E. R. 1015, H. L.; *affy.* S. C. *sub nom.* RENNELL v. LINCOLN (BP.) (1827), 7 B. & C. 113.

*Annotations:—As to (3) Consd.* Alston v. Atlay (1837), 7 Ad. & El. 289. *Refd.* Edwards v. Exeter, Bp. (1839), 7 Scott. 652; Howley v. Knight (1849), 19 L. J. Q. B. 3; Ford v. Harrington (1869), L. R. 5 C. P. 282; Walsh v. Lincoln, Bp. (1875), L. R. 10 C. P. 518. *Generally, Mentd.* Bradburne v. Rothfield (1845), 14 M. & W. 558.

**71. — Consecration of new bishop & restitution of temporalities.]**—MIREHOUSE v. RENNELL, No. 70, *ante*.

**72. — Benefice becoming void while bishopric vacant.]**—The temporalities of a vacant Bishopric are in the hands of the King, till the Bishop sues his writ of restitution of the temporalities; & if a benefice become void in the meantime, the Crown may present to it.—*Ex p.* TARRANT (1783), Rom. 119.

**73. — Patronage in bishop's grantee—Death of bishop after vacancy.]**—(1) An archbishop devised his options to trustees, regard being had in the disposition of them according to their discretion, to his eldest son, the husbands of his daughters, his present & former chaplains, etc.:—*Held*: this was a personal trust, & the trusteeship of C. being vacant, one of the trustees might present the other, he being within the description in the will.

(2) In no case does the ct. grant injunction of course, till hearing.

(3) A surviving trustee can not present himself.

(4) If the bishop, from whom the Archbishop takes the option, dies or is translated before vacancy, the option is lost.

(5) The exors. of the Archbishop cannot present after the death of the bishop, though the vacancy happened in his lifetime; but the presentation falls to the Crown.—POTTER v. CHAPMAN (1750), Amb. 98; 27 E. R. 61, L. C.

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**75. — Effect of presentation by patron before Crown.]**—BEVERLEY v. CANTERBURY (ARCHBP.) (1584), Owen, 2; Moore, K. B. 224; 74 E. R. 856.

*Annotation:—Refd.* Barker v. London, Bp. (1790), 1 Hy. Bl. 412.

**76. — Death of presentee.]**—Title to present by lapse devolved on the Queen. The patron presented one A., who was admitted, instituted, & inducted, & died:—*Held*: the Queen had lost her title to present by lapse.—BASKERVILLE'S CASE (1585), 7 Co. Rep. 28 a; 77 E. R. 452.

*Annotations:—Refd.* Winchcombe v. Winchester, Bp. &

Pulleston (1616), Hob. 165; Comendam's Case, Woodley v. Exeter, Bp. & Manning (1624), Win. 94 R. v. Canterbury, Archbp. (1634), Cro. Car. 354.

**77. — R. v. LINCOLN & LIGH (1588), Cro. Eliz. 119; 78 E. R. 377; sub nom. LINCOLNE'S (BP.) CASE, Owen, 89; sub nom. R. v. CLARKE, BLOWER & AUSTIN, 2 Lut. 1078.**

**78. — Effect of death of presentee before induction.]**—WRIGHT & NORWICHES (BP.) CASE (1590), 1 Leon. 156; 74 E. R. 144.

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**79. — Within what time Crown must present.]**—(1) If title of lapse accrue to the King & the patron present, yet the King may present at any time as long as that presentee is parson; but if the presentee die or resign before the King has presented, the King has now lost his presentment, except the resignation be by covin with an intent to take away the King's title; for the King shall not lose it thereby (*per* CUR.).

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**80. — Presentation by Crown without title of lapse—Recovery by stranger.]**—RUD v. LINCOLN (BP.) (1623), 1 Hut. 66; 123 E. R. 1105.

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**81. — Death of King—Right of successor.]**—R. v. CANTERBURY (ARCHBP.), No. 2421, *post*.

**82. By turn—Advowson held in common.]**—GROCERS' Co. v. CANTERBURY (ARCHBP.), No. 1958, *post*.

**83. How effected.]**—(1) A presentation by the King of a church in right of a ward may be either under the Great Seal or the seal of the Ct. of Wards; but if it be not in right of a ward, it must be under the Great Seal.

(2) A lease from the Crown is not void, but voidable only, for non-payment of the rent according to the reservation.—STEPHENS v. POTTER (1627), Cro. Car. 99; 79 E. R. 688.

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**85. In Duchy of Lancaster.]**—ASTILL v. CLARKE (1697), 2 Lut. 1233; 125 E. R. 684.

**Right of presentation where advowson vested in Roman Catholic & Protestant jointly.]**—See No. 1059, *post*.

#### SUB-SECT. 3.—VISITATORIAL POWER.

**86. Effect of—Whether jurisdiction of courts ousted.]**—The French Protestant Church in London was founded in 1550 by letters patent of the Crown. The pastor, when elected, was presented to, & approved & instituted by the Crown. The governing body had, apart from the charter of incorporation, funds impressed with a trust in favour of the pastor. The governing body dismissed the pastor:—*Held*: this ct. notwithstanding the rights of the Crown as visitor, had jurisdiction to see to the performance of the trust, & to determine on the validity of the dismissal, & the ct., having come to the conclusion that it was not justifiable, should grant an injunction

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The visitatorial power of the Crown does not remove the jurisdiction of the et., or prevent it from exercising its functions in respect of an existing trust.—*DAUGARS v. RIVAZ* (1860), 28 Beav. 233; 29 L. J. Ch. 685; 3 L. T. 109; 24 J. P. 373; 6 Jur. N. S. 854; 8 W. R. 225; 54 E. R. 355.

*Annotations*:—*Reid*. Hayman v. Rugby School (1874), L. R. 18 Eq. 28. *Mentd.* A.-G. v. Daugars (1864), 33 Beav. 621.

#### SUB-SECT. 4.—ROYAL PECULIARS.

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88. — Monastery converted into deanery.]—*COMBE v. DE LA BERE*, No. 1543, *post*.

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90. —.]—*COMBE v. DE LA BERE*, No. 1543, *post*.

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*Annotations*:—*Reid*. Edos v. Oxford, Bp. (1667), Vaugh. 18; Thomas v. Sorrell (1673), Freeman, K. B. 85; It. v. London, Bp. & Lancaster (1694), Comb. 300; Reynolds v. Blake (1697), 1 Ld. Raym. 102. *Mentd.* Manby v. Scott (1662), O. Bridg. 229; R. v. Worcester, Bp., Jervason & Hinkley (1670), 1 Mod. Rep. 276; Shatter v. Friend (1690), 1 Show. 172; Hornbee's Petn. (1691), Freeman, K. B. 331; Harcourt v. Fox (1693), 4 Mod. Rep. 167; Owen v. Saunders (1697), 1 Ld. Raym. 158; Thornby v. Fleetwood (1720), 1 Str. 318; Bellamy v. Burrow (1736), Cas. temp. Talb. 97; Roe d. Berkeley v. York, Archbp. (1805), 6 East, 86; Donn d. Nowell v. Roake (1826), 5 B. & C. 720; Mirc. house v. Rennell (1832), 8 Bing. 490; R. d. Gibbs (1845), 5 L. T. O. S. 475; Osrood v. Nelson (1869), 10 B. & S. 119; Rumsey v. Nichol (1877), 2 C. P. D. 179; Roberts v. London Corp. (1882), 30 W. R. 637.

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95. — Whether acts void or voidable.]—*WRIGHTON v. BROWNE* (1685), 3 Lev. 211; 83 E. R. 655.

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Election of bishop—Confirmation.]—*See Sect. 5*, sub-sect. 1, *post*.

#### B. Judicial Jurisdiction.

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101. —.]—The Bishop of Lincoln was cited to appear before the Archbishop of Canterbury to answer the charge of having been guilty of illegal practices in the conduct of divine service. The bishop appeared under protest denying that the archbishop had jurisdiction to try a bishop of the Province of Canterbury, & affirming that the proper tribunal was the archbishop & other bishops of the province assembled in Convocation or otherwise:—*Held*: the archbishop sitting alone or with assessors had jurisdiction to entertain the charge.—*READ v. LINCOLN (BP.)* (1889), 14 P. D. 88; 61 L. T. 403; Itoscoe's Rep. 1.

*Annotation*:—*Mentd.* Marshall v. Graham, Bell v. Graham, [1907] 2 K. B. 112.

102. Refusal to exercise—Whether appeal lies.]

—The archbishop has jurisdiction to cite a bishop in respect of ecclesiastical offences, & an appeal lies to Her Majesty in Council from his refusal to exercise such jurisdiction.—*Ex p. READ* (1888), 13 P. D. 221; 58 L. J. P. C. 32; *sub nom.* *READ v. CANTERBURY (ARCHBP.)*, 59 L. T. 909; 4 T. L. R. 741, P. C.

103. Power of deprivation—Common law power.]—*CHESTER'S (BP.) CASE*, No. 99, *ante*.

104. To determine lecturer's right to place—Though licence necessary.]—The Archbishop or bishop must license a lecturer; but they cannot determine his right to the place.—*ST. BARTHOLOMEW'S (CHURCHWARDENS) CASE* (1700), 3 Salk.

#### PART III. SECT. 4, SUB-SECT. 1.—A.

a. "Lord Primate of All Ireland"  
—*Title held by Archbishop of Armagh.*  
—A settlement made in 1849 for the benefit of the Church of Ireland gave

a power of appointing new trustees to the "Lord Primate of All Ireland" for the time being:—*Held*: the power of appointment was still exercisable by the Archbishop of Armagh, as the title of Lord Primate of All Ireland was not,

by the Irish Church Act, 1869, taken away from the Archbishops of Armagh.  
—*Re MARSHAL, HEREFORD'S TRUST FUND, ALDENHAM (LORD) v. ARMAGH (ARCHBP.)* (1917), 33 T. L. R. 208.—*IR.*



**Sect. 3.—The Crown in relation to the Church: Sub-sects. 2, 3 & 4. Sect. 4: Sub-sect. 1, A. & B.]**

dies, the presentation belongs to the administratrix & not to the successor.

(2) Where the patron is a bishop & entitled to the living in right of his see, if the bishop dies after the vacancy & before it is filled up, the King & not the exors. of the bishop shall present (Gaselee, J.).

(3) If the vacancy remains unfilled, not only until after the consecration of the new bishop, but after restitution of the temporalities, the vacancy is still to be supplied by the King or his grantee & not by the new bishop (Gaselee, J.).—MIREHOUSE v. RENNEL (1833), 1 Cl. & Fin. 527; 7 Bll. N. S. 241; 8 Bing. 490; 1 Moo. & S. 683; 6 E. R. 1015, H. L.; affg. S. C. sub nom. RENNEL v. LINCOLN (BP.) (1827), 7 B. & C. 113.

**Annotations:—**As to (3) *Consd.* Alston v. Atlay (1837), 7 Ad. & El. 289. *Refd.* Edwards v. Exeter, Bp. (1839), 7 Scott, 652; Howley v. Knight (1840), 19 L. J. Q. B. 3; Ford v. Harrington (1869), L. R. 5 C. P. 282; Walsh v. Lincoln, Bp. (1875), L. R. 10 C. P. 518. *Generally, Mentd.* Bradburne v. Botfield (1845), 14 M. & W. 559.

**71. — Consecration of new bishop & restitution of temporalities.]—**MIREHOUSE v. RENNEL, No. 70, *ante*.

**72. — Benefice becoming void while bishopric vacant.]—**The temporalities of a vacant bishopric are in the hands of the King, till the Bishop sues his writ of restitution of the temporalities; & if a benefice become void in the meantime, the Crown may present to it.—*Ex p.* TARRANT (1783), Rom. 119.

**73. — Patronage in bishop's grantee—Death of bishop after vacancy.]—**(1) An archbishop devised his options to trustees, regard being had in the disposition of them according to their discretion, to his eldest son, the husbands of his daughters, his present & former chaplains, etc.:—*Held*: this was a personal trust, & the trusteeship of C. being vacant, one of the trustees might present the other, he being within the description in the will.

(2) In no case does the ct. grant injunction of course, till hearing.

(3) A surviving trustee can not present himself.

(4) If the bishop, from whom the Archbishop takes the option, dies or is translated before vacancy, the option is lost.

(5) The exors. of the Archbishop cannot present after the death of the bishop, though the vacancy happened in his lifetime; but the presentation falls to the Crown.—POTTER v. CHAPMAN (1750), Amb. 98; 27 E. R. 61, L. C.

**Annotations:—**As to (1) *Refd.* Brown v. Higgs (1803), 8 Ves. 561; Mirehouse v. Rennell (1833), 7 Bll. N. S. 241. As to (3) *Refd.* Walsh v. Lincoln, Bp. (1875), L. R. 10, C. P. 518.

**74. — Effect of presentation by stranger—Death or resignation of presentee.]—**RINDELTON v. THORNEWELL (prior to 1588), cited in Moore, K. B. 200; 72 E. R. 507.

**75. — Effect of presentation by patron before Crown.]—**BEVERLEY v. CANTERBURY (ARCHBP.) (1584), Owen, 2; Moore, K. B. 224; 74 E. R. 856.

**Annotation:—***Refd.* Barker v. London, Bp. (1790), 1 Hy. Bl. 412.

**76. — Death of presentee.]—**Title to present by lapse devolved on the Queen. The patron presented one A., who was admitted, instituted, & inducted, & died:—*Held*: the Queen had lost her title to present by lapse.—BASKERVILLE'S CASE (1585), 7 Co. Rep. 28 a; 77 E. R. 452.

**Annotations:—***Refd.* Winchcombe v. Winchester, Bp. &

Pulleston (1616), Hob. 165; Comendani's Case, Woodley v. Exeter, Bp. & Mannering (1624), Wln. 94 R. v. Canterbury, Archbp. (1634), Cro. Car. 354.

**77. —**—R. v. LINCOLN & LIGH (1588), Cro. Eliz. 119; 78 E. R. 377; sub nom. LINCOLNE'S (BP.) CASE, Owen, 89; sub nom. R. v. CLARKE, BLOWER & AUSTIN, 2 Lut. 1078.

**78. — Effect of death of presentee before induction.]—**WRIGHT & NORWICHES (BP.) CASE (1590), 1 Leon. 150; 74 E. R. 144.

**Annotation:—***Refd.* A.-G. v. London Bp. & Lancaster & Birch (1693), 4 Mod. Rep. 200.

**79. — Within what time Crown must present.]—**(1) If title of lapse accrue to the King & the patron present, yet the King may present at any time as long as that presentee is parson; but if the presentee die or resign before the King has presented, the King has now lost his presentment, except the resignation be by covin with an intent to take away the King's title; for the King shall not lose it thereby (*per Cur.*).

(2) If the King has title by lapse because a parson has taken a second benefice; if the parson die or resign the first benefice & the patron present, whose presentee resigns upon covin, or dies, the King has lost that presentment for lapse is but *united et proxima vice* (*per Cur.*).—CUMBER v. CHICHESTER (BP.) & GREEN (1609), Cro. Jac. 216; 79 E. R. 188; sub nom. COMBER v. CHICHESTER (BP.), 1 Brownl. 161.

**80. — Presentation by Crown without title of lapse—Recovery by stranger.]—**RUD v. LINCOLN (BP.) (1623), Hut. 66; 123 E. R. 1105.

**Annotations:—***Mentd.* Cornwallis v. Hood (1665), Cart. 33; Alston v. Atlay (1837), 7 Ad. & El. 289.

**81. — Death of King—Right of successor.]—**R. v. CANTERBURY (ARCHBP.), No. 2421, *post*.

**82. By turn—Advowson held in common.]—**GROGERS' CO. v. CANTERBURY (ARCHBP.), No. 1958, *post*.

**83. How effected.]—**(1) A presentation by the King of a church in right of a ward may be either under the Great Seal or the seal of the Ct. of Wards; but if it be not in right of a ward, it must be under the Great Seal.

(2) A lease from the Crown is not void, but voidable only, for non-payment of the rent according to the reservation.—STEPHENS v. POTTER (1627), Cro. Car. 99; 79 E. R. 688.

**Annotation:—**As to (2) *Refd.* Doe d. Hayne v. Redfern (1810), 12 East, 96.

**84. — Church in right of ward.]—**STEPHENS v. POTTER, No. 83, *ante*.

**85. In Duchy of Lancaster.]—**ASTILL v. CLARKE (1697), 2 Lut. 1233; 125 E. R. 684.

**Right of presentation where advowson vested in Roman Catholic & Protestant jointly.]—**See No. 1959, *post*.

#### SUB-SECT. 3.—VISITATORIAL POWER.

**86. Effect of—Whether jurisdiction of courts ousted.]—**The French Protestant Church in London was founded in 1550 by letters patent of the Crown. The pastor, when elected, was presented to, & approved & instituted by the Crown. The governing body had, apart from the charter of incorporation, funds impressed with a trust in favour of the pastor. The governing body dismissed the pastor:—*Held*: this ct. notwithstanding the rights of the Crown as visitor, had jurisdiction to see to the performance of the trust, & to determine on the validity of the dismissal, & the ct., having come to the conclusion that it was not justifiable, should grant an injunction

to restrain the governing body from hindering the pastor in the exercise of his office.

The visitatorial power of the Crown does not remove the jurisdiction of the ct., or prevent it from exercising its functions in respect of an existing trust.—*DAUGARS v. RIVAZ* (1860), 28 Beav. 233; 29 L. J. Ch. 685; 3 L. T. 109; 24 J. P. 373; 6 Jur. N. S. 854; 8 W. R. 225; 54 E. R. 355.

*Annotations*.—*Reid*. *Hayman v. Rugby School* (1874), L. R. 18 Eq. 28. *Mentd.* *A.-G. v. Daugars* (1864), 33 Beav. 621.

#### SUB-SECT. 4.—ROYAL PECULIARS.

87. Royal foundation—Priory translated into deanery—No prejudice to founder—Presentation & visitation.]—*TRINITY CHAPEL, DUBLIN (DEAN) v. DUBLIN (ARCHBP.)* (1723), 8 Mod. Rep. 183; *Fortes. Rep.* 329; 88 E. R. 134, H. L.

88. — Monastery converted into deanery.]—*COMBE v. DE LA BERE*, No. 1543, *post*.

89. Subject only to the Crown—Independent of Archbishop.]—A Royal Peculiar is in no degree subject to the Archbishop; it is independent of him: it is out of his province in point of jurisdiction as much as the province of York or of Dublin: it is co-ordinate (*SIR JOHN NICHOLL*).—(*ROWLEY v. CROWLEY* (1744), 3 Hag. Ecc. 758, n.; 162 E. R. 1335.

90. —.]—*COMBE v. DE LA BERE*, No. 1513, *post*.

### SECT. 4.—CONSTITUTION OF THE CHURCH INTO PROVINCES.

#### SUB-SECT. 1.—ARCHBISHOPS.

##### A. In General.

91. Dignitaries of the church.]—*BOUGHTON v. GOUSLEY* (1599), Cro. Eliz. 663; 78 E. R. 902.

92. Power of dispensation—Compared with papal power.]—*COMMENDAM CASE, COLT & GLOVER v. COVENTRY & LICHFIELD (Bp.)* (1817), Hob. 140; Moore, K. B. 898; 80 E. R. 290; *sub nom.* *COLT v. GLOVER*, 1 Roll. Rep. 451; *sub nom.* *COLT'S CASE*, Jenk. 300, Ex. Ch.

*Annotations*.—*Reid*. *Edes v. Oxford, Bp.* (1667), Vaugh. 18; *Thomas v. Sorrell* (1673), Freem. K. B. 85; *It. v. London, Bp. & Lancaster* (1694), Comb. 300; *Reynoldson v. Blake* (1697), 1 Ld. Raym. 192. *Mentd.* *Manby v. Scott* (1682), O. Bridg. 229; *It. v. Worcester, Bp.*, *Jorvason & Hinkley* (1670), 1 Mod. Rep. 276; *Shatter v. Friend* (1690), 1 Show. 172; *Hornbee's Petn.* (1691), Freem. K. B. 331; *Harcourt v. Fox* (1693), 4 Mod. Rep. 167; *Owen v. Saunders* (1697), 1 Ld. Raym. 158; *Thornby v. Fleetwood* (1720), 1 Stra. 318; *Belamy v. Burrow* (1736), Cas. temp. Talb. 97; *Roe d. Berkeley v. York, Archbp.* (1805), 6 East. 86; *Denn d. Nowell v. Roske* (1826), 5 B. & C. 720; *Mirohouse v. Rennell* (1832), 8 Bing. 490; *Re Gibbs* (1845), 5 L. T. O. S. 475; *Osgood v. Nelson* (1869), 10 B. & S. 119; *Rumsey v. Nicholl* (1877), 2 C. P. D. 179; *Robarts v. London Corp.* (1882), 30 W. R. 637.

93. Rights in respect of peculiars.—On death of intestate owning property therein.]—*TULL v. OSBERSON* (1662), 1 Sid. 90; 82 E. R. 989.

94. Jurisdiction—Provincial & diocesan.]—*GRANGE v. DENNY*, No. 204, *post*.

95. — Whether acts void or voidable.]—*WRIGHTON v. BROWNE* (1885), 3 Lev. 211; 83 E. R. 655.

96. — Exercise of diocesan jurisdiction sede vacante.]—*GRANGE v. DENNY*, No. 204, *post*.

97. — Over bishops of province.]—*CHESTER'S (Bp.) CASE*, No. 99, *post*.

Election of bishop—Confirmation.]—*See* Sect. 5, sub-sect. 1, *post*.

#### B. Judicial Jurisdiction.

98. Proceeding against bishop.—In matter of lay cause.]—The bishop of Durham imprisoned one for a lay cause; whereupon the Archbishop of York, as his sovereign, cited him to appear before him to answer for that imprisonment; whereupon complaint being made to the King in Parliament, the matter was heard there, & the Archbishop submitted himself to the King's grace, & was fined 4,000 marks.—*ANON.* (prior to 1596), Cro. Eliz. 484; 78 E. R. 780.

99. — Offence cognisable by temporal court.]—(1) The Archbishop has a power over his suffragans, & may deprive them for an offence committed against the spiritual duties of their office; (2) but if the libel also contain charges of a nature cognisable by the Temporal Courts, a prohibition shall go as to those charges.—*CHESTER'S (Bp.) CASE* (1699), 5 Mod. Rep. 433; 87 E. R. 749; *sub nom.* *ST. DAVID'S (Bp.) v. LUCY*, Carth. 484; Holt, K. B. 651; 1 Ld. Raym. 447; 1 Salk. 134.

*Annotations*.—*As to* (1) *Folld. Read v. Lincoln, Bp.* (1889), 14 P. D. 88. *As to* (2) *Consd. Re York, Dean* (1841), 2 Q. B. 1. *Reid*. *It. v. Tristram*, [1902] 1 K. B. 816. *Generally, Mentd.* *Middleton v. Crofts* (1730), 2 Atk. 650; *Marsden v. Wardle* (1854), 2 W. R. 455; *Shepherd v. Payne* (1863), 9 Jur. N. S. 354; *Blane v. Geraghty* (1866), 15 W. R. 133; *McGeath v. Geraghty* (1866), 15 W. R. 127; *Boyd v. Philpotts* (1874), L. R. 4 A. & E. 297; *Combe v. De La Bere* (1881), 6 P. D. 157; *Re Haigh with Aspull, New Parish*, [1910] P. 143.

100. — Ecclesiastical offence.]—*CHESTER'S (Bp.) CASE*, No. 99, *ante*.

101. —.]—The Bishop of Lincoln was cited to appear before the Archbishop of Canterbury to answer the charge of having been guilty of illegal practices in the conduct of divine service. The bishop appeared under protest denying that the archbishop had jurisdiction to try a bishop of the Province of Canterbury, & affirming that the proper tribunal was the archbishop & other bishops of the province assembled in Convocation or otherwise:—*Held*: the archbishop sitting alone or with assessors had jurisdiction to entertain the charge.—*READ v. LINCOLN (Bp.)* (1889), 14 P. D. 88; 61 L. T. 403; *Roscoe's Rep.* 1.

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—The archbishop has jurisdiction to cite a bishop in respect of ecclesiastical offences, & an appeal lies to Her Majesty in Council from his refusal to exercise such jurisdiction.—*Ex p. READ* (1888), 13 P. D. 221; 58 L. J. P. C. 32; *sub nom.* *READ v. CANTERBURY (ARCHBP.)*, 59 L. T. 909; 4 T. L. R. 741, P. C.

103. Power of deprivation—Common law power.]—*CHESTER'S (Bp.) CASE*, No. 99, *ante*.

104. To determine lecturer's right to place—Though licence necessary.]—The Archbishop or bishop must license a lecturer; but they cannot determine his right to the place.—*ST. BARTHOLOMEW'S (CHURCHWARDENS) CASE* (1700), 3 Salk.

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a. "Lord Primate of All Ireland"

—Title held by Archbishop of Armagh.]

—A settlement made in 1849 for the benefit of the Church of Ireland gave

a power of appointing new trustees to the "Lord Primate of All Ireland" for the time being:—*Held*: the power of appointment was still exercisable by the Archbishop of Armagh, as the title of Lord Primate of All Ireland was not,

by the Irish Church Act, 1869, taken away from the Archbishop of Armagh.—*Re MARSHAL BEREKSFORD'S TRUST FUND, AIDENHAM (LORD) v. ARMAGH (ARCHBP.)* (1917), 33 T. L. R. 208.—*IR.*

*Sect. 4.—Constitution of the Church into provinces: Sub-sect. 1, B. & C.; sub-sect. 2. Sect. 5: Sub-sect. 1 & 2, A., B. (a) & (b).]*

87; Holt, K. B. 418; 13 East, 421, n.; 91 E. R. 709.

*Annotations:—*Consd. R. v. London, Bp. (1743), 13 East, 420, n. *Refd.* Ferguson v. Kinnoull (1842), 9 Cl. & Fin. 251.

105. As to qualification of representative for convocation.]—*R. v. YORK (ARCHBP.)*, No. 113, *post*.

106. Appellate jurisdiction—From sentence of bishop—Revoking licence of stipendiary curate.]—*POOLE v. LONDON (BP.)*, No. 1133, *post*.

107. Issue of commission of inquiry—Under Church Discipline Act, 1840 (c. 86), s. 3—On refusal by bishop to issue letters of request.]—*Ex p. DENISON*, No. 1500, *post*.

Exercise by Archbishop of judicial powers of bishop *sede vacante*.]—*See* No. 203, *post*.

#### C. Visitation.

108. Provincial jurisdiction.]—*GRANGE v. DENNY*, No. 204, *post*.

Monition for refusing to extract licence.]—*See* No. 1609, *post*.

109. Effect of visitation—On jurisdiction of bishop.]—*LUNNE v. DODSON* (1661), 3 Salk. 201; 91 E. R. 776.

*Annotation:—*Apld. R. v. Sowter, [1901] 1 K. B. 396.

110. Whether subject to appeal.]—*LENEVE BOUGHTON'S CASE* (1710), cited in L. R. 4 A. & E. 336.

*Annotation:—*Refd. Boyd v. Phillpotts (1874), L. R. 4 A. & E. 297.

111. Manner of exercise of power—How far material.]—Where an Archbishop has a right to visit a dean & chapter, the manner of his visitation is not so material as to lay a ground for a prohibition; because any error or defect in the manner of visiting, may be remedied by appeal.—*KILDARE (BP.) v. DUBLIN (ARCHBP.)* (1724), 2 Bro. Parl. Cas. 179; 1 E. R. 872.

*Annotations:—*Consd. *Re York, Dean* (1841), 2 Q. B. 1. *Refd.* Martin v. Mackenzie (1879), 4 Q. B. D. 697. *Mentd.* Blane v. Geraghty (1866), 15 W. R. 133; McGeath v. Geraghty (1866), 15 W. R. 127.

112. — Error or defect—Ground for appeal.]—*KILDARE (BP.) v. DUBLIN (ARCHBP.)*, No. 111, *ante*.

113. — Proceedings with view to punishment.]—The Archbishop of York, after the passing of Church Discipline Act, 1840 (c. 86), cited the dean & chapter of York, enjoining them to cite the canons, registrar, & officers whose presence might be required, to appear at a visitation of the dean & chapter, canonically to receive & submit to the archbishop's intended "metropolitan visitation, examinations, due corrections," etc., to exhibit their statutes, etc. if required, pay the due procurations, & further to do & receive what the business & nature of such a visitation require. He also appointed a commissary for holding the visitation in his absence, for correcting & punishing by ecclesiastical censures whoever should be contumacious, for administering articles in writing to the dean & chapter, & receiving their presentments & answers, & for adjourning & proroguing such visitation from time to time & place, & completing & dissolving the same, & for doing everything else appertaining to the nature & quality of the said visitation. The visitation was holden, & articles of inquiry delivered to the dean & chapter, touching the administration of their funds, performance of divine service, etc. A canon, in reply to an article as to the repair of

chancels, sent in a statement imputing simony to the dean, which was afterwards communicated to the dean by a private letter from the commissary. At an adjourned meeting, of which the dean had notice, but which he, unavoidably as he said, did not attend, the canon delivered a fuller statement of the charge from a paper, which was afterwards deposited with the actuary. The commissary appointed a day for hearing evidence; & the dean was requested, by letter, written at the archbishop's desire by his secretary, to attend & meet the accusation. No formal articles or libel were ever exhibited; nor was the dean ever cited to answer any charge. On the appointed day the dean attended, but disclaimed the jurisdiction, obstructed the proceedings, was pronounced in contempt, withdrew contumaciously, & did not appear again. The commissary decreed to proceed *in penam* in his absence, & heard counsel & evidence on the charge, but refused to hear counsel for the dean till he should purge his contempt, which was not done; & the commissary gave judgment, declaring the charge proved, & that sentence of deprivation must be passed. The archbishop then passed sentence, by which he recited the above proceedings, & adjudged that the dean had committed & was convicted of simony, & was in contempt, deprived him of the dignity & place of dean, etc., & monished him not in future to use the dress or ensigns of a dean, on pain of the greater excommunication. The visitation was then adjourned. On motion for a prohibition to the archbishop & commissary against proceeding further in the matter of the said charge of simony, or executing or giving effect to the sentence:—*Held*: (1) the inquiry before the commissary was not a mere incident to the visitation, but became a distinct criminal proceeding when the commissary entered upon the examination of proofs, as above stated, with a view to punishment; (2) such inquiry was a "criminal proceeding" within sect. 23 of the above Act, those words not being restrained by the recital of sect. 1, which mentions only "proceeding in causes for the correction of clerks"; (3) an archbishop or bishop, exercising his general authority as visitor of an ecclesiastical body & not visiting under the statutes of a particular foundation, acts, not personally, but as judge in a ct., & must follow established forms of process & inquiry, at least in hearing accusations with a view to punishment; (4) the proceeding in question was not within the reservation in sect. 25 of the above Act of any authority which the archbishops or bishops may exercise personally, & without process in ct.; (5) the proceeding could not legally be instituted otherwise than as the above Act directs; (6) a prohibition could not properly have been moved for before the visitor proceeded to sentence; but it might well be applied for afterwards, as the sentence had a continuing operation, & as the ct. did not appear to have been dissolved at the time of the motion. Prohibition granted, without calling upon appt. to declare.—*Re YORK (DEAN)* (1841), 2 Q. B. 1; 114 E. R. 1; *sub nom.* R. v. YORK (ARCHBP.), 2 Gal. & Dav. 202; 10 L. J. Q. B. 306; 6 Jur. 412.

*Annotations:—*As to (3) *Refd.* Richards v. Fincher (1873), L. R. 4 A. & E. 107; R. v. Oxford, Bp. (1879), 4 Q. B. D. 245; Cox v. Hakes (1890), 15 App. Cas. 506. As to (3) *Foldd.* Phillpotts v. Boyd (1875), L. R. 6 P. C. 435. As to (4) *Foldd.* *Ex p. Denison* (1854), 4 E. & B. 392. *Consd.* Pusey v. Jowett (1863), 1 New Rep. 488; Blane v. Geraghty (1866), 15 W. R. 133. *Refd.* McGeath v. Geraghty (1866), 15 W. R. 127. As to (6) *Consd.* Worthington v. Jeffries (1875), L. R. 10 C. P. 379. *Refd.* Whiston v. Rochester (Dean & Chapter) (1849), 7 Hare, 532; Read v. Lincoln, Bp. (1889), 14 P. D. 88.

## SUB-SECT. 2.—CONVOCACTION.

**Constitution.]**—See Convocations of the Clergy Measure, 1920 (No. 1).

**Relation of Crown to.]**—See No. 22, *ante*.

**Qualification of members—Jurisdiction of archbishop.]**—See No. 270, *ante*.

**Admission of members—Whether mandamus lies.]**—See No. 270, *ante*.

**114. Privilege of members—Protection from attachment.]**—PERY'S CASE (1609), Freem. Ch. 132; 22 E. R. 1108.

**115. Judicial jurisdiction—Power to condemn false tenets.]**—WHISTON'S CASE (1711), 15 State Tr. 703; Brod. & F. 318; *subsequent proceedings, sub nom.* PELLING v. WHISTON (1714), 1 Hag. Con. 433, n.

*Annotations:—*Consd. *Re* Gorham v. Exeter, Bp. (1850), 5 Exch. 630; *Read v. Lincoln*, Bp. (1889), 14 P. D. 88.

**116. Internal administration—Whether courts of law can control.]**—R. v. YORK (ARCHBP.), No. 113, *ante*.

**Power to make canons binding on laity.]**—See Nos. 22, 26–28, *ante*.

**117. Proctors—Election—Right [of non-residential prebendaries to vote.]**—RANDOLPH v. MILMAN, No. 324, *post*.

## SECT. 5.—CONSTITUTION OF THE CHURCH INTO DIOCESES.

## SUB-SECT. 1.—IN GENERAL.

**118. Creation of bishoprics—Power of Crown.]**—R. v. ETON COLLEGE, No. 48, *ante*.

**Cathedral & precincts—Whether extra-parochial.]**—See Nos. 317, 357, *post*.

## SUB-SECT. 2.—BISHOPS.

## A. In General.

**119. Whether dignity of the church.]**—BOUGHTON v. GOUSLEY, No. 91, *ante*.

**120. Bishops of the province of Canterbury—Who are.]**—A bishop of the province of Canterbury means a bishop beneficed in the province of Canterbury; & the words of this Act should receive the same literal construction (BYLES, J.).—DAY v. PEACOCK (1865), 18 C. B. N. S. 702; 144 E. R. 620; *sub nom.* DAY v. PEACOCK, CORB v. SAME, BINDER v. SAME, 34 L. J. C. P. 225; 12 L. T. 571; 11 Jur. N. S. 428; 13 W. R. 717.

*Annotation:—*Mentd. *Halg v. Barlow, Re St. Mary, Islington, Burial Fees* (1891), Trist. 149.

**121. Temporalities—What are.]**—BISHOPS' TEMPORALITIES & SPIRITUALITIES CASE (1583), Sav. 52; 123 E. R. 1007.

**122. Spiritualities—What are.]**—BISHOPS' TEMPORALITIES & SPIRITUALITIES CASE (1583), Sav. 52; 123 E. R. 1007.

**123. Episcopal courts—Nature of.]**—RECONCILIATION SENTENCE & SERVICE IN ST. PAUL'S, No. 1068, *post*.

**As corporation sole.]**—See CORPORATIONS, Vol. XIII., p. 275, Nos. 49–52.

## B. Appointment.

## (a) In General.

**124. Validity—Appointment after 1606.]**—Such bishops as were made & created after the first day of the session of Parliament, 4 Jac. 1, 1606, were lawful bishops.—BISHOPS', A CASE AT A COMMITTEE CONCERNING (1606), 12 Co. Rep. 7; 77 E. R. 1290.

*Annotations:—*Mentd. *Young v. Fowler* (1639), Cro. Car. 553; *Thomas v. Sorrell* (1673), 3 Keb. 143; *Tattle v. Grimwood* (1826), 4 L. J. O. S. C. P. 174.

**125. —By Crown—Without congé d'élire.]**—OSSERIES (BP.) CASE (1620), as reported in Palm. 22; 81 E. R. 959.

*Annotations:—*Reid. *Evans & Kiffins v. Askwith* (1627), W. Jo. 158. *Mentd.* *Parker v. Kett* (1700), 1 Ld. Raym. 658; *Kent v. Kent* (1734), Leo temp. Hard. 50; *Meriton v. Stevens* (1741), Willes, 271.

**126. Effect of election—On previous benefices.]**—EVANS & KIFFINS v. ASKWITH (1627), W. Jo. 158; Lat. 31, 233; Palm. 457; Noy, 93; 82 E. R. 84; *sub nom.* VAUGHAN v. ASCUE, 2 Roll. Rep. 450; *sub nom.* ANON., 3 Salk. 71.

*Annotations:—*Consd. *R. v. Canterbury, Archbp.*, [1902] 2 K. B. 503. *Reid.* *Colt & Glover v. Coventry & Lichfield, Bp.* (1616), Hob. 140; *R. v. London, Bp.* (1694), 1 Ld. Raym. 23; *Alston v. Atlay* (1837), 7 Ad. & El. 289; *R. v. Canterbury, Archbp.* (1848), 11 Q. B. 483; *R. v. Eton College (Provost & Fellows) & Clarke* (1857), 27 L. J. Q. B. 132. *Mentd.* *Berry v. White* (1662), O. Bridg. 82; *R. v. Leighton* (1708), Fortes. Rep. 173; *Holt v. Ward* (1732), 2 Barn. K. B. 173; *R. v. Lisle* (1738), Andr. 163; *Wolferstan v. Lincoln, Bp.* (1763), 2 Wils. 174; *Grocers' Co. v. Canterbury, Archbp.* (1771), 2 Wm. Bl. 770; *Jewison v. Dyson* (1842), 6 State Tr. N. S. 1.

**127. —**—*Ex p. TARRANT, No. 72, ante.*

**128. Effect of consecration—Right to temporalities.]**—EVANS & KIFFINS v. ASKWITH (1627), W. Jo. 158; Palm. 457; Noy, 93; Lat. 31, 233; 82 E. R. 84; *sub nom.* VAUGHAN v. ASCUE, 2 Roll. Rep. 450; *sub nom.* ANON., 3 Salk. 71.

*Annotations:—*Reid. *Berry v. White* (1662), O. Bridg. 82; *Threadneedle v. Linum* (1674), Freem. C. B. 179; *R. v. Canterbury, Archbp.* (1848), 11 Q. B. 483. *Mentd.* *Commendam Case, Colt & Glover v. Coventry & Lichfield, Bp.* (1616), Hob. 140; *R. v. London, Bp.* & Birch (1694), 1 Ld. Raym. 23; *R. v. Leighton* (1708), Fortes. Rep. 173; *Holt v. Ward* (1732), 2 Barn. K. B. 173; *R. v. Lisle* (1738), Andr. 163; *Grocers' Co. v. Canterbury, Archbp.* (1771), 2 Wm. Bl. 770; *Alston v. Atlay* (1837), 7 Ad. & El. 289; *Jewison v. Dyson* (1842), 6 State Tr. N. S. 1; *R. v. Eton College & Clark* (1857), 27 L. J. Q. B. 132; *R. v. Canterbury, Archbp.*, [1902] 2 K. B. 503.

**Cession of previous benefices.]**—See Sect. 3, sub-sect. 2, *ante*.

**Right of presentation to vacant living—Whether in new bishop or Crown.]**—See Nos. 70, 72, *ante*.

## (b) Procedure.

**129. General rule.]**—EVANS & KIFFINS v. ASKWITH (1627), W. Jo. 158; Palm. 457; Noy, 93; Lat. 31, 233; 82 E. R. 84; *sub nom.* VAUGHAN v. ASCUE, 2 Roll. Rep. 450; *sub nom.* ANON., 3 Salk. 71.

*Annotations:—*Consd. *R. v. Canterbury, Archbp.* (1848), 11 Q. B. 483. *Reid.* *R. v. London, Bp.* & Birch (1694), 1 Ld. Raym. 23; *R. v. Leighton* (1708), Fortes. Rep. 173; *Grocers' Co. v. Canterbury, Archbp.* (1771), 2 Wm. Bl. 770; *R. v. Canterbury, Archbp.*, [1902] 2 K. B. 503. *Mentd.* *Commendam Case, Colt & Glover v. Coventry & Lichfield, Bp.* (1616), Hob. 140; *Berry v. White* (1662), O. Bridg. 82; *Threadneedle v. Linum* (1674), Freem. C. B. 179; *Holt v. Ward* (1732), 2 Barn. K. B. 173; *R. v. Lisle* (1738), Andr. 163; *Alston v. Atlay* (1837), 7 Ad. & El. 289; *Jewison v. Dyson* (1842), 6 State Tr. N. S. 1; *R. v. Eton College & Clark* (1857), 27 L. J. Q. B. 132.

**Whether congé d'élire necessary.]**—See No. 125, *ante*.

**130. Election by dean & chapter—Freedom of election.]**—MOUNTAGUE'S (BP.) CASE (1620), 6 State Tr. N. S. 427, n.

*Annotations:—*Reid. *R. v. Canterbury, Archbp.* (1848), 11 Q. B. 483; *R. v. Canterbury, Archbp.*, [1902] 2 K. B. 503.

**131. —Objection to election—Power to hear.]**—MOUNTAGUE'S (BP.) CASE, No. 130, *ante*.

**132. Confirmation—Duty of Archbishop to determine fitness—Whether mandamus lies.]**—R. v. CANTERBURY (ARCHBP.), No. 133, *post*.

**133. —Duty to confirm—Archbishop—Whether judicial or ministerial act.]**—(1) H. having been, in pursuance of letters missive & congé d'élire, elected Bishop of Hereford by the dean & chapter, letters patent issued to the Metropolitan, commanding him to confirm the election & consecrate H. The Metropolitan appointed comrs. for the purpose; & notice of the confirmation, to be performed at Bow Church in London, was published, with a

**Sect. 5.—Constitution of the Church into dioceses:**  
**Sub-sect. 2, B. (b), C. & D. (a) i. & ii.]**

citation of opposers. On the day named in the notice, the certificate of election was read; & opposers were publicly called to appear on pain of contumacy. Three clergymen, two of them holding benefices in the diocese of Hereford, then offered to appear, & claimed to put in a libel or plea, stating objections to the confirmation, on the grounds that H. had published works repugnant to the doctrine of the Established Church, & had been therefore censured by the University of Oxford. The comrs. refused to hear the objections, & confirmed the election in the form usual where no opposition is made. A rule *nisi* having been obtained, on behalf of the objectors, for a *mandamus* to the Metropolitan or his vicar-general to hear the objections:—*Held*: the objections could not be heard, 25 Hen. 8, c. 20, making it imperative on the Metropolitan to confirm without taking cognisance of such objections; (2) if the objections ought to have been heard, the case was one in which a *mandamus* ought to have issued; (3) the confirmation of a bishop is a merely ministerial, & not a judicial, act; & therefore no one has a right to appear & oppose such confirmation.—*R. v. CANTERBURY (ARCHBP.)* (1848), 11 Q. B. 483; 6 State Tr. N. S. 409; Cripps' Church Cas. 59; 17 L. J. Q. B. 252; 10 L. T. O. S. 325, 304; 12 Jur. 862; 12 J. P. Jo. 71, 85, 101; Jebb's Report, 1; 110 E. R. 557; *sub nom. Re HAMPDEN (LORD ELECTED BP. OF HEREFORD)*, 5 Notes of Cases, Supp. 18.

*Annotations*:—*As to* (1) *Folld. R. v. Canterbury, Archbp.*, [1902] 2 K. B. 503. *Generally, Consd. R. v. Canterbury, Archbp.*, [1902] 2 K. B. 503. *Mentd. Exeter, Bp. v. Rust, & Canterbury, Archbp.* (1850), 14 Jur. 876; *R. v. Canterbury, Archbp.* (1856), 6 E. & B. 546; *R. v. Oxford, Bp.* (1879), 41 L. T. 122; *Reid v. Lincoln, Bp.* (1889), 14 P. D. 88; *Poulton v. Moore*, [1915] 1 K. B. 400.

**134. ——— Commissioners of Archbishop of York.]—*Re MANCHESTER (BP.)* (1848), 5 Notes of Cases, Supp. 9.**

*Annotations*:—*Reid. R. v. Canterbury, Archbp.* (1848), 11 Q. B. 483; *R. v. Canterbury, Archbp.*, [1902] 2 K. B. 503.

**135. ——— Objections—Power of Archbishop to hear objectors.]—**(1) G. having been, in pursuance of letters missive & *congé d'élire*, elected Bishop of W. by the dean & chapter, letters patent issued to the Archbishop of C. directing him to confirm & consecrate G. Thereupon a citation of opposers was issued, & notice of objections in writing was ordered to be given before a certain date, a day prior to the day fixed for confirmation, & the Vicar-General sat in chambers to consider such objections before proceeding with the confirmation. The objections handed in alleged that the bishop-elect had committed ecclesiastical offences & had published false doctrine, & had thereby contravened the articles of religion, & that he was by reason of such publications unfit to be entrusted with the care & superintendence of a diocese; that he was not a prudent & discreet man, & not at all a fit & proper person to fill the office of bishop, by reason of certain passages in his published works; & further, that he had been a member of certain societies mentioned in the objections. The Vicar-General, after considering the nature of the objections, declined to hear any of the opponents in support of them at the confirmation, & when he sat in ct., after taking the names of the objectors,

gave his decision that they were not objections which he could entertain, & he thereupon proceeded with the confirmation in the usual manner. Rules *nisi* having been obtained on behalf of objectors for a *mandamus* to the Archbishop of C. or his Vicar-General to hear the objections:—*Held*: the Vicar-General was right in not entertaining objections of this kind.

*Semble*: (2) a *mandamus* will not lie to the archbishop to compel him to inform his mind as to the fitness of the bishop-elect before he proceeds to confirmation.

(3) The practice of requiring written notice of the objections to be presented before the actual ceremony of confirmation is a proper one.—*R. v. CANTERBURY (ARCHBP.)*, [1902] 2 K. B. 503; 71 L. J. K. R. 894; 86 L. T. 79; 50 W. R. 348; 18 T. L. R. 300; 46 Sol. Jo. 282.

*Annotations*:—*Generally, Mentd. Thomas v. Pritchard*, [1903] 1 K. B. 209; *Re Letters Patent No. 139, 207, Re Carbonit Akt.*, [1923] 2 Ch. 504.

**136. ——— Objection on grounds of doctrine.]—*R. v. CANTERBURY (ARCHBP.)*, No. 135, *ante*.**

**137. ——— Power of Archbishop to require notice in writing.]—*R. v. CANTERBURY (ARCHBP.)*, No. 135, *ante*.**

**138. ——— Effect of.]—TEMPLE'S CASE** (1869), *Times*, Dec. 9; cited in 1 Phillim. Eccl. Law, 2nd ed. at p. 42.

*Annotation*:—*Reid. R. v. Canterbury, Archbp.*, [1902] 2 K. B. 503.

**139. ——— Form—Whether customary form obligatory.]—TEMPLE'S ELECTION CASE** (1869), *Times*, Dec. 9; cited in 1 Phillim. Eccl. Law, 2nd ed. at p. 42.

*Annotation*:—*Reid. R. v. Canterbury, Archbp.*, [1902] 2 K. B. 503.

**C. Translation.**

**140. Procedure—Same as on creation—Except consecration.]—EVANS & KIFFINS v. ASKWITH**, No. 129, *ante*.

**D. Powers, Duties & Privileges.**

**(a) Powers.**

**i. In General.**

**141. Exercise of powers out of diocese—In London.]—KNOLLS v. DORRINS** (1623), *Palm.* 306; 81 E. R. 1120.

**142. Power to bind successors—Covenant to pay all charges—Whether land tax included.]—BLANDFORD (MARCHIONESS) v. MARLBOROUGH (DOWAGER DUCHESS)** (1743), 2 Atk. 542; 26 E. R. 725.

*Annotations*:—*Consd. Tyreconnell v. Ancaster* (1754), *Amb.* 237; *Floyer v. Bankes* (1863), 3 De G. J. & Sm. 306. *Reid. Londonderry v. Wayne* (1763), 2 Eden. 170. *Mentd. Phillips v. James* (1865), 3 De G. J. & Sm. 72.

**By grant of or appointment to office.]—*See Nos.* 173, 2048, *post*.**

**143. Execution of documents—By seal—Whether own seal necessary—Letters of institution.]—CORT v. ST. DAVID'S (BP.)** (1634), *Cro. Car.* 341; 79 E. R. 899.

*Annotation*:—*Mentd. Strother v. Hutchinson* (1837), 4 Bing. N. C. 83.

**144. ——— Signature by stamp—Dilapidations order.]—DE BEAUVAIS v. GREEN**, No. 3673, *post*.

**145. As to vacant living—Duty to fill.]—COMMENDAM CASE, COLT & GLOVER v. COVENTRY & LICHFIELD (BP.)** (1617), *Hob.* 140; *Moore*, K. B. 898; 80 E. R. 290; *sub nom. COLT v. GLOVER*,

**PART III. SECT. 5, SUB-SECT. 2.—**  
**D. (a) i.**

**d. Church conveyed to trustees—Purposes connected with Church of**

**England—Jurisdiction of colonial bishop.]—A bishop of the Church of South Africa has no jurisdiction in or over a church in that colony conveyed to trustees for ecclesiastical pur-**

**poses in connection with the Church of England.—MERRIMAN (BP. OF GRAHAM'S TOWN) v. WILLIAMS** (1882), 51 L. J. P. C. 85.—*S. AF.*

1 Roll. Rep. 451; *sub nom.* COLT'S CASE, Jenk. 300, Ex. Ch.

*Annotations*.—*Reid*. R. v. Worcester, Bp., Jevason & Hinkley (1870), 1 Mod. Rep. 276; R. v. London, Bp., & Lancaster (1894), Comb. 300; Bellamy v. Burrow (1735), Cas. temp. Talb. 97; Wolferston v. Lincoln, Bp. (1763), 2 Wils. 174; Mirehouse v. Rennell (1833), 7 Bll. N. S. 241. *Mentd.* Manby v. Scott (1662), O. Bridg. 229; Edes v. Oxford, Bp. (1667), Vaugh. 18; Thomas v. Sorrell (1873), Freem. K. B. 85; Shatter v. Friend (1690), 1 Show. 158, 172; R. v. Hornbee (1691), Freem. K. B. 331; Harcourt v. Fox (1692), 4 Mod. Rep. 167; Owen v. Saunders (1696), 1 Ld. Raym. 158; Reynoldson v. Blake (1696), 1 Ld. Raym. 192; Cole v. Hawkins (1717), 1 Stra. 21; Thornby v. Fleetwood (1720), 1 Stra. 318; Roe d. Berkeley v. York, Archbp. (1805), 6 East, 86; Denn v. Roake (1826), 5 B. & C. 720; Osgood v. Nelson (1869), 10 B. & S. 119; Rumsey v. Nicholl (1877), 2 C. P. D. 179; Roberts v. London Corp. (1882), 30 W. R. 637.

146. — Undertaking not to fill.]—*COM-MENDAM CASE*, COLT & GLOVER v. COVENTRY & LICHFIELD (Bp.) (1617), Hob. 140; Moore, K. B. 898; 80 E. R. 200; *sub nom.* COLT v. GLOVER, 1 Roll. Rep. 451; *sub nom.* COLT'S CASE, Jenk. 300, Ex. Ch.

*Annotations*.—*Reid*. R. v. Worcester, Bp., Jevason & Hinkley (1870), 1 Mod. Rep. 276; R. v. London, Bp., & Lancaster (1894), Comb. 300; Bellamy v. Burrow (1735), Cas. temp. Talb. 97; Wolferston v. Lincoln, Bp. (1763), 2 Wils. 174; Mirehouse v. Rennell (1833), 7 Bll. N. S. 241. *Mentd.* Manby v. Scott (1662), O. Bridg. 229; Edes v. Oxford, Bp. (1667), Vaugh. 18; Thomas v. Sorrell (1873), Freem. K. B. 85; Shatter v. Friend (1690), 1 Show. 158, 172; R. v. Hornbee (1691), Freem. K. B. 331; Harcourt v. Fox (1692), 4 Mod. Rep. 167; Owen v. Saunders (1696), 1 Ld. Raym. 158; Reynoldson v. Blake (1696), 1 Ld. Raym. 192; Cole v. Hawkins (1717), 1 Stra. 21; Thornby v. Fleetwood (1720), 1 Stra. 318; Roe d. Berkeley v. York, Archbp. (1805), 6 East, 86; Denn v. Roake (1826), 5 B. & C. 720; Osgood v. Nelson (1869), 10 B. & S. 119; Rumsey v. Nicholl (1877), 2 C. P. D. 179; Roberts v. London Corp. (1882), 30 W. R. 637.

147. To determine question of title—Place of lecturer.]—*ST. BARTHOLOMEW'S (CHURCH-WARDENS) CASE*, No. 104, *ante*.

148. To sit in own consistory court.]—A bishop may sit when he pleases in his own ct., but the vicar, chancellor, shall have fees (HOLT, C.J.).—*GIBBONS v. CLOYNE* (Bp.) (1706), Holt, K. B. 599; 90 E. R. 1232; *sub nom.* CLOYNE (Bp.) v. GIBBONS, Holt, K. B. 602; 11 Mod. Rep. 62.

*Annotation*.—*Reid*. R. v. Tristram, [1902] 1 K. B. 816.

149. To hold ecclesiastical courts.]—*RECONCILIATION SENTENCE & SERVICE IN ST. PAUL'S*, No. 1068, *post*.

150. To pronounce sentence of reconciliation—After pollution of church.]—*Re RECONCILIATION SENTENCE & SERVICE IN ST. PAUL'S*, No. 1068, *post*.

151. To licence proprietary chapel for marriages—Rector of parish not concurring in application.]—*Ex p. GRAY* (1897), 13 T. L. R. 400, C. A.

152. Validity of acts of bishop *de facto*—Judicial Acts.]—All judicial acts, as admissions, institutions, certificates, etc., done by a bishop *de facto* only, are good; but not voluntary acts injurious to the successor.—*O'BRIAN v. KNIVAN* (1619), Cro. Jac. 552; 79 E. R. 473.

*Annotations*.—*Reid*. Parker v. Kett (1701), 12 Mod. Rep. 466. *Mentd.* Kent v. Kent (1734), 2 Barn. K. B. 441.

153. — Voluntary acts injurious to successor.]—*O'BRIAN v. KNIVAN*, No. 152, *ante*.

154. Control by temporal courts—Waste.]—The Ct. of Common Pleas has no power to issue an original writ of prohibition to restrain a bishop from committing waste in the possession of his see: at least at the suit of an uninterested person.

*Semble*: that no ct. of common law has that power. *Qu.*: if the Ct. of Chancery has not?

I consider the bishop as having, to certain purposes, a fee simple in his bishopric; but he is seised to a special intent, as a public officer for public trusts (HOOKE, J.).—*JEFFERSON v. DURHAM* (Bp.) (1797), 1 Bos. & P. 105; 126 E. R. 804.

*Annotations*.—*Consd.* Withers v. Winchester (Dean & Chapter) (1817), 3 Mer. 421; Herring v. St. Paul (Dean & Chapter) (1819), 3 Swan. 492. *Reid*. Ross v. Adcock (1868), L. R. 3 C. P. 655.

— Of bishop's visitatorial powers.]—*See* Sub-sect. 2, 12. (d), *post*.

## ii. Disciplinary Powers.

155. General superintendence of clergy in diocese.]—(1) The chancellor of the diocese of London is not invested with authority to grant licenses to lecturers. (2) The bishop has the general superintendence of the clergy within his diocese, & no one without his permission can perform the clerical functions within such diocese.—*SMITH v. LOVEGROVE* (1755), 2 Lee, 162.

*Annotations*.—*As to* (1) *Reid*. Down & Connor & Dromore (Lord Bp.) v. Miller, Same v. Potter (1861), 5 L. T. 30; Martin v. Mackonochie (1879), 4 Q. B. D. 697; St. Alban's, Bp. v. Fillingham, [1906] P. 163.

156. — Licence to officiate—Necessity for.]—*SMITH v. LOVEGROVE*, No. 155, *ante*.

157. — Unbeneficed clergy.]—*TREBEC v. KEITH* (1743), 2 Atk. 498; 20 E. R. 700.

*Annotations*.—*Reid*. Barnes v. Shore (1846), 8 Q. B. 640; Down & Connor & Dromore, (Lord Bp.) v. Miller, Same v. Potter (1861), 5 L. T. 30. *Mentd.* *Re* Barnes (1846), Cr. & Ph. 31; Mackonochie v. Ponza (1881), 6 App. Cas. 424.

158. — Lecturer.]—*ST. BARTHOLOMEW'S (CHURCHWARDENS) CASE*, No. 104, *ante*.

159. — Determination of licence—By revocation—Whether appeal lies.]—*SEDGWICK v. MANCHESTER* (Bp.), No. 2050, *post*.

*See, also*, No. 161, *post*.

160. Power to take proceedings against clergy—Under 13 Eliz. c. 12, s. 2—For maintaining false doctrine.]—*Ex p. DENISON*, No. 1500, *post*.

161. — Under Pluralities Act, 1838 (c. 106), s. 98—Revocation of curate's licence—"Good reasonable cause."—The Ct. of Q. B. will not interfere by prohibition, unless it is plain that the ct. against which the prohibition is prayed is exceeding, or is about to exceed, its authority.

*Semble*: the rule prohibiting ecclesiastical cts. from taking cognisance of matters triable at common law, does not apply to the statutory powers of the bishops & archbishops over curates' licences under above sect.—*Re* SINYANKI (1864), 12 W. R. 825; *sub nom.* *Ex p. SINYANKI*, 28 J. P. Jo. 325.

162. — Under Pluralities Act, 1838 (c. 106), s. 77—Divine service omitted or inadequately performed.]—(1) It is not competent to a clerk in holy orders, having two churches in one benefice, to perform divine service in one only at his own discretion; it is his duty to perform a service every Sunday in each church.

(2) Sect. 109 of above Act, which enacts that in every case in which jurisdiction is given by the Act to the bishop of the diocese for the purposes thereof, & the enforcing the due execution of the provisions thereof, all other & concurrent jurisdiction in respect thereof shall wholly cease, will not apply to prevent the bishop instituting proceedings against a beneficed clergyman, under the

## PART III. SECT. 5, SUB-SECT. 2.—D. (a) ii.

e. Bishop enforcing obedience—With aid of civil courts.]—*Held*: though

the letters patent from which the Bishop of Columbia derives his authority do not confer upon him any effective coercive jurisdiction over his

clergy, he could still enforce obedience by having recourse to the civil cts.—*BRITISH COLUMBIA* (Bp.) v. CRIBBE (1874), 1 B. C. R. pt. 1, 5.—*CAN.*

**Sect. 5.—Constitution of the Church into dioceses:**  
*Sub-sect. 2, D. (a) ii., iii. & iv., (b) & (c) & E. (a):*

Church Discipline Act, 1840 (c. 86), for omitting to perform, or provide for the performance of public divine service in a consecrated building within his parish; the provisions of the 1838 Act, s. 77, only applying to cases where the services of any benefice have been inadequately performed, not where they have been omitted altogether.

(3) Although an incumbent of a parish has a right to object to the consecration of a building within his parish, if the bishop overrules such objection, & proceeds to consecrate the building, such consecration will not be invalid by reason of the dissent of the incumbent.

(4) Act of Uniformity, 1602 (c. 4), does not apply where there are two churches in the same parish, so as to require the incumbent to perform morning & evening service in each of them every Lord's Day, & the words of sect. 2 of that Act "every Church, Chapel, or other place of public worship within this realm of England," must be read, "in each Church" for which there is a minister.

(5) The jurisdiction given exclusively to the bishop by sect. 100 of 1838 Act, has reference only to proceedings taken under that Act, & does not oust the general jurisdiction of the Ecclesiastical Ct. for an offence committed against the Common Ecclesiastical Law.

(6) *Qu.*: whether the refusal to perform service in one of two churches in a parish is an inadequate performance of ecclesiastical duties within the meaning of sect. 77 of 1838 Act.—*RUGG v. WINCHESTER (Bp.)* (1868), L. R. 2 P. C. 223; 5 Moo. P. C. O. N. S. 313; 38 L. J. Eccl. 23; 19 L. T. 578; 33 J. P. 750; 17 W. R. 235; 16 E. R. 533, F. C.; *affr.* S. C. *sub nom.* WINCHESTER (Bp.) *v.* RUGG (1868), L. R. 2 A. & E. 247.

*Annotation*:—*Generally, Mentd.* Mackonochie *v.* Penzance (1881), 6 App. Cas. 424.

**163. — Exercise of power—Discretion to exercise—Clerk accused of ecclesiastical offence.**—*JULIUS v. OXFORD (LORD Bp.)*, No. 1504, *post*.

**164. — Addition to cathedral ornaments—Whether appeal lies.**—*ALLCROFT v. LONDON (LORD Bp.)*, *LIGHTON v. LONDON (LORD Bp.)*, No. 1555, *post*.

**165. — What amounts to—Refusal to issue letters of request.**—*Ex p.* DENISON, No. 1500, *post*.

**166. — Disqualification by patronage—Alternate right of presentation.**—*Resp.*, the rector of two united parishes in London, was represented by three parishioners to the Bishop of London under Public Worship Regulation Act, 1874 (c. 85), s. 8, for breach of the provisions of that sect. Proceedings were duly taken under sect. 9 against *resp.*, who neither appeared nor answered throughout, & was adjudged guilty & condemned in costs. Afterwards an inhibition from the Arches Ct., issued against *resp.*, in consequence of which he was prevented from ministering in his church; & the livings were subsequently sequestered for the stipend of the curate appointed by the bishop, & notice to tax the costs was served upon *resp.* After the adjudication, but before the inhibition & sequestration, *resp.* discovered, as the fact was, that the patronage of the Dean & Chapter of St. Paul's who had instituted him (the presentation at that time alternately belonging to them & to the Archbishop of Canterbury), had been since transferred by Ord. in Council to

the Bishop of London; so that the right to present to the joint living would fall to the archbishop on the next vacancy & to the bishop on the vacancy after. About ten months after the adjudication, & about six months after *resp.*'s discovery concerning the patronage, *resp.* applied to the ct. for a prohibition from further proceedings to the Arches Ct., on the ground of no jurisdiction:—*Held*: (1) the bishop of London was patron of *resp.*'s benefice within the meaning of sect. 16 of above Act, & was thereby disqualified from acting in relation to the representation under sect. 9; (2) the initiatory proceedings essential to give jurisdiction to the Ct. of Arches were, under the circumstances, contrary to the statute, & void; & the ct. had no jurisdiction to hear or adjudicate on the representation; (3) *resp.* was entitled to have the rule for prohibition made absolute.—*SERJEANT v. DALE* (1877), 2 Q. B. D. 558; 46 L. J. Q. B. 781; 37 L. T. 153; 41 J. P. 694.

*Annotations*:—*As to* (1) *Refd.* Tolpuitt *v.* Mole, [1911] 1 K. R. 87. *As to* (3) *Refd.* Toomer *v.* L. C. & D. Ry. (1877), 2 Ex. D. 450. *Generally, Mentd.* Hudson *v.* Tooth (1877), 3 Q. B. D. 46; Dale's Case, Enraght's Case (1881), 6 Q. B. D. 376; Combe *v.* De La Bere (1882), 22 Ch. D. 316.

**167. — Whether decision subject to appeal—Revocation of licence.**—*SEDGWICK v. MANCHESTER (Bp.)*, No. 2680, *post*.

**168. — — — — —**—*ALLCROFT v. LONDON (LORD Bp.)*, *LIGHTON v. LONDON (LORD Bp.)*, No. 1555, *post*.

### iii. Faculties.

**169. For what purposes granted—Constitution of select vestry.**—(1) On an issue whether a churchwarden ought to be elected by the select vestry, a record between a former churchwarden & another person is admissible evidence.

(2) If in pleading, it is stated, "that from time immemorial there had been a select vestry composed of a certain number of select persons," it is incumbent on the party making that averment to prove that the vestry has consisted of a definite number.

(3) So if it had been stated that the vestry was composed of a certain select number of persons *comme semble*. A select vestry cannot be constituted by a faculty from the bishop.—*BERRY v. HANNER* (1792), Peake, 212, N. P.

**Faculties for burials.**—*See BURIAL*, Vol. VII., pp. 528–530, No. 87, 89, 90, 93–96 98–100.

**Faculties for erection of monuments.**—*See BURIAL*, Vol. VII., p. 532, Nos. 121, 125, 120.

### iv. Grants and Appointments.

**170. What offices may be granted—Ancient office with fees.**—*ELY'S (Bp.) CASE* (1568), 2 Brownl. 137; Cro. Car. 48; 2 Burn's Eccl. Law, 9th ed., p. 379; 2 Phillim. Eccl. Law, 2nd ed., p. 918; 123 E. R. 859; *sub nom.* HAWSE *v.* ELY (Bp.), Ben. 182; *sub nom.* HALL *v.* ELY (Bp.), Ley. 78; *sub nom.* HOWSE *v.* ELY (Bp.), Moore, K. B. 88.

*Annotations*:—*Consd.* Geo *v.* Freedland (1626), Cro. Car. 47; Trelawny *v.* Winchester, Bp. (1757), 1 Burr. 219.

**171. — Confirmed by dean & chapter.**—A grant by a bishop, etc., of an ancient office with the ancient fees only annexed, if confirmed by the dean & chapter, is not restrained by 1 Eliz. c. 19; but he cannot grant a new office, nor add new fees to old offices, except they be necessary; nor can they grant offices in any manner not warranted by usage.—*GEE v. FREEDLAND* (1626), Cro. Car. 47; 79 E. R. 645; *sub nom.* CHESTER (Bp.) *v.* FREEDLAND, Ley. 71.

*Annotations*:—*Refd.* Young *v.* Fowler (1639), Cro. Car. 555; Threadneedle *v.* Linum (1674), Freem. K. B. 179;



Ridley v. Pownell (1675), Freem. K. B. 394; Trelawny v. Winchester, Bp. (1757), 1 Burr. 219. *Mentd.* (Churchman v. Harvey (1757), Amb. 335; Kerrison v. Colo (1807), 8 East, 231.

*See, also*, No. 173, *post*.

172. ———]—Bishops may grant ancient offices with the ancient fees.—TRELAUNY v. WINCHESTER (Bp.) (1757), 1 Burr. 219; 1 Keny. 250; 97 E. R. 281.

173. ———]—Office formerly granted to one—Grant to two.]—(1) In a writ of second deliverance, *deft.* pleaded a grant by J., Bishop of S., to G. & himself for their lives, of the office of surveyor of his manors with a rent-charge, which grant was confirmed by the dean & chapter; & that the office was an ancient office used to be granted, etc. to such person or persons as the bishop should please. *Pltf.* pleaded in bar 1 Eliz. (c. 19), & that the office, etc. used not to be granted but for the life of one, & therefore the grant of J., late Bishop of S., was void. *Resolved*: The averment in the avowry that the office is an ancient office, is too general & uncertain. (2) The grant of the office for two lives is void against the successor by the above Act. (3) At common law bishops with the consent of the chapter, might by their charters of feoffments, grants, or leases, bind their successors. 32 Hen. 8 (c. 28), has enlarged the power of the bishop, for by this Act he may make a lease for 21 years or three lives, & the bishop alone may so lease by deed indented following the limitations of the statute.

(4) A grant by the bishop contrary to 1 Eliz. shall bind himself though not his successor. The grant with the ancient fee of an ancient & necessary office is exempted out of the general restraint of 1 Eliz. But where such office has been granted to one, a grant to two is not out of the general restraint. The grant of any ancient office to one with the ancient fee by a bishop, shall not bind the successor unless confirmed by the dean & chapter, for such grants remain at the common law.—SALISBURY'S (Bp.) CASE (1613), 10 Co. Rep. 58 b; cited in Hob. 44; 77 E. R. 1013.

*Annotations*:—As to (1) *Refd.* R. v. Trinity House (1662), 1 Keb. 331. As to (2) *Refd.* Gee v. Freedland (1626), Cro. Car. 47. As to (3) *Refd.* Thredneedle v. Linum (1674), Freem. K. B. 178. As to (4) *Consd.* Gee v. Freedland (1626), Cro. Car. 47; Trelawny v. Winchester, Bp. (1757), 1 Burr. 219. *Refd.* Young v. Fowler (1639), Cro. Car. 555. *Generally*, *Refd.* Walker v. Lamb (1632), Cro. Car. 258; Ridley v. Pownell (1675), Freem. K. B. 394. *Mentd.* Evans v. Ascutell (1628), Palm. 457; Manby v. Scott (1660), 1 Lev. 4; Sharpe v. Bechenowe (1688), 2 Lut. 1249; Phillips v. Smith (1718), 1 Com. 279.

174. ———]—When binding on successor—Lease for twenty-one years or three lives.]—SALISBURY'S (Bp.) CASE, No. 173, *ante*.

175. ———]—Confirmation by dean & chapter.]—SALISBURY'S (Bp.) CASE, No. 173, *ante*.

*See, also*, No. 171, *ante*.

176. ———]—New office—With fees.]—ELY'S (Bp.) CASE, No. 170, *ante*.

177. ———]—GEE v. FREEDLAND, No. 171, *ante*.

178. ———]—Addition of new fees to old office—Where necessary.]—GEE v. FREEDLAND, No. 171, *ante*.

Lease of advowson appendant to bishopric—Length of term.]—*See* No. 2048, *post*.

#### (b) Duties.

179. To observe rubrics—When officiating in communion service.]—The word minister in the rubrics relating to the administration of the Holy Communion must be taken to include a bishop, & a bishop officiating as minister in the service of Holy Communion is bound to celebrate it in the order & form prescribed by the Book of Common

Prayer.—READ v. LINCOLN (Bp.) (1889), 14 P. D. 148; 64 L. T. 149; Roscoe's Rep. 43.

#### (c) Privileges.

180. Defamatory matter in charge to convocation.]—The charge of a bishop to his clergy in convocation contained defamatory matter in respect of a layman in the diocese who had publicly attacked the conduct of the bishop, & the charge, by authority of the bishop, was afterwards published in a local newspaper:—*Held*: both the charge & the publication were privileged communications, if made *bona fide*, & for the purpose of vindicating the conduct of the bishop.—LAUGHTON v. SODOR & MAN (Bp.) (1872), L. R. 4 P. C. 495; 9 Moo. P. C. C. N. S. 318; 42 L. J. P. C. 11; 28 L. T. 377; 37 J. P. 244; 21 W. R. 204; 17 E. R. 534, P. C.

*Annotations*:—*Consd.* Adam v. Ward, [1917] A. C. 309. *Refd.* Jenoure v. Delmoge, [1891] A. C. 73; Novill v. Fine Arts & General Insco., [1895] 2 Q. B. 156; Gorhold v. Baker (1918), 63 Sol. Jo. 135. *Mentd.* Hart v. Gumpach (1873), L. R. 4 P. C. 439; Murdock v. Funduklian (1885), 2 T. L. R. 215.

Privileged communication generally, *see* LABEL & SLANDER.

As Peer of Parliament.]—*See* PARLIAMENT.

#### E. Visitation Powers.

##### (a) In General.

181. Power to visit—Whether commission under great seal necessary.]—R. v. BASTWICK, BURTON & PRYNN (1637), 3 State Tr. 711. *Annotation*:—*Mentd.* Faulkner v. Litchfield (1845), 1 Rob. Eccl. 184.

182. Extent of jurisdiction—Royal palace.]—NYERFORD'S CASE (1314), 3 Co. Inst. 141; *sub nom.* NYERFORD'S CASE, Prynn's Parliamentary Writs, p. 1180.

*Annotations*:—*Refd.* A.-G. v. Dakin (1867), L. R. 2 Exch. 290; Combe v. De La Boro (1882), 22 Ch. D. 316.

*See, generally*, CONSTITUTIONAL LAW, Vol. XI., pp. 519, 520.

—Royal foundation.]—*See* No. 87, *ante*.

—Peculiars.]—*See* Sub-sect. 6, *post*.

183. ———]—Benefice appropriated to the dean & chapter.]—Although a benefice is appropriated to a prior, or a dean & chapter, yet the bishop may visit, to see how the church is served, etc. & for contumacy, may proceed to suspension *ab officio et beneficio*.—HARRISON v. DUBLIN (ARCHBp.) (1713), 2 Bro. Parl. Cas. 199; 10 Mod. Rep. 68; 1 E. R. 885, II. L.

*Annotations*:—*Refd.* Boyd v. Phillpotts (1874), L. R. 4 A. & E. 297; Mackonochie v. Penzance (1881), 6 App. Cas. 424.

184. ———]—Representatives of deceased prebendaries.]—R. v. DURIAM (Bp.), No. 201, *post*.

185. ———]—Cathedral church—In respect of fabric.]—Upon a reredos erected for purpose of decoration in Exeter cathedral by the dean & chapter of Exeter were sculptured representations in high relief of the Ascension, the Transfiguration, & the Descent of the Holy Ghost on the Day of Pentecost, with figures of the Apostles delineated as forming part of the connected representation of the historical subject. On each side of the reredos, as finials to its architectural form, was a separate figure of an angel. The Bishop of Exeter, at a visitation of the cathedral of the dean & chapter, held the structure to be illegal, & ordered it to be removed:—*Held*: (1) although the bishop, as ordinary in the exercise of his visitatorial power over the cathedral church of Exeter, cannot at his discretion order any alteration in its fabric, it was within his jurisdiction to find that the sculpture had been unlawfully erected, & on that definite

*Sect. 5.—Constitution of the Church into dioceses: Sub-sect. 2, E. (a), (b), (c) & (d) & F.]*

legal ground to order its removal; (2) the structure was not illegal, & so much of the decree of the Court of Arches as reversed the order of the bishop directing its removal must be affirmed.

(3) *Semble*: a faculty is not necessary for an alteration in the fabric of a cathedral church.—*PHILLIPOTS v. BOYD* (1875), L. R. 6 P. C. 435; 44 L. J. Eccl. 44; 32 L. T. 73; 39 J. P. 244; 23 W. R. 491, P. C.; *previous proceedings, sub nom. BOYD v. PHILLIPOTS* (1874), L. R. 4 A. & E. 297.

*Annotations*:—As to (2) *Consd. Kildale v. Clifton* (1877), 2 P. D. 274; *Re St. Lawrence, Pittington* (1880), 5 P. D. 131; *R. v. London, Bp.* (1889), 24 Q. B. D. 213; *St. John, Pendlebury* (Vicar, etc.) *v. St. John, Pendlebury* (Parishioners), [1895] P. 178; *Great Bardfield* (Vicar) *v. All Having Interest*, [1897] P. 185; *Paignton* (Vicar) *v. All Having Interest*, [1905] P. 111; *Markham v. Shirebrook Overseers*, [1906] P. 239. *Reid. Hughes v. Edwards* (1877), 2 P. D. 361; *Allcroft v. London* (Lord Bp.), *Lighton v. London* (Lord Bp.), [1891] A. C. 666; *R. v. London, Bp., Leighton's Case*, [1891] 2 Q. B. 48; *St. John the Baptist, Timberhill* (Vicar, etc.) *v. St. John the Baptist, Timberhill* (Rectors, etc.), [1895] P. 71; *Barsham, Suffolk* (Rectors, etc.) *v. Barsham, Suffolk* (Parishioners), [1896] P. 256; *Re St. Mark's, Marylebone Rd. St. Mark's* (Vicar) *v. St. Mark's* (Parishioners), [1898] P. 114; *Kensit v. St. Ethelburga, Bishopsgate Within*, [1900] P. 80; *Re St. Anselm, Plinner*, [1901] P. 202; *Davey v. Hindo*, [1903] P. 221; *Re Christ Church, Basing*, [1906] P. 289; *Wimbledon* (Vicar & Churchwardens) *v. Eden, Re St. Mark's, Wimbledon*, [1908] P. 167; *St. John the Evangelist, Wimbledon* (Vicar & Churchwardens) *v. All Having Interest*, [1909] P. 6; *St. Paul, Bow Common* (Vicar & Churchwardens) *v. St. Paul, Bow Common* (Inhabitants), [1909] P. 245; *Bourne v. Keane*, [1910] A. C. 815; *Re Tenbury Parish Church* (1919), 36 T. L. R. 188; *Re St. Luke's, Southport* (1920), 36 T. L. R. 733. As to (3) *Reid. Paignton* (Vicar) *v. All Having Interest*, [1905] P. 111; *Markham v. Shirebrook Overseers*, [1906] P. 239. *Generally, Mendt. Bowman v. Lax*, [1910] P. 300.

186. *Extent of visitatorial powers—Appointment of canon residentiary pro tempore.*—Prohibition issued to the Bishop of Chichester, who claimed a right to present by lapse under pretence of his visitatorial authority to the office of a canon residentiary of his church, it being a freehold office, & the right of election thereto in the dean & chapter. *Qu.*: whether, in case the dean & chapter neglect or refuse to appoint a canon residentiary in proper time, the bishop by virtue of his general visitatorial power may appoint *pro tempore*, till such election be had.—*CHICHESTER (Bp.) v. HARWARD & WEBBER* (1787), 1 Term Rep. 650; 99 E. R. 1300.

187. *Bishop appointed visitor of foundation by ordinance of founder—Whether confined to powers as ordinary.*—A *mandamus*, commanding the dean & chapter of a cathedral to restore a chorister, alleged that the office was a freehold in their gift, paid by salary out of their land revenues, & conferring a right to vote on the election of members of Parliament, & that the chorister had been wrongfully removed. Return, that, by ordinances of the founder, for the government of the cathedral, it was provided that, if any of the officers of the cathedral, including choristers, commit a small fault, he may be punished by the dean, but that, "if his crime be of a blacker dye, if it be judged equitable, he may be expelled by whom he was admitted"; & that the bishop of the diocese should be the visitor of the cathedral, to take special care that all its ordinances should be inviolably preserved, to punish & correct all offences committed by officers of the cathedral, & to do all things that are judged lawfully to appertain to the office of visitor: & that the chorister had not appealed to the bishop:—*Held*: on demurrer to the return, *mandamus* did not lie, as the remedy for the wrongful amotion complained of was by application to the visitor,

who had sufficient & exclusive jurisdiction, although the foundation was spiritual & not eleemosynary, & the office was a freehold office: & it was not necessary to return the cause of amotion.

The powers of the Bishop of Chester are not confined to cases in which he would have had jurisdiction as ordinary, but that he is constituted a special visitor to see that the statutes are enforced; he is empowered to do all things that appertain to the office of visitor—a functionary well known to the law; the law defining & recognising his powers where they are not limited by the founder. One of these powers is, upon appeal, to him to restore a person to an office on the foundation, from which, in violation of the statutes, he has been removed. We were told that the *mandamus* ought to go, because this is a spiritual, not an eleemosynary foundation; but no authority was cited to show that this distinction is material where there is a special visitor appointed by the founder, although there is a difference with respect to the act of the visitor merely in his capacity of ordinary. The office here is a lay office belonging to a spiritual foundation, & on principle there seems nothing to show for the present purpose that this is to be viewed differently from a fellowship in a college (*LORD CAMPBELL, C.J.*).—*R. v. CHESTER (DEAN & CHAPTER)* (1850), 15 Q. B. 513; 19 L. J. Q. B. 485; 15 L. T. O. S. 342; 14 J. P. 654; 15 Jur. 10; 117 E. R. 553.

*Annotation*.—*Fold. R. v. Rochester* (Dean, etc.) (1851), 17 Q. B. 1.

188. *Cathedral church—Alteration of fabric.*—*PHILLIPOTS v. BOYD*, No. 185, *ante*.

189. *Exercise of jurisdiction—In judicial capacity.*—*Re YORK (DEAN)*, No. 113, *ante*.

190. *Forms to be followed.*—*Re YORK (DEAN)*, No. 113, *ante*.

191. *Right to procurations—In respect of impropriate rectory.*—Procurations are due of common right to the ordinary or his vicar, the archdeacon, although the church be a rectory impropriate, without a vicarage endowed, & they are properly suable for in the ecclesiastical ct.—*SANDERSON v. CLAGGET* (1721), 1 Stra. 421; 93 E. R. 609; *sub nom. SAUNDERSON v. CLAGGET*, 1 P. Wms. 657.

192. *Suspension of jurisdiction—By archiepiscopal visitation & inhibition.*—*LUNNE v. DODSON* (1661), 3 Salk. 201; 91 E. R. 776. *Annotation*.—*Consd. R. v. Sowter*, [1901] 1 K. B. 396.

193. *Extinction of jurisdiction—Cathedral school—Scheme under Endowed Schools Act, 1869 (c. 56).*—*Held*: a scheme under the above Act had destroyed the connexion between the headmaster of the King's School, Chester, & the cathedral church of Chester so as to oust the jurisdiction of the bishop as visitor to adjudicate upon the claim of the headmaster to a seat in the choir of the cathedral.—*CHESTER (DEAN & CHAPTER) v. CHESTER (Bp.)* (1902), 87 L. T. 618; 19 T. L. R. 131, H. L.; *revg. S. C. sub nom. R. (ON PROSECUTION OF CHESTER, DEAN & CHAPTER) v. CHESTER (Bp.)* (1901), 17 T. L. R. 533, C. A.

*See, generally, EDUCATION.*

*The bishop as visitor of charities.*—*See CHARITIES*, Vol. VIII.

(b) *Inhibition.*

194. *Operation—As regards archdeacon.*—*LUNNE v. DODSON* (1661), 3 Salk. 201; 91 E. R. 776.

*Annotation*.—*Consd. R. v. Sowter*, [1901] 1 K. B. 396.

195. *Admission of churchwardens.*—(1) Where an archdeacon was inhibited during

the period of the bishop's triennial visitation from exercising any spiritual or ecclesiastical jurisdiction concerning, among other things, the admission of churchwardens:—*Held*: it was not the duty of the archdeacon during the period covered by the inhibition to admit a churchwarden, & he could not be ordered by *mandamus* to do so.

(2) When a bishop is visiting, & during his visitation inhibits the archdeacon, the law is that during the period covered by the inhibition, in respect of various matters, the office or duty of the archdeacon is displaced by that of the bishop (ROMER, L.J.).—*R. v. SOWTER*, [1901] 1 K. B. 396; 70 L. J. K. B. 322; 84 L. T. 36; 65 J. P. 355; 49 W. R. 338; 17 T. L. R. 211; 45 Sol. Jo. 218, C. A.

*Annotation*:—*As to* (1) *Consd. R. v. Sarum, Bp.*, [1916] 1 K. B. 466.

196. — *As regards commissary*.—(1) A *significavit* under Eccles. Courts Act, 1813 (c. 127), s. 1, need not appear on the face of it to have been issued within ten days of the party having been pronounced in contempt, as it will be presumed to have been so issued, & no such statement is contained in the form of *significavit* given by the act. Nor is a *significavit* vitiated by the introduction of merely superfluous words, not contained in the statutable form, viz. by the addition of the words "as by our citation he was required to appear" after the statement that the party has been pronounced in contempt.

(2) By the bishop's inhibition, during his visitation, the jurisdiction of his commissary is superseded, & a party resident within the commissary's jurisdiction may then be cited before the bishop's official principal. The appointment of a commissary for a district does not make it a peculiar.—*R. v. THOROGOOD* (1840), 12 Ad. & El. 183; 3 Per. & Dav. 629; 9 L. J. Q. B. 211; 4 J. P. 298; 4 Jur. 937; 113 E. R. 780.

*Annotations*:—*Generally, Mentd. Richards v. Dyke* (1842), 3 Q. B. 256; *Ec p. Cox* (1887), 20 Q. B. D. 1; *R. v. Penzance & Hakes* (1887), 56 L. J. Q. B. 532.

197. *Form*.—*R. v. SOWTER*, No. 195, *ante*.

#### (c) Appeals.

198. *To court of arches*.—*Havers v. London (Bp.)* (1679), Return of Appeals before the High Court of Delegates p. 31, No. 69 (Parliamentary Papers, 199, April 3, 1868); cited in 2 Q. B. at pp. 9, 27.

*Annotation*:—*Consd. Boyd v. Phillpotts* (1874), L. R. 4 A. & E. 297.

199. — *Removal of cathedral ornaments set up without faculty*.—The Dean & Chapter of the Cathedral of Exeter removed a "reredos" which had been erected in the choir of the cathedral in 1823, & substituted for it a new "reredos" of a different character. The original "reredos" extended across the whole of the east end of the choir. The new structure only occupied about the space required for the communion table in the centre, & on it were carved representations in bas-relief of the "Ascension of Our Blessed Lord," the "Transfiguration of Our Blessed Lord," & the "Descent of the Holy Ghost on the Day of Pentecost." All the figures were cut or carved out of the actual structure during the progress of the reredos. The dean & chapter had obtained no faculty for its erection, & the bishop, on a special visitation of the cathedral, made an order for its removal:—*Held*: (1) an appeal from the order of the bishop lay to the Ct. of Arches; (2) the absence of an episcopal faculty did not render the erection of the "reredos" illegal; (3) the figures or images carved upon it were not unlawful.—*Boyd v. Phillpotts* (1874), L. R. 4

A. & E. 297; 44 L. J. Eccl. 1; *on appeal, sub nom. Phillpotts v. Boyd* (1875), L. R. 6 P. C. 435, P. C.

*Annotations*:—*As to* (2) *Refd. Paington (Vicar) v. All Having Interest*, [1905] 1 P. 111; *Markham v. Shirebrook Overseers*, [1906] P. 239. *As to* (3) *Consd. Ridsdale v. Clifton* (1877), 2 P. D. 274; *Re St. Lawrence, Pittington* (1880), 5 P. D. 131; *R. v. London, Bp.* (1889), 24 Q. B. D. 213; *St. John, Pendlebury (Vicar, etc.) v. St. John, Pendlebury (Parishioners)*, [1895] P. 178; *Great Bardfield (Vicar) v. All Having Interest*, [1897] P. 185; *Paington (Vicar) v. All Having Interest*, [1905] P. 111; *Markham v. Shirebrook Overseers*, [1906] P. 239. *Refd. Hughes v. Edwards* (1877), 2 P. D. 361; *Allcroft v. London (Lord Bp.)*, [1891] A. C. 606; *R. v. London, Bp., Leighton's Case*, [1891] 2 Q. B. 48; *St. John the Baptist, Timberhill (Vicar, etc.) v. St. John the Baptist, Timberhill (Rectors, etc.)*, [1895] P. 71; *Barsham, Suffolk (Rector, etc.) v. Barsham, Suffolk (Parishioners)*, [1899] P. 256; *Re St. Mark's, Marylebone Rd., St. Mark's (Vicar) v. St. Mark's (Parishioners)*, [1898] P. 114; *Kensit v. St. Ethelburga, Bishopsgate Within*, [1900] P. 80; *Re St. Anselm, Pinner*, [1901] P. 202; *Davey v. Hinde*, [1903] P. 221; *Re Christ Church, Kaling*, [1906] P. 289; *Wimbledon (Vicar & Churchwardens) v. Eaton*, *Re St. Mark's, Wimbledon*, [1908] P. 167; *St. John the Evangelist, Clevedon (Vicar & Churchwardens) v. All Having Interest*, [1909] P. 6; *St. Paul, Bow Common (Inhabitants, Churchwardens) v. St. Paul, Bow Common (Inhabitants)*, [1909] P. 245; *Bourne v. Keane*, [1919] A. C. 815; *Re Tenbury Parish Church* (1919), 36 T. L. R. 188; *Re St. Luke's, Southport* (1920), 36 T. L. R. 733. *Generally, Mentd. Bowman v. Lax*, [1910] P. 300.

*From Archbishop as visitor of his cathedral church*.—*See* Nos. 110, 111, *ante*.

#### (d) Control by Temporal Courts.

200. *Mandamus—Prebendary deprived for incontinency*.—(1) A *mandamus* lies not to a visitor, who has deprived a prebendary for incontinency.

(2) [The prebendary] ought to have applied for a prohibition while the matter was under consideration before the bishop (LEE, C.J.).—*R. v. CHESTER (Bp.)* (1748), 1 Wils. 206; 1 Wm. Bl. 22; 95 E. R. 576.

*Annotations*:—*As to* (1) *Consd. R. v. York, Archbp.* (1842), 2 Gal. & Dav. 202. *Refd. Whiston v. Rochester (Dean & Chapter)* (1849), 7 Haro, 532; *McGeath v. Geraghty* (1866), 15 W. L. R. 127. *As to* (2) *Refd. Whiston v. Rochester (Dean & Chapter)* (1849), 7 Haro, 532.

201. — *Refusal to hear claim to profits of prebend—Profits accruing during vacancy claimed by incoming prebendary*.—(1) The ct. will not issue a *mandamus* to a visitor, to hear a claim by a prebend to the profits of his stall, during its vacancy.

(2) As the other prebendaries had divided those profits, & some of them were dead, their representatives must be heard, & no visitatorial power of the bishop could extend to them (LORD MANSFIELD, C.J.).

(3) If [the incoming prebendary] had a right to this money, he might recover it in an action for money had & received (LORD MANSFIELD, C.J.).—*R. v. DURHAM (Bp.)* (1758), 1 Burr. 567; 2 Keny. 290; 97 E. R. 451.

— *Bishop as visitor of charity*.—*See* CHARITIES, Vol. VIII., p. 390.

*See, generally, CROWN PRACTICE*, Vol. XVI., pp. 276 *et seq.*

202. *Prohibition—Time for application*.—*R. v. CHESTER (Bp.)*, No. 200, *ante*.

— *Bishop as visitor of charity*.—*See* CHARITIES, Vol. VIII., p. 390.

*See, generally, CROWN PRACTICE*, Vol. XVI., pp. 372 *et seq.*

#### F. Vacation of Bishopric.

203. — *Exercise of judicial powers of Archbishop—Where court held*.—*PICKAVER'S CASE* (1616), Hob. 178; 80 E. R. 325.

*Annotation*:—*Refd. Parkes v. Parkes* (1852), 2 Rob. Eccl. 518.

*Sect. 5.—Constitution of the Church into dioceses: Sub-sect. 2, F. & G.; sub-sect. 3, A. (a), (b), (c) & (d).]*

**204. Effect of vacation—On spiritualities.]—**Where the bishop admits another man to my benefice, & in a *quare impedit* against him & the other, he pleads, that he hath nothing but as Ordinary, I shall yet have my election, to have my writ to him, or to the metropolitan, or *sede vacante*, to the guardian of the spiritualite; & as touching the guardian of the spiritualities of common right, by the common law, the dean & chapter *sede vacante* of the bishop, is guardian of the spiritualities (COKE, C.J.).

Every archbishop hath a diocese & a province, & of his diocese he is a bishop, & of his province he is archbishop, & within his province he is to be visitor of all the churches within his province & *sede vacante* of any bishop within his province, he himself is guardian of the spiritualities, of all the bishoprics within his province, *sed sede vacante* of his own diocese, the dean & chapter of this is guardian of the spiritualities (DODDERIDGE, J.).—GRANGE v. DENNY (1616), 3 Bulst. 174; 81 E. R. 147.

**205. ——— Right to temporalities during vacancy—Escheat.]—**COVERT'S CASE (1600), Cro. Eliz. 754; 78 E. R. 985.

*Annotation:—*Refd. *Partridge v. Galt* (1605), 1 Brownl. 201.

**206. ———.]—***Ex p. TARRANT*, No. 72, ante.

——— **Successor's right to temporalities.]—**See Sub-sect. 2, B. (a), ante.

**207. ——— Successor's right to chapel ornaments.]—**CARLISLE'S (BP.) CASE (1347), Y B. 21 Edw. 3, fo. 48, pl. 73.

*Annotation:—*Refd. *Corven's Case* (1605), 12 Co. Rep. 105.

**208. ———.]—**(CORVEN'S CASE, No. 3159, post.

——— **By deprivation—Right of presentation to living vacant at date of deprivation.]—**See No. 68, ante.

**209. ——— By death—On pending suit by bishop in archbishop's court.]—**(1) If a bishop, having a commendatory within his diocese, libel for tithes in the ct. of the Archbishop, & die pending the suit, his executors may revive it.

(2) The question is if a suit, being lawfully commenced in the Archbishop's ct., shall afterwards be prohibited as illegal? & in this case, although the cause cease, yet the suit shall continue; for, by the civil law, the death of plff. or deft. is not any abatement of the libel, but they have a reviver. . . . The intent of the statute is not that such a cause should be remanded, whereby plff. should lose the costs of his suit (DODDERIDGE, J.).—CARLISLE'S (BP.) CASE (1618), Cro. Jac. 483; 79 E. R. 412.

*Annotation:—*Refd. *Oxford's, Bp. Case* (1622), Palm. 174.

See, generally, PRACTICE.

——— **Right of presentation to living vacant at death.]—**See No. 146, ante.

#### G. Episcopal Registers.

**210. Register of presentations—Right of inspection.]—**A bishop's registry of presentations is a public book; & a *mandamus* lies to him to grant inspection of it to one claiming a right to present to a vacant living, though the bishop claim a right to collate to it. A bishop's registry is kept for the benefit of the public at large, & ought to be accessible to every individual who has, or who can by possibility claim title to, the presentation to a living within his diocese. They are, strictly speaking, public documents, & must be open to the public.

The fact of the bishop being a claimant is a strong additional reason why an inspection ought to be allowed of the books, which are kept by the bishop himself for the benefit of the public.—R. v. ELY (BP.) (1828), 8 B. & C. 112; 108 E. R. 985; *sub nom. FINCH v. ELY* (BP.), 2 Man. & Ry. K. B. 127; 6 L. J. O. S. K. B. 223.

**211. ———.]—**R. v. RIFON (BP.) (1844), 3 L. T. O. S. 202; 8 J. P. Jo. 388.

See, generally, DISCOVERY.

**Documents from—Whether admissible as evidence.]—**See BOUNDARIES, Vol. VII., pp. 318, 319, Nos. 379, 401; EVIDENCE.

#### SUB-SECT. 3. —DIOCESAN CHANCELLORS AND OTHER OFFICERS.

##### A. The Diocesan Chancellor.

###### (a) In General.

**212. Nature of office—Within Sale of Offices Act, 1551 (c. 16).]**—The Chancellor, Register, & Commissary in the Ecclesiastical cts., are officers within Sale of Offices Act, 1552 (c. 16), & restrained from buying or selling their offices.—TREVOR'S CASE (1611), 12 Co. Rep. 78; Cro. Jac. 269; 77 E. R. 1356.

*Annotations:—*Refd. *Woodward v. Foxe* (1691), 3 Lev. 289. *Refd. Lyn v. Wyn* (1665), O. Bridg. 122; *Layng v. Paine* (1745), Willes, 571. *Mentd. Morton's Case* (1661), 1 Sid. 65.

**213. ——— Freehold.]—**(1) The ct. will not grant a prohibition to stay a suit in the Ecclesiastical Ct. against the chancellor of a bishop, to examine whether he be skilled in the civil law, although the bishop had granted him the office for life.

(2) If an office of skill be granted to one for life who hath no skill to execute the office, the grant is void, & he hath no frank-tenement in it. A prohibition is for two causes: first to give to us jurisdiction of that which doth belong unto us; & secondly, when a thing is done against the law, & in breach of the law, then we use to grant a prohibition (DODDERIDGE, J.).

(3) The chancellor of a diocese is vicar-general to the bishop, & if the bishop will not elect a chancellor, the metropolitan must. For the bishop cannot be judge in his own consistory. The bishop ought to examine the chancellor before admitting him, but can do so afterwards. The chancellor can be deprived even after admittance (RICHARDSON, C.J.).—SUTTON'S CASE (1627), Godb. 390; Cro. Car. 65; Lat. 228; Litt. 22; Noy, 91; 78 E. R. 230.

*Annotations:—*As to (1) *Refd. Anon.* (1677), Freem. K. B. 290. *As to* (3) *W.F. Jones v. Llandaff, Bp.* (1692), 12 Mod. Rep. 47.

**214. ———.]—**The spiritual ct. shall be prohibited from proceeding in a suit by a bishop against the chancellor of his diocese to deprive him for ignorance in the civil & canon laws, although the office was granted by his predecessors; for being granted for life, the grantee has a freehold in the office.—JONES v. LANDAFF (BP.) (1693), 4 Mod. Rep. 27; 12 Mod. Rep. 47; 87 E. R. 242.

*Annotation:—*Refd. *Grace v. Ossory, Bp.* (1848), 4 Cox, C. C. 159.

**215. Right of office—Court having jurisdiction to try.]—**ROBOTHAM v. TREVOR (1610), 2 Brownl. 11; 123 E. R. 780.

*Annotation:—*Refd. *Peak v. Bourne* (1732), 2 Stra. 942.

**216. Right to fees—Though bishop holds court.]—**(HIBBONS v. CLOYNE (BP.), No. 148, ante.

**217. Power to make leases.]—**BISCO v. HOLTE

(1063), 1 Lev. 112; 83 E. R. 323; *sub nom.* BIS v. HOLT, 1 Sid. 158.

(b) *Appointment.*

218. By whom appointed.]—SUTTON'S CASE, No. 213, *ante*.

219. —.]—GLANVIL'S CASE (1627), Palm. 450; 81 E. R. 1166.

220. Qualifications.]—GLANVIL'S CASE (1627), Palm. 450; 81 E. R. 1166.

221. — Examination as to.]—SUTTON'S CASE, No. 213, *ante*.

222. Appointment of two jointly—Whether valid.]—Judicial office may be granted to two; but if one dies, it shall not survive, unless said to the survivor.—JONES v. BEAU (1691), 4 Mod. Rep. 16; 12 Mod. Rep. 10; 1 Show. 288; 87 E. R. 236; *sub nom.* JONES v. PUGH, 2 Salk. 465; *sub nom.* JONES v. BEW, Carth. 213.

Annotations:—*Refd.* Trowlaway v. Winchester, Bp. (1757), 1 Burr. 219; Bell v. Holtby (1873), L. R. 15 Eq. 178.

223. Appointment with reservations—Whether valid.]—A grant of the office of vicar-general, with a reservation to the bishop, is void.—ANON. (1705), 11 Mod. Rep. 46; 88 E. R. 874.

224. — Reservation of certain causes.]—By letters patent appointing a chancellor for a diocese the bishop gave him power, in the absence of the bishop from his Consistory Ct., to determine certain causes, "Nevertheless first consulting us & our successors, & having our consent in case either party earnestly crave our judgment." A suit was promoted for the removal of certain ornaments from a church in the diocese, & the respondents in their reply asked that the bishop should be first consulted & his consent had, & earnestly craved his judgment. The chancellor heard the suit, & delivered a judgment in which he held that he had jurisdiction & dealt with the merits of the case. It appeared from the judgment, though not so stated in terms, that he had not consulted the bishop or obtained his consent either to the hearing of the suit or the terms of the judgment. On appeal from a refusal to direct the issue of a writ of prohibition:—*Held*: the limitation in the patent was not illegal; it did not relate to procedure, but had the effect of excluding the jurisdiction of the chancellor over the excepted causes; the absence of jurisdiction sufficiently appeared on the face of the proceedings; & as the objection to the hearing of the suit by the chancellor had not been abandoned or waived, a writ of prohibition should issue.—R. v. TRISTRAM, [1902] 1 K. B. 810; 71 L. J. K. B. 418; 86 L. T. 515; 50 W. R. 477; 18 T. L. R. 406, C. A.

Annotations:—*Refd.* Smythe v. Wiles, [1921] 2 K. B. 66; St. Magnus, etc. Parochial Church Council v. London Diocese Chancellor, [1923] P. 38.

See, also, No. 2768, *post*.

(c) *Jurisdiction.*

225. Issue of commission to tax parishioners—For repairs of church.]—The chancellor of the diocese cannot grant a commission to tax parishioners for the repairs of the church.—ANON. (1674), 1 Freem. K. B. 286; 89 E. R. 206.

See, generally, Part VII., Sect. 3, sub-sect. 5, *post*.

226. Where separate commissary appointed—Archdeaconry of Buckinghamshire.]—(1) The chancellor of Lincoln cannot exercise jurisdiction within the jurisdiction of the Archdeacon & Commissary of Buckinghamshire.

(2) Commissaries are ancient officers & were instituted, not so much for the ease of the chan-

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cellors or vicars-general, as for the benefit of the subject, that justice might be done them near home (SIR GEORGE LEE).—HILLYER v. MILLIGAN (1754), 2 Lee, 8.

Annotation:—*Generally*, *Refd.* R. v. Tristram, [1902] 1 K. B. 816.

227. In what capacity exercised—As representative of bishop.]—THORPE v. MANSELL (1810), 1 Hag. Con. 4, n.

Annotations:—*Refd.* Prankard v. Deacle (1828), 1 Hag. Eco. 169; R. v. Canterbury, Archbp., [1902] 2 K. B. 503; Bowman v. Lax, [1910] P. 300.

228. —.]—ST. SEPULCHRE (VICAR) v. ST. SEPULCHRE (CHURCHWARDENS), No. 747, *post*.

229. Improper exercise of jurisdiction—Liability in damages.]—(1) An action upon the case was held not to lie against the vicar-general of the bishop for excommunicating pltf. with the greater excommunication, for contumacy in not taking upon him administration of an intestate's effects, to whom pltf. was next of kin, & had intermeddled with the goods, etc., although the citation by which pltf. was cited was void, by reason that it required him to appear & take administration, etc., without leaving him an option to renounce it, & the proceedings thereupon had been set aside upon appeal; for the vicar-general had jurisdiction over the subject-matter, *viz.* the granting administration, & there was no malice.

(2) This action is not maintainable if the ecclesiastical ct. had a general jurisdiction over the subject-matter, & that it had general jurisdiction over the subject-matter, & in regard to some of the particulars mentioned in the citation, there can be no doubt. I accede however to the decision of the Ct. of Delegates that this citation must be considered as a nullity. It has left no election to the party cited but obedience to its requisitions (LORD ELLENBOROUGH, C.J.).—ACKERLEY v. PARKINSON (1815), 3 M. & S. 411; 105 E. R. 605.

Annotations:—As to (2) *Refd.* Martin v. Mackonochie (1879), 4 Q. B. D. 697. *Generally*, *Mentd.* Brittain v. Kinnaird (1810), 1 Brod. & Bing. 432; Painter v. Liverpool Oil Gas Light Co. (1836), 2 Har. & W. 233; Wingate v. Walte (1840), 6 M. & W. 739; Watson v. Rodell (1845), 14 M. & W. 57; Pears v. Chaytor (1863), 3 B. & S. 620.

230. In particular dioceses—Chichester.]—DAVEY v. HINDE, No. 2768, *post*.

231. — Lincoln—Archdeaconry of Buckinghamshire.]—HILLYER v. MILLIGAN, No. 226, *ante*.

232. — London—To license to lecture.]—SMITH v. LOVEGROVE, No. 155, *ante*.

233. How lost—Bishop interested in cause.]—It is no ground for prohibiting a cause before the chancellor of a diocese in the Consistorial Ct. of the diocese, that the bishop of the diocese is interested in the cause.—*Ex p.* MEDWIN (1853), 1 E. & B. 609; 17 Jur. 1178; 118 E. R. 566; *sub nom.* RAWLINSON v. MEDWIN, *Ex p.* MEDWIN, 22 L. J. Q. B. 169; *sub nom.* RAWLINSON v. MEDWIN & HURST, 21 L. T. O. S. 5; *sub nom.* RAWLINSON v. MEDWIN & WEST, 17 J. P. 166.

Annotations:—*Apld.* Lee v. Flack, [1896] P. 138; *It. v.* Tristram, [1902] 1 K. B. 816. *Mentd.* Page v. Lee (1873), L. R. 4 A. & E. 135; *It. v.* Taunton Corp'n. (1887), 4 T. L. R. 87.

(d) *Termination of Office.*

234. By removal—Whether capable of removal.]—SUTTON'S CASE, No. 213, *ante*.

235. —.]—JONES v. LANDAFF (Bp.), No. 214, *ante*.

236. — Grounds for.]—SUTTON'S CASE, No. 213, *ante*.

237. —.]—GLANVIL'S CASE (1627), Palm. 450; 81 E. R. 1166.

*Sect. 5.—Constitution of the Church into dioceses: Sub-sect. 3, A. (d), B. (a) & (b) & C.]*

**238. By death of one of two joint holders—Form of grant.]—**JONES v. BEAU, No. 222, *ante*.

**239. Effect of pardon.]—**A pardon of a sentence in the spiritual ct. of fine, imprisonment, & deprivation, for bribery in the office of chancellor of a province, discharges not only the sentence but the consequent disabilities.—BENNET v. EASEDALE (1626), Cro. Car. 55; 79 E. R. 651. *Annotation:—Mentd.* Hay v. London Tower Division JJ. (1890), 24 Q. B. D. 561.

### B. The Registrar.

#### (a) In General.

**240. Nature of office—Whether within Sale of Offices Act, 1552 (c. 16).]**—TREVOR'S CASE, No. 212, *ante*.

**241. — Freehold.]—**(1) The registrar of a spiritual ct. cannot sue there for his fees.

(2) The office of registrar or archdeacon is a freehold (HOIT, C.J.).—BALLARD v. GERARD (1702), 12 Mod. Rep. 608; Hoit, K. B. 596; 1 Salk. 333; 88 E. R. 1553; *sub nom.* POLLARD v. GERARD, 1 Ld. Raym. 703.

*Annotations:—As to (1) Reidd.* Shepherd v. Payne (1862), 31 L. J. C. P. 297; Veley v. Portwee (1870), L. R. 5 Q. B. 573. *Generally, Mentd.* Mills v. Colchester Corp'n. (1867), L. R. 2 C. P. 476; Lawrence v. Hitch (1868), L. R. 3 Q. B. 521.

**242. Appointment—In reversion—Whether valid.]—**(1) A grant by the bishop of the office of a diocese, in reversion after the death of the tenant for life, to an infant of eleven years of age, *exercendum per se vel deputatum sufficientem*, is good, notwithstanding the infancy; but if he make an insufficient deputy, it is a forfeiture of the office.

(2) The office of registrar of a diocese or any other office usually granted for life in possession or reversion may be granted in reversion by every bishop; & if confirmed by the dean & chapter will bind his successors.—YOUNG v. FOWLER (1630), Cro. Car. 555; March, 38; 79 E. R. 1078.

*Annotations:—As to (1) Reidd.* Eddleston v. Collins (1852), 10 Hare, 99. *As to (2) Reidd.* Ridley v. Pownell (1675), Freeman. K. B. 394; Trolawney v. Winchester, Bp. (1757), 1 Burr. 219. *Generally, Mentd.* Threadneedle v. Litnum (1674), Freeman. K. B. 179; R. v. Kempe (1895), 1 Ld. Raym. 49; Claridge v. Evelyn (1821), 5 B. & Ald. 81.

**243. — Reversioner an Infant—Of full age at death of predecessor.]—**ROCHESTER'S (Bp.) CASE (1607), Jonk. 121; 145 E. R. 85.

**244. — Power under grant to exercise by deputy.]—**YOUNG v. FOWLER, No. 242, *ante*.

**245. — For three lives—Whether valid.]—**The office of registrar may be granted for three lives, whether the bishopric be an old or a new one, if it was usually so granted before 1 Eliz. c. 19.—RIDLEY v. POWNELL (1675), 1 Freeman. K. B. 394; 2 Lev. 136; 3 Keb. 472, 506; 89 E. R. 293; *subsequent proceedings*, 3 Keb. 540, 560.

*Annotation:—Reidd.* Trolawney v. Winchester, Bp. (1757), 1 Burr. 219.

**246. Recovery of fees—In what court.]—**BALLARD v. GERARD, No. 241, *ante*.

**247. — Registrar acting as proctor—Whether within 54 Geo. 3 (c. 68), s. 10.]—**(1) Above Act, sect. 9, prohibits a proctor from permitting or suffering "his name to be in any manner used in any suit, the prosecution or defence of which shall appertain to the office of a proctor, or in obtaining probates of will, letters of administration, or marriage licenses" for the benefit of any other person. Sect. 10 enacts, "that in case any

person shall, in his own name, or in the name of a other person, make, do, act, exercise, or perform any act, matter, or thing whatsoever, in any way appertaining or belonging to the office, function, or practice of a proctor, for or in consideration of any gain, fee, or reward, or with a view to participate in the benefit to be derived from the office, function, or practice of a proctor, without being admitted & enrolled, he shall forfeit £50": *Held: construing these two sections together, the acts intended by the latter section to be prohibited were those which were legally incident to the office of a proctor; not those which, though usually performed by him, were not of right incident to the office.*

(2) Therefore, a registrar of an ecclesiastical ct., who, in cases where there was no testamentary contest, had prepared the documents, & done the acts necessary, for obtaining letters testamentary & probates of wills, & other similar matters, had not thereby subjected himself to the penal imposed by sect. 10.—STEPHENSON v. HIGGINS (1851), 3 H. L. Cas. 638; 10 E. R. 252, H. L. *Annotations:—Generally, Reidd.* Law Soc. of United Kingdom v. Shaw, Same v. Waterlow (1882), 51 L. J. Q. B. 2. *Mentd.* Income Tax Special Purposes Comm. v. Pemsel (1891) A. C. 531.

**248. Termination of office—By forfeiture—Appointment of insufficient deputy by infant.]—**YOUNG v. FOWLER, No. 242, *ante*.

#### (b) Deputy Registrar.

**249. Nature of office—Whether within Sale of Offices Act, 1551 (c. 16).]**—LAKE v. PRIGER (1633), Nels. 27; 21 E. R. 781.

**250. — Held at will.]—***Mandamus* lies for the principal registrar of the Archbishop's Ct. to admit & swear his deputy, but it will not lie for the deputy himself, he being an officer at will. It lies notwithstanding that this is a spiritual office. The writ need not aver that the person to whom it is directed, is the person to whom appertains to admit & swear.—R. v. WARD (1731) 2 Stra. 893; 1 Barn. K. B. 294, 380, 411; Fitzg. 123, 194; 93 E. R. 922.

*Annotations:—Mentd.* R. v. Williams (1828), 8 B. & Ald. 681; R. v. Sowter (Archdeacon) (1900), 70 L. J. Q. B. 8.

**251. — Spiritual office.]—**R. v. WARD, N. 250, *ante*.

**252. Admission—Whether mandamus will issue.]—**R. v. WARD, No. 250, *ante*.

**253. — Disapproval of bishop—Construction of registrar's patent of office.]—**The registrars of a diocese were authorised by the patent of office to appoint a deputy, to be "approved of & allowed by the bishop"; who, if he should not approve of & allow the deputy name & proposed to him, was empowered to nominate another, with a salary payable out of the profits of the registrarship. The registrars appointed a deputy, subject to the approbation & consent of the bishop, who on being informed of it, answered that "for good & sufficient reasons" he disapproved of the party nominated, but decline specifying his reasons. The ct. refused a rule nisi for a *mandamus* to the bishop to admit the deputy.—R. v. GLOUCESTER (Bp.) (1831), 2 B. & Ald. 158; 9 L. J. O. S. K. B. 228; 109 E. R. 110; *Annotation:—Mentd.* R. v. London Corp'n. (1832), 3 B. & Ald. 255.

**254. Termination of office—Recovery of public books—Whether mandamus will arise—Termination of office disputed.]—**R. v. WHEELER (1735) Cunn. 155; Lee *temp.* Hard. 99; 94 E. R. 1123.

**255. Clerk to deputy registrar—Nature of office—Whether within Sale of Offices Act, 1551 (c. 16).**

—The office of clerk to the deputy registrar in the Perogative Court of Canterbury is not office connected with the administration of justice, within the meaning of the above sect., so as to prevent its being aliened or charged. Nor is an alienation of or charge on the profits of the office, contrary to the policy of the law, restricting the alienation of the income of a public officer.—*ASTON v. GWINNELL* (1829), 3 Y. & J. 136; 148 E. R. 1125, Ex. Ch. in Eq.

*Annotation* :—*Mentd. Earl v. Browne* (1839), 3 Jur. 1146.

**256.** — *Alienation of or charge on profits of office—Whether contrary to public policy.*—*ASTON v. GWINNELL*, No. 255, *ante*.

#### C. Other Subordinate Officers.

**257. Commissary—Nature of office—Whether within Sale of Offices Act, 1552 (c. 16).—*TREVOR'S CASE*, No. 212, *ante*.**

**258.** — *Appointment—Who may be appointed.*—A person may be commissary to a bishop though he is not a doctor of laws.—*PRATT v. STOCKE* (1594), Cro. Eliz. 315; 78 E. R. 565.

**259.** — *Grant in reversion—Whether valid.*—Special verdict on an action on the case for disturbance in the offices, (1) Of official of an archdeaconry; (2) Of commissary to a bishop: & adjudged, that a grant of them in reversion is good. 37 Hen. 8, c. 17, does not restrain a lay person & bachelor of the civil law only from holding the offices of commissary, chancellor, or official to a bishop.

1 Eliz. c. 10, & 13 Eliz. c. 10, restrain bishops & archdeacons from granting the offices above-mentioned, so as to bind successors for a longer term than one life, unless usually granted in reversion.—*WALKER v. LAMB* (1632), Cro. Car. 258; 79 E. R. 825.

*Annotations* :—*As to* (2) *Refd. Threadneedle v. Linum* (1674), Freem. K. B. 179; *Ridley v. Pownell* (1675), Freem. K. B. 394.

**260.** — *Purpose of.*—*HILLYER v. MILLIGAN*, No. 226, *ante*.

**261.** — *Jurisdiction.*—*COOK v. WALL* (1607), Noy, 123; 74 E. R. 1087.

*Annotations* :—*Refd. Blanc v. Geraghty* (1866), 15 W. R. 133; *McGeath v. Geraghty* (1866), 15 W. R. 127.

**262.** — *Suspension by inhibition during visitation of bishop.*—*R. v. THOROGOOD*, No. 196, *ante*.

*See, also*, No. 226, *ante*.

**263. Surrogate—Appointment.**—(1) Upon an indictment for perjury before a surrogate in the Ecclesiastical Ct., the fact of the person who administered the oath having acted as surrogate is sufficient *prima facie* evidence of his being duly appointed, & having authority to administer the oath; (2) if it appear that the surrogate was appointed contrary to the canon which requires that no judicial act shall be speeded by any ecclesiastical judge, unless in the presence of the registrar or his deputy, or other persons by law allowed in that behalf, his appointment is a nullity, & the averment that he had authority to administer the oath is negatived.—*R. v. VERELST* (1813), 3 Camp. 432.

*Annotations* :—*As to* (1) *Refd. Doe d. Bowley v. Barnes* (1846), 16 L. J. Q. B. 293; *R. v. Roberts* (1878), 38 L. T. 690. *As to* (2) *Distd. Dale's Case*, Enraght's Case (1881), 6 Q. B. D. 376. *Generally, Refd. Parkes v. Parkes* (1852), 2 Rob. Ecol. 518. *Mentd. Faulkner v. Johnson* (1843), 11 M. & W. 681; *R. v. Chapman* (1849), 1 Den. 432; *Wolton v. Gavin* (1850), 16 Q. B. 48; *McMahon v. Lennard* (1858), 6 H. L. Cas. 970.

**264. Receiver—Restrained from performing alleged duties—Remedy.**—By a grant or patent, dated in 1801, the then Bishop of E. having, as the grant stated, "confidence in the probity, fidelity, care & industry of P." granted to P., who was a solicitor, "the office of receiver of all issues, profits, & sums of money, arising & issuing" from the possessions of the see, to hold to P. by himself or his sufficient deputy or deputies, to be approved of by the bishop & his successors, for his life. The office of receiver was an ancient office, & had been exercised before the restraining statute of 1 Eliz., c. 19. P. held the office under three successive bishops, during the whole of which time he not only received the rents, but negotiated the renewals of leases, & prepared the leases of the see, & likewise attended all searches for records in the bishop's muniment room, of which he kept a key; for the performance of which acts he received fees & emoluments. It appeared also that his predecessor in office, who had held the office since 1785, had done the same. Upon the accession of A. to the bishopric in 1836, he refused to admit P.'s claim of right to perform these last-mentioned acts; upon which P. filed his bill against the bishop, praying a declaration of the rights in question in his favour, that he might be quieted in the possession of the office, & that the bishop might be restrained by injunction from obstructing pltf. in the exercise of such rights, & from doing acts in contravention of them :—*Held* : (1) pltf.'s claims were not of such a nature as to induce this ct. to interfere to protect them, without being well satisfied (which the ct. was not) that his legal remedy was insufficient to do him complete justice; (2) the relief sought being analogous to the specific performance of an agreement, the bill must fail, on the ground of want of mutuality; the nature of the duties and services asserted by pltf. being such as to preclude the possibility of a decree in this ct. against him, compelling their specific performance.—*PICKERING v. ELY* (Bp.) (1843), 2 Y. & C. Ch. Cas. 249; 12 L. J. Ch. 271; 7 Jur. 479; 63 E. R. 109.

*Annotations* :—*As to* (2) *Refd. Brett v. East India & London Shipping Co.* (1864), 2 Hem. & M. 404; *Milligan v. Sullivan* (1888), 4 T. L. R. 203. *Generally, Refd. Johnson v. Shrewsbury & Birmingham Ry.* (1853), 3 De G. M. & G. 914.

**265. Seal keeper—Tenure of office.**—Upon the trial of various issues raised upon a return to a writ of *mandamus*, commanding deft. to deliver up the seal of the Consistory Ct. of the diocese of L., it appeared that deft. had been appointed by the chancellor of 1821, by an instrument under seal, to hold the office of seal keeper "in as full & ample a manner as his predecessors had held it." It appeared that for many years, as far back as 1766, the office had been held for life, or during good behaviour, if the grantor should so long continue in the office of chancellor; but there was no record of such an office in the registry of the diocese in very ancient times, nor in very old books; & it appeared that in the cts. of the Archbishop of Canterbury & Bishop of London, the seal keeper was orally appointed during will & pleasure :—*Held* : this was evidence from which the ct., being placed in the situation of a jury, ought to infer, that the office of seal keeper was an ancient office, which might be granted to the holder for life, or during good behaviour, if the grantor should so long continue in the office of chancellor.—*R. v.*

#### PART III.—SECT. 5, SUB-SECT. 3.—C.

**1. Surrogate—Appointment—Oath of Office—Presumption.**—It will be pre-

sumed that a person acting as surrogate has taken the oath of office; but if he has not, his acts will not be invalid if he has been appointed to the

office.—*CROOKSHANK v. McFARLANE* (1853), 2 All. 644; *appud. Re TRUTHING MARRH*, 38 N. S. R. 28.—*CAN.*



*Sect. 5.—Constitution of the Church into dioceses: Sub-sect. 3, C.; sub-sects. 4 & 5, A., B., C. & D.; sub-sect. 6.]*

MOTT (1849), 3 New Mag. Cas. 178; 13 L. T. O. S. 233; 13 J. P. Jo. 377.

**266. Summoner—Liability for false return.]—Held:** (1) an action on the case lay against a summoner of the spiritual ct., for returning one "warned" when he was not, on which excommunication followed; (2) it was not necessary to show the suit or the authority of the official.—*POWLE v. GODFREY* (1614), Cro. Jac. 351; 1 Roll. Rep. 63; 79 E. R. 300; *sub nom. POLE v. GODFREY*, 2 Bulst. 204; Moore, K. B. 835; *sub nom. ANON.*, 12 Co. Rep. 128.

*Annotations:—Mentd.* Iveson v. Moore (1699), Holt, K. B. 10; Ashby v. White (1703), 2 Ld. Raym. 938.

#### SUB-SECT. 4.—DEANS AND CHAPTERS.

*See Sect. 6, post.*

#### SUB-SECT. 5.—ARCHDEACONS AND ARCHDEACONRIES.

##### A. In General.

**267. Nature of office—Freehold.]—BALLARD v. GERAUD**, No. 241, *ante*.

**268. Admission to office—Bye-law by dean & chapter requiring oath—Whether valid.]—A dean & chapter who have power to make bye-laws cannot make a bye-law that an archdeacon shall take the oath of canonical obedience before he is admitted into his office.—R. v. TRINITY CHAPEL, DUBLIN (DEAN & CHAPTER) (1722), 8 Mod. Rep. 27; 88 E. R. 21.**

**269. Glebe—No part of bishopric.]—The glebe of an archdeaconry is not any part of the possessions of the bishopric.—DENNY v. EAKENSTALL** (1595), Cro. Eliz. 430; 78 E. R. 670.

**270. Representation of archdeaconry in convocation—Qualification of candidate—Jurisdiction of temporal court.]—The Archbishop of Y. as President of the Convocation of his province having decided that a candidate who had been elected to represent an archdeaconry in the Lower House was disqualified;—*Held:* the ct. of Q. B. had no jurisdiction to grant a *mandamus* commanding the Archbishop to admit the candidate to Convocation.—R. v. YORK (ARCHBP.) (1888), 20 Q. B. D. 740; 57 L. J. Q. B. 306; 59 L. T. 443; 52 J. P. 709; 36 W. R. 718; 4 T. L. R. 483.**

**271. Refusal to admit churchwardens—Mandamus—Whether absolute in first instance.]—ANON.** (1815), No. 720, *post*.

**272. —————.]—Ex p. CLARK** (1867), 31 J. P. Jo. 739.

**Prebends annexed to archdeaconries.]—See Nos. 334, 338, *post*.**

##### B. Powers.

**273. Jurisdiction—Whether concurrent with episcopal jurisdiction.]—A person residing within a peculiar archdeaconry, cannot in general be sued in the Bishop's Ct. But where the archdeaconry is not peculiar, the bishop & archdeacon have concurrent jurisdiction.—ROBINSON v. GODSALVE** (1606), 1 Ld. Raym. 123; 91 E. R. 978.

**274. —————.]—Whether independent of diocesan chancellor.]—The Dean of Arches declined to accept letters of request presented jointly by the Archdeacon & Chancellor of N.**

The archdeacon has not a jurisdiction entirely independent of the chancellor of the diocese, but

an appeal lies from the archdeacon to the chancellor of the diocese, & from him to the Arches Ct. of Canterbury. The Archdeacon of N. has no separate jurisdiction, therefore it is not competent for him to sign letters of request to this ct.; his is not an exempt jurisdiction. The Chancellor of N. has jurisdiction, even if the archdeacon has no separate jurisdiction, & although the proceedings were commenced in his ct., there cannot be joint letters of request signed by the archdeacon & the chancellor of the diocese together to this ct. passing over the intermediate right of appeal. A delegated power is given to the chancellor, & it cannot be delegated to this ct.—*STEWART v. BATEMAN* (1842), 3 Curt. 201; 163 E. R. 702.

*Annotations:—Consd.* Sheppard v. Bennett (1869), L. R. 2 A. & E. 335. *Held.* Parkes v. Parkes (1852), 2 Rob. Eccl. 518. *Mentd.* Fagg v. Lee (1873), L. R. 4 A. & E. 135.

**In peculiars.]—See No. 273, *ante*, & No. 287, *post*.**

**275. Control of clergy—Request to preach visitation sermon.]—HUNTLEY'S CASE** (1626), 4 Burn's Eccl. Law 27.

**276. As to fabric of churches—Report on alteration—Adoption by court.]—(1) Articles having been filed under the Church Discipline Act, 1840 (c. 80), against a clergyman for making certain alterations in his church without having first obtained a legal sanction to them, he gave an affirmative issue thereto. The ct. then requested the archdeacon of the district in which the church is situated to inspect such alterations, & to report to it as to their nature & propriety, which he did;—*Held:* the ct. would adopt the recommendation of such a report, unless it contained some grievous misstatements of fact, or erroneous conclusion of law.**

(2) The ct. ordered a confirmatory faculty to issue in regard to those alterations which met with the archdeacon's approval, & admonished the clergyman to restore the church in every other respect to the state it was in before he commenced the alterations.—*SIEVEKING & EVANS v. KINGSFORD* (1866), 36 L. J. Eccl. 1; 15 L. T. 300; *sub nom. EVANS v. KINGSFORD*, 31 J. P. 179.

*Annotations:—As to (2) Consd.* Gardner v. Ellis (1874), L. R. 4 A. & E. 265. *Fold.* Re St. Mark's, Marylebone Rd., St. Mark's (Vicar) v. St. Mark's (Parishioners), [1898] P. 114. *Held.* Adlam v. Colthurst (1867), 37 L. J. Eccl. 3; Fagg v. Lee (1873), L. R. 4 A. & E. 135. *Generally, Mentd.* Davey v. Hyde, [1901] P. 95; Marson v. Unmack, [1923] P. 163.

##### C. Visitation.

**277. Right to fees—Procurations—In respect of impropriate rectory.]—SANDERSON v. CLAGGET**, No. 191, *ante*.

**278. —————.]—Liability of incumbents & churchwardens.]—(1) Except in those archdeaconries where by arrangement with the Ecclesiastical Comrs. procurations in respect of the archidiaconal procurations are not required to be paid by the clergy, the incumbents of parishes cited to attend the annual visitation of the archdeacon within whose jurisdiction their benefices are situated, if not otherwise exempt, are legally bound to pay procurations to the archdeacon at the customary rate, notwithstanding that the archdeacon has not personally visited the parish in respect of which the procurations are claimed either personally or by deputy, & although the visitation is held in another parish or in the cathedral of the diocese & for a number of parishes collectively.**

The Archdeacon of E. claimed in a civil suit brought against the incumbent of a parish within his archdeaconry a procuration of ten shillings in respect of his annual visitation in that year held

for a number of parishes within the archdeaconry, including deft.'s parish, on May 8, 1911, in a parish of which deft. was not the incumbent, & in the cathedral of the diocese. Deft. was cited to attend the visitation, but did not appear at it or pay the sum claimed from him. At the hearing it appeared that no arrangement had been made with the Ecclesiastical Comrs. under which procurations in respect of the archdeacon's visitation would not be required to be paid, & that ten shillings was the amount at which the procurations in kind formerly payable to the archdeacon in respect of deft.'s parish had been commuted:—*Held*: (2) deft. was legally liable to pay to the promovent the customary procuration of ten shillings due & payable to him as archdeacon in respect of his visitation in 1911, notwithstanding that the archdeacon had not visited deft.'s parish either personally or by deputy, but had held his visitation outside deft.'s parish & for a number of parishes at one & the same time; (3) Ecclesiastical Fees Act, 1867 (c. 135), & the Tables of Fees thereunder afforded no defence to the suit, as the fees under that Act, so far as they relate to visitations, are confined to fees payable by the churchwardens of parishes in cases where they have funds to pay them, & are not fees which affect, or are substituted for, procurations payable by the incumbents of parishes.

(4) The ct. ordered that as long as deft. remained beneficed in the benefice of which he was incumbent at the date of the judgment in the suit, he should pay to the Archdeacon of E. for the time being the annual sum of ten shillings in respect of procurations due & payable by him to the archdeacon in respect of the archidiaconal visitations from & inclusive of the year 1912 & onwards.—*EXETER (ARCHDEACON) v. GREEN*, [1913] P. 21; 29 T. L. R. 8.

**Fees payable to archdeacon's registrar.]**—*See* No. 284, *post*.

#### D. Commissaries and Registrars.

**279. Official or commissary—Grant of office in reversion—Whether valid.]**—*WALKER v. LAMB*, No. 259, *ante*.

**280. Registrar—Nature of office—Whether within Sale of Offices Act, 1551 (c. 16).]**—A bond given by any of the officers mentioned in above Act for securing all the profits of the office to the person appointing, is void by that statute. So is a bond given by such an officer to surrender whenever the person appointing chose. The office of registrar of an archdeaconry is an office within that statute.—*LAYNG v. PAINE* (1745), Willes, 571; 125 E. R. 1326.

*Annotations*:—*Consd.* *Lough v. Lewis* (1801), 1 East, 391; *Fletcher v. Sondes* (1827), 1 Bl. N. S. 144.

**281. — Grant of office for three lives—Whether valid.]**—*WOODWARD v. FOX* (1691), 2 Vent. 267; 3 Lev. 289; 86 E. R. 432.

*Annotations*:—*Refd.* *Layng v. Paine* (1745), Willes, 571. *Mentd.* *Thornby v. Fleetwood* (1720), 1 Stra. 318; R. v. Toole (1867), 11 Cox, C. C. 75.

**282. — Forfeiture of office—On sale.]**—*WOODWARD v. FOX* (1691), 2 Vent. 267; 3 Lev. 289; 86 E. R. 432.

*Annotations*:—*Refd.* *Layng v. Paine* (1745), Willes, 571. *Mentd.* *Thornby v. Fleetwood* (1720), 1 Stra. 318; R. v. Toole (1867), 11 Cox, C. C. 75.

**283. — Right of presentation to vacancy.]**—*WOODWARD v. FOX* (1691), 2 Vent. 267; 3 Lev. 289; 86 E. R. 432.

*Annotations*:—*Refd.* *Layng v. Paine* (1745), Willes, 571. *Mentd.* *Thornby v. Fleetwood* (1720), 1 Stra. 318; R. v. Toole (1867), 11 Cox, C. C. 75.

**284. — Right to visitation fees—From**

**churchwardens—By custom.]**—From 1727 to 1801 visitation fees of the unvarying amount of 7s. 6d. for the Easter visitation, & 4s. 6d. for the Michaelmas visitation, were received by the registrars of an archidiaconal ct. from the churchwardens of a parish within the archdeaconry. From 1801 to 1857 fees of a varying amount, but always slightly in excess of 7s. 6d., & 4s. 6d. were received. A dispute having arisen in 1857, as to the fees payable to the registrars, & an action having been brought by the registrars, to recover fees of 7s. 6d. & 4s. 6d. for the Easter & Michaelmas visitations in 1857 & subsequent years:—*Held*: the uniform receipt for 71 years of the amounts of 7s. 6d. & 4s. 6d. was overwhelming evidence that the excess subsequently claimed was an usurpation on the part of the registrars, but that such modern usurpation did not affect their title to the original fees of 7s. 6d. & 4s. 6d. which had been received for 130 years, & that in favour of vested interests a legal origin of the right to those fees would be presumed unless the contrary were proved.—*SHEPARD v. PAYNE* (1864), 10 C. B. N. S. 132; 3 New Rep. 580; 33 L. J. C. P. 158; 10 L. T. 193; 28 J. P. 270; 10 Jur. N. S. 540; 12 W. R. 581; 143 E. R. 1075, Ex. Ch.

*Annotations*:—*Fold.* *Veley v. Portwee* (1870), L. R. 5 Q. B. 573. *Mentd.* *Mills v. Colchester Corp.* (1867), L. R. 2 C. P. 476; *Bryant v. Foot* (1868), L. R. 3 Q. B. 497; *Lawrence v. Hitch* (1868), L. R. 3 Q. B. 521; *Northumberland v. Houghton* (1870), 22 L. T. 491; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140.

**285. — Nature of churchwardens' liability.]**—The liability of churchwardens to pay the fee of the registrar to an archdeacon is not personal, but is contingent upon their possessing funds out of which the fees may be legally paid. Therefore, where churchwardens had no funds in their hands for the repairs of the church, or for any other expense incident to their office, except by voluntary subscriptions, & were without the means of obtaining funds:—*Held*: they were not liable to pay the fee of the registrar due upon a visitation of the archdeacon.—*VELEY v. PERTWEE* (1870), L. R. 5 Q. B. 573; 39 L. J. Q. B. 195; 22 L. T. 713; 34 J. P. 824; 18 W. R. 1025.

*Annotation*:—*Mentd.* *Klenck v. Farris* (1904), 68 J. P. 321.

**286. — Claim to excessive fees—Whether right to customary fees lost.]**—*SHEPARD v. PAYNE*, No. 284, *ante*.

#### SUB-SECT. 6.—PECULIARS.

**287. Classes.]**—There are three sorts of peculiars. First when the archdeacon etc., have a peculiar within the diocese & subject to the jurisdiction of the ordinary: secondly, when one has a peculiar not subject to the ordinary but to the archbishop, & thirdly, when one has a peculiar subject neither to the ordinary nor to the archbishop (*HOLT, C.J.*).—*JOHNSON v. LEY* (1690), Holt, K. B. 656; Skin. 589; 1 Com. 18; 5 Mod. Rep. 238; 90 E. R. 1262.

**288. Jurisdiction in.]**—*JONES v. JONES* (1617), Hob. 185; 80 E. R. 332.

*Annotations*:—*Consd.* *Sheppard v. Bennett* (1869), L. R. 2 A. & E. 335. *Refd.* *Smith v. Waller* (1699), 1 Ld. Raym. 587; *Lysons v. Barrow* (1836), 1 Hodg. 390.

**289. — Ely Chapel.]**—*BARTON v. WELLS* (1789), 1 Hag. Con. 21.

*Annotations*:—*Mentd.* *Kilton v. Drury* (1865), 29 J. P. 643; *Jenkins v. Cook* (1875), 1 P. D. 80; *Combe v. Edwards* (1878), 3 P. D. 103.

**290. Appeal from sentence in.]**—The appeal from a peculiar is to the archbishop, & not to the

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bishop.—ANON. (1702), 11 Mod. Rep. 6; 88 E. R. 850.

*Royal peculiars.]—See Sect. 3, sub-sect. 4, ante.*

## SECT. 6.—DEANS AND CHAPTERS.

### SUB-SECT. 1.—IN GENERAL.

**291. Creation.—By translation of abbot & prior —Whether valid.]**—Hen. 8, translated the Abbot & Prior of Norwich by his letters patent, & created them by the name of dean & chapter, who surrendered their possessions to Edw. 6; Edw. 6 reincorporated them by the name of "The Dean & Chapter of the Cathedral Church of the Holy & undivided Trinity of Norwich, of the foundation of Edward the Sixth," & regranted their possessions to them, omitting the words "of the foundation of Edward the Sixth."—*Held*: (1) the translation, if there were any defect in it, was made good by 35 Eliz. c. 3; (2) the misnomer in the regrant by Edw. 6, if material, was cured by the Statute of Confirmations, 1547 (c. 8); (3) the old corporation remained, notwithstanding the surrender.—NORWICH'S (DEAN & CHAPTER) CASE (1598), 3 Co. Rep. 73 a; 2 And. 165; 70 E. R. 793.

*Annotations:—As to (1) Held. Trinity Chapel, Dublin (Dean) v. Dublin (Archbp.) (1723), 3 Mod. Rep. 183. As to (2) Held. R. v. — (1610), Cro. Jac. 247. As to (3) Held. Sutton's Hospital Case (1612), 10 Co. Rep. 1 a; R. v. London Corp'n. (1692), 12 Mod. Rep. 17. Generally, Mentd. Lynne Regis Corp'n. Case (1612), 10 Co. Rep. 120 a; Thompson v. Leach (1690), 2 Vent. 198; Mirohouse v. Rennell (1833), 1 Cl. & Fin. 527; Ford v. Harrington (1809), L. R. 5 C. P. 282; Boyd v. Phillpotts (1874), L. R. 4 A. & E. 297.*

**292. As corporation aggregate—Chapter apart from dean.]**—EIRE'S CASE (1563), Moore, K. B. 51; 72 E. R. 434.

**293. ————**—By the common law a dean & chapter, being a corp'n. aggregate, might have made what estates they would of their possessions, as any person owner of a fee simple might do. But a bishop, or a dean of the possessions of his deanery, or other ecclesiastical person being a single corp'n., were not entrusted by the law singly, without the consent of the chapter, patron, or ordinary, as the case required, to alien their possessions. . . . The dean & chapter are one thing & the dean another in person & possession; yet the dean & chapter cannot present the dean to the church; but they may present one of the chapter; for it is no perfect corp'n. without the dean, as it is without the chapter. Therefore a gift or alienation to the chapter, the deanery being void, is not good (BRIDGMAN, C. J.).—LYN v. WYN (1665), O. Bridg. 122; 121 E. R. 502.

*Annotations:—Mentd. Doe d. Gill v. Pearson (1805), 2 Smith, K. B. 295; Irving v. Cuthbertson (1860), 6 Jur. N. S. 1211; Thames Conservators v. Hall (1868), L. R. 3 C. P. 415; Thorpe v. Adams (1871), L. R. 6 C. P. 125; Dodds v. Shepherd (1876), 1 Ex. D. 75; Garnett v. Bradley (1878), 26 W. R. 698; Re Smith's Estate, Clements v. Ward (1887), 35 Ch. D. 589.*

*See, also, Nos. 300, 318, post; CORPORATIONS, Vol. XIII., pp. 275, 372, Nos. 53, 1037.*

**294. Continuity of corporate existence —Surrender & reincorporation.]**—NORWICH'S (DEAN & CHAPTER) CASE, No. 291, *ante*.

**295. Whether spiritual or lay body —Christ Church, Oxford.]**—The ct. determined that the dean & chapter [of Christ Church, Oxford] was a spiritual & not a lay body.—FISHER'S CASE (1725), Bunb. 209; 145 E. R. 649.

**296. Title to property —Omission of part of**

**title of incorporation from grant.]**—NORWICH'S (DEAN & CHAPTER) CASE, No. 291, *ante*.

**297. Regulation—By statutes made by bishop—Statute contrary to policy of ecclesiastical establishment—Construction.]**—A statute made in 1663 by the Bishop, with the consent of the chapter, of Exeter, conferring upon every canon residentiary who should cease to be such by promotion to a higher degree & dignity in the Church of England (unless it be by voluntary resignation, etc.) the right of receiving to his own use the whole profits & advantages of the canonry for the following year, supposing such a statute to be valid, is at all events contrary to the policy of the ecclesiastical establishment, & to be construed strictly: therefore, where deft., who was dean & canon of that chapter, resigned the same in order to obtain promotion to another deanery, to which he was shortly afterwards promoted:—*Held*: he was not within the statute, not having ceased to be a member of the former church by promotion to the latter, but having ceased to be so before his promotion: besides, his resignation having been voluntary, he was expressly excluded by the terms of the exception; a promotion from one deanery to another seems not a promotion to a higher degree. The admission of plff. as canon into *plenum jus*, although not made until a year after his first admission, related back to the time when his title to the profits accrued, so as to enable him to maintain an action for them.—GARNETT v. GORDON (1813), 1 M. & S. 205; 105 E. R. 77.

**298. Power to make bye-laws —As to archdeacon's oath.]**—R. v. TRINITY CHAPEL, DUBLIN (DEAN & CHAPTER), No. 268, *ante*.

**Control of minor canons & vicars-choral.]**—*See Nos. 348, 349, post.*

**299. Rights in relation to property—Grant of next avoidance —Whether successors bound.]**—A grant by a dean & chapter of the next avoidance will not bind their successors.—HEREFORD (DEAN & CHAPTER) v. HEREFORD (BP.) & BALLARD (1595), Cro. Eliz. 440; 78 E. R. 681.

*Annotations:—Consd. Rennell v. Lincoln, Bp. (1827), 7 B. & C. 113. Held. Case of Ecclesiastical Persons (1601), 5 Co. Rep. 14 a.*

**300. ———— Whether valid—Chapter without dean.]**—A chapter although it hath no dean, is within 13 Eliz., c. 10; which is a general law; therefore if such chapter grant a next avoidance, it is void *ab initio*; for otherwise, as there is no dean on whose death it might determine, it would be good for ever.—SOUTHWELL (CHAPTER) v. LINCOLN (BP.) (1675), 1 Mod. Rep. 204; 2 Mod. Rep. 56; 86 E. R. 830, 938.

*Annotations:—Consd. Magdalen Hospital v. Knotts (1879), 4 App. Cas. 324. Held. Rous d. Berkeley v. York, Archbp. (1805), 6 East, 86.*

**301. ———— Lease by—Effect of.]**—ANON. (undated), Plowd. Quaries, 28; 75 E. R. 898.

**302. ———— Granted for longer term than allowed—Remedies of lessee.]**—When a dean & chapter make a church-lease for a greater number of years than they can justify, & the dean & most of the prebendaries are changed, where a bill may be brought against the present dean & chapter, & likewise against the former dean & chapter, praying that the present dean & chapter may make the party such lease as they can by law, & that the former dean & chapter may refund such part of the fine in proportion as a fine upon a lease for 21 years would have born to a fine upon a lease for forty years.—SAUNDERS & BRISTOL (DEAN & CHAPTER) (1740), Barn. Ch. 323; 27 E. R. 663, L. C.

— Dividends on fund in court—Compensation

for land compulsorily acquired.]—See COMPULSORY PURCHASE OF LAND, Vol. XI., p. 248, No. 1480.

**303. Relationship with bishop.]**—The statute regulating appeals from archdeacons does not appear to me to regulate any appeals from deans & chapters; for a dean & chapter are of higher rank than an archdeacon. . . . The dean & chapter have in some instances a control over the bishop; while the archdeacon is only an officer of the bishop, & is sometimes called *oculus episcopi*, subordinate to him, & supervising for him (SIR JOHN NICOLL).—*PARHAM v. TEMPLAR* (1821), 3 Phillim. 223, 615.

*Annotations*.—*Reid*, *Phillipotts v. Boyd* (1875), L. R. 6 P. C. 435. *Mentd.* *Lysons v. Barrow* (1836), 2 Scott, 721; *Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113.

— **Visitatorial power of bishop.]**—See Sect. 5, sub-sect. 2, E. (a), *ante*.

**304. Legal proceedings by & against—Pleading—Omission of part of corporate name.]**—(1) In trespass for taking a load of wheat, if deft. justify for tithes under a feoffment from the dean & chapter of the rectory, it shall be intended there was glebe land appertaining thereto, whereof a feoffment might be made.

(2) In pleading an act done by a corp., as entering for a forfeiture, a deed to enter need not be shown. In pleading a lease by a dean & chapter the omission of part of their corporate name, is fatal.—*EDGAR & WEBB v. SORRELL* (1829), Cro. Car. 169; 79 E. R. 748.

**305. ——— Variance.]**—An action for use & occupation may be maintained by a corporation aggregate.

In such an action by a dean & chapter, if the name of the present dean is mentioned at the beginning of the declaration, & it is afterwards laid that the occupation was, "by the permission of the dean & chapter," & it appears in evidence that deft. occupied only in the time & by the permission of a former dean, this is a fatal variance.—*ROCHESTER (DEAN & CHAPTER) v. PIERCE* (1808), 1 Camp. 466.

*Annotations*.—*Reid*, *Beverley v. Lincoln Gaslight & Coke Co.* (1837), 6 Ad. & El. 829. *Mentd.* *Hull v. Vaughan* (1818), 6 Price, 157; *Stafford Corp. v. Till* (1827), 4 Bing. 75; *Arnold v. Poole Corp.* (1842), 2 Dowl. N. S. 574; *Fishmongers' Co. v. Robertson* (1843), 5 Man. & G. 131; *Finlay v. Bristol & Exeter Ry.* (1852), 7 Exch. 409; *Lowe v. N. W. Ry.* (1852), 18 Q. B. 632; *Eccl. Comrs. v. Merral* (1869), L. R. 4 Exch. 102; *De Keyser's Royal Hotel, De Keyser's Royal Hotel v. R.*, [1919] 2 Ch. 197.

**306. Whether subject to statutes of limitation.]**—The Dean & Chapter of W. made a grant of manor lands for three lives. In 1820, shortly after the death of the surviving life, they, by letter, requested the party holding the deed of grant to deliver it up to them. In 1822, the deed not having been delivered up, they wrote a second letter, referring to an interview held on the subject, & expressing surprise that no time had been fixed for handing over the document. Of this letter no notice was taken by the party holding the grant. In 1844, the dean & chapter filed a bill for the delivery up of the deed. Deft. by his answer set up Stat. Limitations as a bar to their claim:—*Held*: the non-compliance with the letter of 1822 constituted a conversion; plffs. were barred by the statute.

If I am to consider the dean & chapter in the same position as any man under no disability, of full age, seised in fee simple of the land, & I think, I must so consider them, the question is, is there not, if the letters written in 1822 were not followed by compliance, such a refusal as acts as a conversion, & which puts the parties in a position adverse to each other? Very little establishes conversion. Plffs.' counsel have not established any especial

parliamentary privilege in the dean & chapter, exempting them from the operation of Stat. Limitations. I must, therefore, hold them to be barred by it (KNIGHT-BRUCK, V.C.).—*WELLS (DEAN & CHAPTER) v. DODDINGTON* (1845), 2 Coll. 73; 14 L. J. Ch. 304; 5 L. T. O. S. 170; 9 Jur. 708; 63 E. R. 642.

**Cathedral & precincts—Whether extra parochial.]**—See Nos. 317, 357, *post*.

**307. Rights of members to share in property.]**—*WINNE v. HAMPTON*, No. 321, *post*.

## SUB-SECT. 2.—DEANS.

### A. In General.

**308. Whether affected by statute—Statute naming "bishop or other spiritual person."]—***SWALLOW v. CITY OF LONDON* (1866), 1 Sid. 287; 82 E. R. 1110.

*Annotation*.—*Mentd.* *Re Clarke* (1842), 2 Q. B. 619.

**309. Vacation—Whether by cession—Acceptance of Irish bishopric.]—***EVANS & KIFFINS v. ASKWITH* (1827), W. Jo. 158; Palm. 457; Noy, 93; Lat. 31, 233; 82 E. R. 84; *sub nom.* *VAUGHAN v. ASCUE*, 2 Roll. Rep. 450; *sub nom.* *ANON.* 3 Salk. 71. *Annotations*.—*Mentd.* *Colt & Glover v. Coventry & Lichfield, Bp.* (1617), Hob. 140; *Berry v. White* (1662), O. Bridge. 82; *Lienall v. Carro* (1669), 2 Kob. 572; *Threadneedle v. Litum* (1674), From. K. B. 179; *R. v. London, Bp.* & Broth (1694), 1 Ld. Raym. 23; *R. v. Leighton* (1708), Fortes. Rep. 173; *Thomlinson v. Dighton* (1711), 1 Salk. 239; *Holt v. Ward* (1732), 2 Barn. K. B. 173; *R. v. Lisle* (1738), Andr. 163; *Grocers' Co. v. Canterbury, Archbp.* (1771), 2 Wm. Bl. 770; *Alston v. Atlay* (1837), 7 Ad. & El. 289; *Jewison v. Dyson* (1842), 6 State Tr. N. S. 1; *R. v. Canterbury, Archbp.* (1848), 11 Q. B. 483; *R. v. Eton College & Clark* (1857), 27 L. J. Q. B. 132; *R. v. Canterbury, Archbp.*, [1902] 2 K. B. 503.

**Dean of the Arches.]—**See Part IV., Sect. 3, sub-sect. 1, *post*.

### B. Deans of Chapters.

**310. Nature of office—Whether temporal or spiritual promotion—Deanery created by Act of Parliament.]—**The Deanery of Wells is a spiritual & not a temporal promotion, nor is it a donative, therefore leases made by the dean need not the confirmation of the King, nor even of the bishop, & the Act of Parliament that erected the new deanery on the surrender of the old one, & gave the nomination of the dean to the King, enacting also, that the new dean & his successors might grant, demise or depart with their possessions in the same manner as the ancient deans could, whose leases only required the confirmation of their chapter.

The lands & possessions of the prebend of C. were annexed by the Act to the deanery, but not the prebend itself:—*Qu.*: whether in that case the dean taking another prebend in the same cathedral may be deprived as having two promotions; & whether the deanery is thereby vacated *ipso facto*, or only voidable by sentence.—*WALROND v. POLLARD* (1568), 3 Dyer, 273; 73 E. R. 610.

*Annotations*.—*Mentd.* *Grendon v. Lincoln, Bp.* (1576), 2 Plowd. 493; *Bagg's Case* (1615), 11 Co. Rep. 93 b; *R. v. Patrick* (1667), 2 Kob. 65, 164; *Fletcher v. Sondes* (1827), 1 Bl. N. S. 144; *R. v. Exeter, Bp.* (1850), 10 C. B. 102; *Exeter, Bp. v. Fust & Canterbury, Archbp.* (1850), 14 Jur. 876; *R. v. Fust* (1850), 14 J. P. 258; *Phillipotts v. Boyd* (1875), L. R. 6 P. C. 435.

**311. Appointment—Old foundation—Right of Crown to nominate.]—**The Deanery of Exeter was founded & endowed by the bishop of that see in 1225; the dean to be elected freely by the chapter from among the prebendaries. For more than 300 years from the foundation the course pursued at the election of dean was for the bishop to issue his licence to the chapter to elect, for the chapter to

**Sect. 6.—Deans and chapters: Sub-sect. 2, B.; sub-sect. 3, A. & B.]**

elect & present to the bishop, & for the bishop to confirm. Elizabeth issued letters recommendatory on a vacancy occurring in 1559, & the person recommended by her was elected by the chapter, & all the formalities of previous elections were observed. Charles II. & succeeding monarchs down to 1839, granted the deanery as it became vacant by letters patent & as of full right, but the same formalities were always observed, the bishop issuing his license, the chapter electing, & then the bishop confirming. In 1839 the Crown issued letters patent granting the deanery, to which the chapter paid no attention. The Crown afterwards issued letters recommendatory in favour of the same person who was grantee under the letters patent, but the chapter elected another person. A rule for a *mandamus* to elect the person recommended by the Crown was discharged, on the grounds, that the Crown had not the right, which it appeared to claim, of recommending a person whom the chapter would be bound to elect, so that the election of any other would be void; & that, on the other hand, if the deanery were donative in the Crown, it would pass by letters patent, & the person elected by the chapter be a mere trespasser; that, if it were in the presentation of the Crown as patron, or the Crown had a right to nominate a person to the chapter to be by them presented to the bishop for institution, the proper remedy was *quare impedit*.—*R. v. EXETER (CHAPTER)* (1840), 12 Ad & El. 512; 113 E. R. 906; *sub nom.* *R. v. EXETER CATHEDRAL (CHURCH PRESIDENT & CHAPTER)*, 4 Jur. 674; *sub nom.* *R. v. ST. PETER'S, EXETER (CHAPTER)*, 4 Per. & Dav. 252; 9 L. J. Q. B. 308.

*Annotations:—Mentd.* *R. v. Orton Trustees* (1849), 14 Q. B. 139; *A. G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Harper v. Hodges*, [1923] 2 K. B. 314.

**312. As corporation sole.—Apart from chapter.]**—*LYN v. WYN*, No. 203, *ante*.

**313. As member of the chapter — Document sealed with chapter seal in absence of dean.]**—*RICHARDSON v. THOMAS* (1753), 2 Burn's Eccl. Law, 9th ed. 113.

*Annotation:—Mentd.* *R. v. Barre* (1849), 13 L. T. O. S. 528.

**314. Power of leasing — Whether confirmation by Crown necessary.]**—*WALROND v. POLLARD*, No. 310, *ante*.

**315. Rectory annexed to deanery — Effect of Ecclesiastical Commissioners Act, 1840 (c. 113)—Whether rectory vested in commissioners.]**—A private Act united & annexed the rectory of T. (not in the cathedral city of Lichfield) to the deanery of Lichfield, & the dean was to be instituted thereto on application to the bishop, without presentation, & be possessed thereof in right of his deanery. Ecclesiastical Commissioners Act, 1840 (c. 113), provided that all the estate of the holder of any deanery or canonry & his successors should be vested in the Ecclesiastical Comrs. for the purposes of the act. Ecclesiastical Commissioners Act, 1850 (c. 94), s. 19, provided that no dean should hold with his deanery any benefice unless in the cathedral city:—*Held*: the rectory of T. did not pass to the Ecclesiastical Comrs., & the dean of Lichfield was not disabled by the last named Act from holding it.—*R. v. CHAMPNEYS* (1871), L. R. 6 C. P. 384; 40 L. J. C. P. 95; 24 L. T. 181; 36 J. P. 56; 19 W. R. 386.

*NOTE:—The above decision dealing with the Rectory of Tatenhill formerly annexed to the Deanery of Lichfield was the subject of a special Act of Parliament: see Ecclesiastical Commissioners Act, 1873 (c. 64).*

**316. — Rectory lying outside cathedral city—Effect of Ecclesiastical Commissioners Act, 1850 (c. 94), s. 19—Whether dean incapacitated from holding rectory.]**—*R. v. CHAMPNEYS*, No. 315, *ante*.

**317. Sub-dean — Whether independent of cathedral authority.]**—(1) If the foundation of the cathedral & the grant of the adjoining land date before the year 1189 & the institution of civil parishes, it will be presumed that neither the site of the cathedral nor of the precincts are within the limits of any parish.

(2) An office held by a person called a sub-dean in a cathedral, but independently of the dean, & not subject to the cathedral authority, is an anomaly unknown to the law.

In the cathedral church of A., from a very early period, there has been an officer called the sub-dean, who is not a member of the chapter, & is not inducted into a stall. Except on very rare occasions, the sub-dean has been also vicar of the parish in which the cathedral is locally situated. For many centuries, & until the year 1852, the north transept of the cathedral was used as a church by the parishioners of the same parish, & the churchyard adjoining the cathedral as their place of burial. No church rate was ever levied upon the parish for the repairs of the north transept, but the whole expense of the maintenance of the north transept & the churchyard was defrayed by the dean & chapter, & the services regulated & controlled by them also. The inhabitants of the precincts of the close maintained their own poor, & held an annual vestry in the south transept of the cathedral to lay a rate for that purpose, nor were they inhabitants of the parish, so that they could be presented to the ordinary if they did not receive the sacrament in the parish church at Easter. The vicar & sub-dean kept the registers both of the parish & of the precincts of the close. Before the year 1813 the names of the inhabitants of the parish & of the close were entered promiscuously in the register books of baptisms, marriages & burials. After 1813 the marriages of inhabitants of the parish & the close were still entered in the same book, but the baptisms & burials were entered in separate books for the parish & for the close. The vicar & sub-dean performed all the ordinary ministerial duties for, & received the usual fees from, the inhabitants of the parish & of the close, & for many years some of the inhabitants of the precincts of the close paid Easter offerings to the vicar & sub-dean:—*Held*: (3) the right conceded to the parish by using the north transept for divine service & the churchyard for burials, was only a limited privilege, & the incumbent of the parish had only such rights as vicar as were incidental to the privileges conceded, & were limited accordingly; (4) such rights were extinguished in 1852, when a new church was substituted for the north transept, & in 1854, when the cathedral churchyard was closed for burials by an Ord. in Council; (5) the sub-dean, as distinguished from the vicar, had separate rights & duties, namely, the discharge of spiritual functions within the close, & the ministerial fees arising from the duties so discharged; (6) the appointment of sub-dean did not legally incapacitate the dean, when he thought fit, from personally discharging the spiritual duties in respect of the inhabitants of the close.—*BRAITHWAITE v. HOOK* (1862), 7 L. T. 254; 26 J. P. 660; 8 Jur. N. S. 1186.

*Annotations:—Generally, Mentd.* *St. Sepulchre (Vicar) v. St. Sepulchre (Churchwardens)* (1879), 5 P. D. 64; *Davey v. Hinde*, [1901] P. 95.

318. — Acting as vicar of surrounding parish — Functions distinguished.] — *BRAITHWAITE v. HOOK*, No. 317, *ante*.

319. — Effect on spiritual duties of dean — In regard to inhabitants of close.] — *BRAITHWAITE v. HOOK*, No. 317, *ante*.

### SUB-SECT. 3.—CANONS AND PREBENDARIES.

#### A. In General.

Whether corporation sole.] — See CORPORATIONS, Vol. XIII., pp. 275, 276, Nos. 53, 54.

320. Rights — To share of revenue.] — A prebendary is not entitled to share of the revenues of the church before it is divided, unless some part thereof be allotted to his prebend in particular. — *YOUNG v. LYNCH* (1753), Say. 84; 96 E. R. 811. Annotations:—*Refd.* R. v. Durham, Bp. (1758), 2 Keny. 296; *Mitchouse v. Rennell* (1833), 7 Bl. N. S. 241.

321. — Fine on lease granted after election — Agreement for lease before election.] — Though a dean & chapter are reasonable in the fines they demand, if an accident delays the lease which has not happened from their fault or from the tenant's, yet if it is not completed till after a new member comes in, he shall have his proportion. — *WINNE v. BAMPTON* (1747), 3 Atk. 473; 20 E. R. 1072, L. C.

Annotation:—*Mentd.* *Wilmot v. Coventry Corpn.* (1835), 1 Y. & C. Ex. 518.

322. — Inspection of charters, etc., concerning prebend.] — A prebendary may inspect charters, etc., of the chapter in a suit concerning his prebend at reasonable times. — *YOUNG v. LYNCH* (1747), 1 Wm. Bl. 27; 96 E. R. 14.

323. Residence — Whether prebend benefice within Stat. 43 Geo. 3, c. 84.] — 43 Geo. 3, c. 84, which prohibits under a penalty a spiritual person from absenting himself from his benefice for more than a certain time in any one year, means year from the time when the action is brought for a penalty. In such action it is not necessary to allege in the declaration that the benefice has the cure of souls; & its being alleged that he absented himself for a period exceeding eight months together (to wit), on Oct. 10, 1810, for the space of nine months then next following is sufficiently certain of the time of absence, for it shall be intended to be for more than eight months immediately consecutive to Oct. 10, the jury having found a verdict for a penalty corresponding with that period of absence. The annual value means average annual value. A prebend is a benefice within the statute. — *CATHCART v. HARDY* (1814), 2 M. & S. 534; 105 E. R. 480.

See, generally, Part V., Sect. 8, sub-sect. 3, *post*.

324. — Whether necessary — St. Paul's Cathedral.] — *Eccles. Comrs. Act*, 1840 (c. 113), does not render it necessary that a member of the chapter of the cathedral church of St. Paul, should be residentiary; therefore, the non-residentiary prebendaries of that cathedral are entitled to be summoned to attend & vote at a meeting of the chapter on the occasion of an election of a proctor to represent the chapter in convocation. — *RANDOLPH v. MILMAN* (1868), L. R. 4 C. P. 107; 38 L. J. C. P. 81; 32 J. P. 820; 17 W. R. 262, Ex. Ch.

Annotation:—*Refd.* R. v. York, Archbp. (1888), 36 W. R. 718.

325. — Right to vote — Non-residentiary canon of St. Paul's.] — *RANDOLPH v. MILMAN*, No. 324, *ante*.

326. Voting — By proxy — Whether proxy revoked by personal vote.] — A proxy made by a canon to act for him in his absence, in all corporate business, is not revoked by the canon making the proxy having, in an intermediate period, appeared & acted for himself. — *EYRE v. LOVELL* (1782), 3 Doug. K. B. 66; 99 E. R. 541.

327. Chancellor of chapter — Power of leasing.] — *BISCO v. HOLTE*, No. 217, *ante*.

#### B. Election, Appointment and Installation.

328. Election — By majority of votes — Dean voting in minority.] — *WEBBER'S CASE* (1773), Loftt. 254; 98 E. R. 637.

329. — Before vacancy — Whether valid.] — *OWEN v. STAINHOW* (1682), T. Jo. 199; 84 E. R. 1215.

330. Right of appointment — By bishop — On refusal of chapter to elect.] — *CHICHESTER (Bp.) v. HARWARD & WEBBER*, No. 180, *ante*.

331. — Hereford.] — By *Eccles. Comrs. Act*, 1840 (c. 113), s. 25, in the cathedral church of York, as soon as a vacancy shall occur in the deanery, & in the cathedral churches of Chichester, Exeter, Hereford, Salisbury, & Wells respectively, as soon as every person who was a member of the respective chapters of such churches at the passing of this Act shall cease to be such member, all the canonries shall be in the direct patronage of the Archbishop of York & of the bishops of the respective sees, who shall upon the vacancy of any canonry collate thereto a spiritual person, who shall thereupon be entitled to installation as a canon of such church.

In the cathedral church of Hereford the capitular body consisted at the time of the passing of the Act of a dean & five residentiary canons, who were called the "close chapter," & twenty-two non-residentiary canons, making up the "general chapter." One of the officers in the body was the prælector, who by customary right on a vacancy succeeded to one of the residentiary canonries, & a new prælector was appointed out of the non-residentiary canons by the close chapter. The non-residentiary canons were appointed by the bishop. At York the dean alone appointed the residentiary canons from out of the non-residentiaries. Since the passing of the Act a prælector had been appointed at Hereford; & the last of those persons who were members of the close chapter at the passing of the statute having afterwards died, the bishop claimed under the statute to appoint direct to the vacant canonry residentiary. The prælector claimed to succeed to the vacancy on the ground that several who were members of the general chapter at the passing of the Act were still members:—*Held*: "chapter" meant the "close chapter"; for that it was the intention of the statute to preserve the vested rights of patronage alone, without any regard to the rights of the body out of which the selection was to be made; & the residentiary canonries therefore were now in the direct patronage of the bishop. — *R. v. HEREFORD (DEAN)* (1870), L. R. 5 Q. B. 196; 10 B. & S. 996; 39 L. J. Q. B. 97; 22 L. T. 295; 34 J. P. 437; 18 W. R. 666.

332. Installation — Whether mandamus will issue to compel.] — *Mandamus* [granted] to admit a prebendary to his stall & voice. — *R. v. NORWICH (DEAN & CHAPTER)* (1719), 1 Stra. 159; 93 E. R. 447; *sub nom.* *SHERLOCK v. NORWICH (DEAN & CHAPTER)*, Fortes. Rep. 222.

Annotation:—*Refd.* R. v. Dublin (Dean & Chapter) (1722), 1 Stra. 536.

333. — —.] — *CLARKE v. SARUM (Bp.)*

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(1737), 2 Stra. 1082; 93 E. R. 1046; *sub nom.* R. v. SALISBURY (BP.), Andr. 20.

*Annotations:—*Dttd. Powell v. Milbanko (1772), 1 Term Rep. 399, n. *Consd.* R. v. Orton Trustees (1849), 14 Q. B. 139.

*See, generally,* CROWN PRACTICE, Vol. XVI., pp. 314, 315.

**334. — Whether necessary — Prebend annexed to archdeaconry.]—**An Archdeacon of Rochester, when instituted & inducted into that office, is *ipso facto* inducted into the prebend annexed to it by royal grant, & may claim to be sworn in as prebendary, without being installed.—R. v. ROCHESTER (DEAN & CHAPTER) (1832), 3 B. & Ad. 95; 110 E. R. 36.

*Annotation:—*Refd. A.-G. v. Durham (1882), 46 L. T. 16.

#### *C. The Prebend or Endowment.*

**335. To whom it may be granted.]—**A layman may be presented to a prebendary.—BLAND v. MADDOX (1587), Cro. Eliz. 79; 78 E. R. 339.

*Annotation:—*Refd. Mirehouse v. Rennell (1833), 7 Bl. N. S. 241.

*See, now,* Act of Uniformity, 1662 (c. 4).

**336. Rectory annexed to — Right of presentation.]—**GIE v. RIDER (1602), 1 Sid. 75; 82 E. R. 978.

**337. — Whether appropriation within 21 Hen. 8 (c. 13), s. 31.]—**BRAZEN-NOSE COLLEGE v. SALISBURY (BP.), No. 2428, *post*.

**338. Annexation to archdeaconry — Whether severable — Effect of separate grant.]—**Henry VIII. by his letters patent erected & refounded the cathedral church of Rochester, & appointed therein a chapter, consisting of a dean & six prebendaries, as well as other functionaries, & officers not of the chapter, & directed that the dean should appoint the inferior officers; reserving to the King, his heirs & successors, the right of nominating the dean & six prebendaries, & their successors, as vacancies occurred. Charles I. by his letters patent granted to A., Archdeacon of Rochester, & his successors the first canonry or prebend which after the date of the letters patent should become vacant by death, resignation, etc., & that the said prebend or canonry should be united & annexed to the archdeacon & his successors. In 1639 A. was admitted to the prebend; he & his successors, being archdeacons, had from that time till 1827 held that prebend, when B., the last archdeacon, died. Each of them was collated & inducted to the archdeaconry, & instituted & inducted to the prebend, separately & distinctly. When the last archdeacon died, W. was bishop, & by him C. was collated & admitted to the archdeaconry, & also instituted to the prebend, but he had not been inducted into either at the time of the bishop's death in Feb. 1827. On June 12, 1827, the see continuing vacant, another clergyman, D., was presented by the Lord Chancellor to the prebend by letters patent under the Great Seal, & he was inducted thereto on June 16, 1827. On June 27, the see being still vacant, George IV. granted the archdeaconry to C., habendum for life, with all profits, preeminences, etc. thereto belonging; & on July 14 following, C. was duly inducted into the archdeaconry:—*Held*: (1) the prebend being an ecclesiastical benefice, & not a mere office, the Crown might alienate it; (2) Charles I. might lawfully annex it to the archdeaconry, the archdeacon being a corporation sole, & also a spiritual person capable of discharging all the duties & exercising all the functions belonging to a prebend,

& the letters patent were sufficient for the purpose of annexing it, though the annexation was only of that prebend which should first become vacant; (3) C. was entitled to the prebend, & not D.; because an annexation once made cannot be severed, & because C. became prebend in fact, as well as in law, by his institution & induction into the archdeaconry, & the prior institution & induction of D. to the prebend was wholly void.—KING v. BAYLAY (1831), 1 B. & Ad. 761; 9 L. J. O. S. K. B. 131; 109 E. R. 909.

*Annotations:—*As to (3) *Expld. & Apld.* R. v. Rochester (Dean & Chapter) (1832), 3 B. & Ad. 95. *Refd.* A.-G. v. Durham (1882), 46 L. T. 16.

**339. — Effect of induction as archdeacon.]—**R. v. ROCHESTER (DEAN & CHAPTER), No. 334, *ante*.

**340. Right of presentation in right of prebend — Death of prebendary before presentation — On whom right devolves.]—**MIREHOUSE v. RENNEL, No. 70, *ante*.

**341. Profits — During vacancy — Recovery by new appointee.]—**28 Hen. VIII., c. 11, s. 3, gives the "tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, & all other whatsoever revenues, casualties, or profits, certain & uncertain, belonging to any" dignity, prebend, or benefice therein mentioned, which shall accrue between the occurrence of a vacancy & a new appointment, to the appointee. 5 & 6 Will. IV., c. 30, directs the profits of dignities or benefices, without cure of souls, becoming vacant during the existence of a certain ecclesiastical commission, to be paid to the treasurer of Queen Anne's Bounty, who is to keep an account of the receipts & expenses, & retain the balance until he shall be otherwise ordered "by competent authority." By a subsequent statute the Crown is declared entitled to appoint, notwithstanding the existence of the commission in question, three persons to certain prebends therein named. One of these appointees, having duly demanded from the Treasurer of Queen Anne's Bounty the profits received by him during the vacancy, brought an action for money had & received, to recover them. A special verdict (on a verdict found in his favour), declared these to be "the net profits of the prebend":—*Held*: a judgment for plff. given on this verdict could not be sustained, because it did not distinguish the sources from which these profits might arise, nor show whether they were derived from the *corpus* of the prebend to which he was individually entitled, or from sums due to him in respect of his share of the funds of the corporation aggregate, of which, as prebend, he was a member.—REPTON v. HODGSON (1850), 3 H. L. Cas. 72; 10 E. R. 28, H. L.; *affg.* S. C. *sub nom.* HODGSON v. REPTON (1845), 7 Q. B. 96, Ex. Ch.

*Annotation:—*Refd. Gleaves v. Parfitt (1860), 6 Jur. N. S. 805.

**342. — Power of mortgage.]—**A canon of W. granted the canonry & the profits, etc., to plffs., to secure a sum of money. So far as it appeared on an interlocutory application, the estates were vested in the corp., & the canon was entitled to an aliquot share of the profits. There was no cure of souls, & the only duties were residence within the castle, & attendance in the chapel 21 days a year:—*Held*: upon this state of circumstances, the security was valid, & a receiver of the profits was appointed.—GRENFELL v. WINDSOR (DEAN & CANONS) (1840), 2 Beav. 544; 48 E. R. 1292.

*Annotations:—*Refd. M'Bean v. Deane (1885), 1 T. L. R. 634. *Mentd.* Re Mirams, [1891] 1 Q. B. 594.

**343. — — —.]—**Deft., who was one of the canons of the Queen's free chapel of St. George



at Windsor demised by way of mtge. for 99 years, if he should so long live & continue a canon, to the lessor of plff. "All canonry of R. A. Musgrave, of the Queen's free chapel of St. George at Windsor, & all glebe & other lands, messuages, tenements, & hereditaments belonging thereto; & all & every the rights, rents, profits, etc., to the canonry belonging." On ejectment brought on the demise of the mtgee., it appeared in evidence that there was no property attached to any individual canonry, but that the whole property belonged to the dean & chapter, & that the surplus rents, after payment of certain expenses thereout, were divided equally among the dean & the other members of the chapter; that all the canons had houses assigned to them for their residence, but that no particular house was appropriated to any one canonry; that whenever a vacancy occurred the canons had a right of choice of the vacant house according to their seniority, & that the house which was left after the other canons had made their selection, was assigned to the new canon. Deft. had retained possession of the same house which was assigned to him upon his installation:—*Held*: (1) ejectment would not lie either for the canonry of deft., or for the house assigned to him for his residence as canon; (2) deft. was not estopped, by the mtge. deed, from showing that the house in question did not belong to the canonry.—*DOE d. BUTCHER v. MUSGRAVE* (1840), 1 Man. & G. 625; 1 Scott, N. R. 451; 9 L. J. C. P. 318; 4 Jur. 631; 133 E. R. 483.

**344. Right to residence**—Whether as corporation sole or member of corporation aggregate—*Windsor*.—*DOE d. BUTCHER v. MUSGRAVE*, No. 343, *ante*.

**345.** — *Exeter*.]—The canons of Exeter take their houses by succession, hold them in right of their prebends for life, & repair them at their own expense. The chapter, as a body, cannot interfere with their enjoyment of their houses:—*Held*: though each canon was a member of the corpn. aggregate of the chapter, yet he held his house in severalty as a corpn. sole.—*FORD v. HARRINGTON* (1860), L. R. 5 C. P. 282; 1 Hop. & Colt. 331; 39 L. J. C. P. 107; 21 L. T. 609; 34 J. P. 120; 18 W. R. 289.

*Annotation*:—*Mentd. Harris v. Phillips*, [1891] 1 Q. B. 267.

**Liability for dilapidations.**—*See* No. 3657, *post*.

#### SUB-SECT. 4.—MINOR CANONS AND VICARS CHORAL.

**346. Nature of office**—Whether "corporation sole."—A vicar choral of the cathedral church of Wells is a "corporation sole," & his personal representative is liable to an action at the suit of his successor in the vicarage, for dilapidations of the house held by him as such vicar choral. *Semble*: even if he were not strictly a "corporation sole," he still has such a sole estate in the house as to create the liability.—*GLEAVES v. PARFITT* (1860), 7 C. B. N. S. 838; 29 L. J. C. P. 216; 6 Jur. N. S. 805; 141 E. R. 1045.

*Annotations*:—*Refd. Bridgewater v. Durant* (1861), 11 C. B. N. S. 7; *Ford v. Harrington* (1860), L. R. 5 C. P. 282.

**347. Appointment—Scottish episcopal minister**—Whether valid—Compliance with formalities.—*INNES v. BEDDOE*, *INNES v. DUNCOMBE* (1897), 13 T. L. R. 466.

**348. Suspension—On account of absence.**—*BOUGHTON v. YORK* (DEAN & CHAPTER) (1715), cited in 2 Q. B. at pp. 10, 28; 3 P. D. at p. 111; 3 Q. B. D. at p. 771.

*Annotations*:—*Consd. Combe v. Edwards* (1878), 3 P. D. 103; *Martin v. Macknochie* (1879), 49 L. J. Q. B. 9. *Refd. R. v. Hereford* (Dean & Chapter) (1897), 13 T. L. R. 374.

**349. Customary duties—Jurisdiction of temporal courts as to.**—*R. v. HEREFORD* (DEAN & CHAPTER) (1897), 13 T. L. R. 374, C. A.

**350. Right to residence & appurtenances—Chichester.**—Where a prescriptive ecclesiastical corpn. of vicars choral of the cathedral of Chichester had, besides other estates in common, four vicarial houses with their appurtenances, which had always been appropriated to the several use & residence of the four vicars; & by ancient custom, upon every vacancy the vicars, according to seniority, made their option of taking in severalty any one of such vicarial houses with the appurtenances, of which option an entry was made in the corpn. act book & signed by the vicars:—*Held*: a new vicar having made an option, which was entered in the act book & signed by all, to take one of the vicarial houses, with certain appurtenances, then in the possession of S., which were not all the appurtenances formerly annexed to & enjoyed with the same house by his predecessors therein, could not maintain an ejectment for the other appurtenances, such as part of the ancient garden which had been leased off by the corpn. before his appointment. For supposing him entitled to make an option of the entire premises, & to have it entered in the act book, as against the corpn.; yet no such option having been made & entered in the act book according to the custom, he had no separate legal title to the premises in question, on which he could maintain an ejectment.—*GOODTITLE d. MILLER v. WILSON* (1809), 11 East, 334; 103 E. R. 1033.

*Annotation*:—*Consd. Doe d. Butcher v. Musgrave* (1840), 1 Man. & G. 625.

**351. Right to share in fine on renewal of lease—St. Paul's—Recovery.**—A vicar choral of St. Paul's Cathedral is not entitled, during his year of probation, to share in a fine paid on the renewal of a lease by the dean & chapter & vicars choral, of an estate which is one of the sources of the emoluments enjoyed by such vicars choral. Had he been entitled, money had & received would, it seems, have been the proper form of action to recover it, either against all the other vicars choral, or against the pitiansary, the person entrusted with the collection & distribution of the funds.—*SHOUBRIDGE v. CLARK* (1852), 12 C. B. 335; 19 L. T. O. S. 293; 138 E. R. 934.

**352. Liability for dilapidations—Devolution on death.**—*GLEAVES v. PARFITT*, No. 346, *ante*.

#### SUB-SECT. 5.—CHAPTER RECORDS.

**353. As evidence—On question of title.**—An estates book of the Dean & Chapter of St. Paul's, over one hundred years old, was admitted in evidence on a question of title but commented on in respect of alterations made therein in another handwriting from that of the book.—*IVY'S (LADY) TRIAL*, *MOSSAM v. IVY* (1684), 10 State Tr. 555.

*Annotation*:—*Refd. Darby v. Ousley* (1856), 2 Jur. N. S. 497.

**354. Of reputation.**—A book kept in the chapter house of the Dean & Chapter of Sarum, purporting to contain copies of leases granted by the dean & chapter, is, as a public book, evidence of those leases for the purpose of reputation, without proof of possession under the leases.—*COOMBS v. COETHER & WHEELER* (1829), Mood. & M. 398, N. P.

## SECT. 7.—CONSTITUTION OF THE CHURCH INTO PARISHES.

### SUB-SECT. 1.—THE PARISH.

#### A. In General.

**355. What constitutes.—Within Church Building Act, 1818 (c. 45), s. 59.]—**(1) The township of B. was a populous district situated within the parish of W., had constables of its own, & maintained its own poor. It had, from time immemorial, chapelwardens & a chapel of its own. Divine service was performed, & the sacraments of the church administered, in the chapel, the repairs of which were paid for by the township. It had had its own burial ground from the year 1727; but, until then, it had had none but that of W.: &, down to 1740, but not later, the township made payments to the clergy of W. church in respect of burials at B. There was evidence of payments made from 1727 to 1740, to the clergy of W. for churchings at B. Chapel; & of marriages having been celebrated there by license & banns from 1695 to 1754, but not afterwards till 1843, when the chapel was licensed under the Registration Act, 1836 (c. 85). There was also evidence of payments made, from time to time by B. to the churchwardens of W., on account of W. church, beginning in 1689 & ending in 1752: which payments were sometimes entered in account as "levies":—*Held*: these facts did not show B. to be a parish, within the above Act.

(2) The chapel of B. being insufficient for the accommodation of its inhabitants, they, in vestry, resolved that a grant offered to them by the Society for Promoting the Enlargement, etc., of Churches & Chapels should be accepted, & that the chapel should be enlarged according to the society's plans, "any deficiency in the expense to be made up by the sale" of certain private pews, " & by rates under the Act of Parliament." They also resolved to petition the Comrs. for Building New Churches to erect a new church in the township; & the petition was presented, stating the inability of the inhabitants to build a church, & that the enlargement, now agreed upon, would require a rate of 1s. in the pound for five years, which they had pledged for that purpose. The chapelwardens then borrowed of an individual £600, on the security of the existing & future rates, for the purpose of the enlargement. On *mandamus* to repay the £600; return, that the sum was not borrowed with the consent of the vestry within the meaning of the above Act:—*Held*: the writ could not be enforced, the resolutions of vestry not being a consent to the borrowing of money within the above Act.—*R. v. WILLIAM* (1850), 16 Q. B. 1; 117 E. R. 775; *sub nom.* *R. v. BILSTON* (CHAPEL WARDENS), 20 L. J. M. C. 63; 16 L. T. O. S. 280; 15 Jur. 506.

—**Whether chapelry part of parish.]—See No. 377, post.**

**356. Parish church—Privileged to have bells.]—**A parish church is privileged to have bells.—*SOLTAU v. DE HELD* (1851), 2 Sim. N. S. 133; 21 L. J. Ch. 153; 16 Jur. 320; 61 E. R. 291.

*Annotations:—Mentd.* *R. v. Lister & Biggs* (1856), Dears. & B. 209; *Crump v. Lambert* (1867), L. R. 3 Eq. 409; *Walker v. Brewster* (1867), L. R. 3 Eq. 25; *A.-G. v. Cambridge Consumers Gas Co.* (1868), 4 Ch. App. 71; *Gort v. Clark* (1868), 16 W. R. 569; *Inchbald v. Robinson, Inchbald v. Harrington* (1868), 20 L. T. 109; *Harrison v. Good* (1871), 24 L. T. 263; *Roskell v. Whitworth* (1871), 19 W. R. 804; *Gaunt v. Fynney* (1872), 8 Ch. App. 8; *Winter v. Baker* (1887), 3 T. L. R. 569.

#### B. Boundaries.

**357. Extra-parochial places—Ancient cathedrals.]—**The sites & arvas of ancient cathedrals,

colleges & Inns of Court are extra-parochial.—*R. v. PETERBOROUGH JJ.* (1783), Cald. Mag. Cas. 238.

**358. ——— Presumption from age.]—***BRAITHWAITE v. HOOK*, No. 317, *ante*.

**359. ——— Colleges.]—R. v. PETERBOROUGH JJ.**, No. 357, *ante*.

**360. ——— Inns of Court.]—R. v. PETERBOROUGH JJ.**, No. 357, *ante*.

**361. ——— Presumption from long acquiescence in exclusion from parish.]—**The occupiers of houses in Serjeant's Inn, Fleet Street, are not liable to pay poor's rates to the parish of St. Dunstan in the West.

When a parish has for several hundred years acquiesced in the notion, that a particular place is not within it, a very strong case should be made out, before a jury can be called upon to find that such place is within the parish (*BEST, C.J.*).—*KING v. BUTTERWORTH* (1826), 2 C. & P. 391, N. P.

**Delimitation of—By statutory authority.]—See BOUNDARIES**, Vol. VII., pp. 266-268, Nos. 15, 16, 20-24.

—**By judicial authority.]—See BOUNDARIES**, Vol. VII., pp. 270-272, Nos. 38, 48, 49.

**Evidence of.]—See BOUNDARIES**, Vol. VII., pp. 266, 313, Nos. 12, 332.

—**Admissibility — Reputation.] — See BOUNDARIES**, Vol. VII., pp. 314, 315, Nos. 335, 338, 349, 351.

—**Public documents, etc.]—See BOUNDARIES**, Vol. VII., pp. 316, 318, Nos. 364, 367, 379, 386, 389.

—**Private documents.]—See BOUNDARIES**, Vol. VII., pp. 319, 320, Nos. 399, 404, 409.

**Perambulations.]—See BOUNDARIES**, Vol. VII., p. 321, Nos. 413-415, 417, 418.

**Boundary plates—Presumption arising from.]—See BOUNDARIES**, Vol. VII., p. 280, No. 118.

**Duty to maintain.]—See BOUNDARIES**, Vol. VII., p. 281, No. 119.

#### C. Notices.

**362. Publication—Sufficiency—At principal door of church.]—**(1) In the township of T. where was an ancient chapel, a new church was built & consecrated in 1832, since which period divine service had been regularly performed on Sundays in the new church, though parish meetings continued to be held in the chapel, where christenings & burials were also occasionally performed:—*Held*: (1) the new church, being the church *de facto* of the place, it was a sufficient publication of a poor rate if the notice required by Parish Notices Act, 1837 (c. 45) were affixed at or near the door thereof, & not at that of the chapel; (2) it was a sufficient publication if the notice were affixed to the principal door only of the church.

(3) In the same place a room was hired for a schoolhouse, in which divine service was regularly celebrated on Sundays according to the rites of the Church of England:—*Held*: it was not necessary to affix any notice on the door of the school.—*ORMEROD v. CHADWICK* (1847), 16 M. & W. 367; 2 New Mag. Cas. 55; 2 New Sess. Cas. 697; 16 L. J. M. C. 143; 8 L. T. O. S. 343; 11 J. P. 138; 153 E. R. 1321.

*Annotations:—As to* (2) *Folds, R. v. Salop JJ.* (1864), 5 New Rep. 172. *Generally, Mentd.* *R. v. Shipperbottom* (1847), 2 New Sess. Cas. 641; *Ramsbottom v. Duckworth* (1847), 1 Exch. 506; *R. v. Preston* (1848), 12 Q. B. 816; *R. v. Mills* (1851), 17 L. T. O. S. 164; *R. v. Stretefield & Dixon* (1863), 32 L. J. M. C. 236.

**363. ——— Parish divided into several districts—Each with own chapel—Notice of poor rate.]—**Where a parish has several districts, each having its

own chapel, & separately maintaining its own poor, notice on the chapel door of that district alone for which the poor rate is made is sufficient publication within Parish Notices Act, 1837 (c. 45), s. 2.—*R. v. WORCESTERSHIRE JJ.* (1840), *Arn. & H.* 80; 4 *Per. & Dav.* 440; 10 *L. J. M. C.* 12; 5 *J. P.* 177.

**364.** — Township with ancient chapel & new church.]—*ORMEROD v. CHADWICK*, No. 362, *ante*.

**365.** — Highway parish part of larger poor law parish—No parish church in highway parish.]—*H.*, in Warwickshire, is a parish within Highway Act, 1835 (c. 50), but for poor law & ecclesiastical purposes is not a parish but is included in the parish of K. There was no consecrated church or chapel of the Church of England in H., but only a schoolroom licensed for divine service & a Wesleyan chapel. The parish church of K. was three miles from H. A highway rate for H. having been duly allowed by justices was published by a notice affixed to the doors of the schoolroom & of the Wesleyan Chapel in H., & not by a notice on the parish church of K.:—*Held*: that such notice was a sufficient publication of the rate within sect. 27 of the above Act.—*R. v. WOLFERSTAN*, [1893] 2 *Q. B.* 451; 62 *L. J. M. C.* 148; 60 *L. T.* 429; 58 *J. P.* 133; 42 *W. R.* 176; 37 *Sol. Jo.* 718; 5 *R.* 561.

*Annotation*:—*Reid*, *Beeson v. Derby Overseers* (1903), 89 *L. T.* 47.

**366.** — At schoolroom hired & used for church service—Whether necessary.]—*ORMEROD v. CHADWICK*, No. 362, *ante*.

#### *D. Distinct and Separate Parishes.*

**367. Creation—Under Church Building Acts, 1818 (c. 45), & 1819 (c. 134)—Enrolment of boundaries.]**—In the year 1823, a piece of ground in the parish of M., Leicester, was purchased by subscription of the inhabitants, & conveyed to the Comrs. for Building New Churches, who erected a chapel on part of it & inclosed the remainder for a burial ground. In 1827, the chapel & burial ground were consecrated. In 1828 an Ord. in Council was made & published, whereby, after reciting sect. 16 of Church Building Act, 1818 (c. 45), which empowers the comrs. to divide populous parishes into two or more distinct & separate parishes; also reciting sect. 21 of that Act, which empowers the comrs. to divide populous parishes into ecclesiastical districts; also reciting that the comrs. had made a representation to the Crown respecting the increase of population & insufficient Church accommodation in the parish; also reciting that it appeared to the comrs. expedient that an ecclesiastical district should be assigned to the new chapel under Church Building Act, 1819 (c. 134); & that the consent of the bishop had been obtained: His Majesty ordered that the proposed division should be made & effected according to the provisions of the Acts. The boundaries of the district were duly enrolled under Church Building Act, 1819 (c. 143), s. 22. No Ord. in Council was made respecting the performance of the offices of the Church in the said chapel, or the appropriation of the fees payable in respect thereof, nor did the comrs. make any order as to whether the fees for burials, etc. were to be reserved to the incumbent of the parish, or assigned to the curate of the chapel, or whether burials, etc. should be performed in such chapel. In the year 1848, the corp. of Leicester established a cemetery within the borough, under a local Act, by which the burial service over deceased persons removed

for interment in the cemetery was to be performed by, & the fees paid to the incumbent who might have been required to perform the service, & would have been entitled to the fees, if the interment had taken place in his parish or ecclesiastical district:—*Held*: the Ord. in Council was made under Church Building Act, 1818 (c. 45), s. 21, & not under Church Building Act, 1819 (c. 143), s. 16; & that, upon enrolment of the boundaries, the chapelry became a separate district parish for all ecclesiastical purposes; & after the death of the then incumbent of the original parish, the curate of the district parish was entitled to the fees for burial, both in his parish & in respect of deceased persons removed therefrom for interment in the cemetery.—*EDGELL v. BURNABY* (1853), 8 *Exch.* 788; 23 *L. J. Ex.* 65; 21 *L. T. O. S.* 144; 17 *J. P.* 520; 155 *E. lt.* 1571.

*Annotation*:—*Reid*, *Roberts v. Aulton* (1857), 2 *H. & N.* 432.

**368.** — —.]—*TUCKNESS v. ALEXANDER*, No. 3752, *post*.

**369.** — —.]—In 1851, the church of T. was built & consecrated, & in 1852 a district was assigned to it by Ord. in Council, as a chapel of ease under Church Building Act, 1818 (c. 45), & Church Building Act, 1819 (c. 134), s. 16, out of the ancient parish of W. At that time deceased inhabitants were all buried in the parish churchyard. By the Act of Consecration & Ord. in Council authority was given to perform baptisms, marriages, & burials in the new church, & the fees were to be received by the incumbent of the district:—*Held*: the district of T. became a distinct & new parish in 1856 under New Parishes Act, 1856 (c. 104), s. 14, & was a "new parish" within Burial Act, 1857 (c. 81), s. 5.—*CHRONSHAW v. WIGAN BURIAL BOARD* (1873), *L. R.* 8 *Q. B.* 217; 42 *L. J. Q. B.* 137; 28 *L. T.* 283, *Ex. Ch.*

*Annotations*:—*Folld*, *Harris v. Lambeth Burial Board* (1883), 47 *J. P.* 501. *Reid*, *Hule v. Barlow, &c. St. Mary, Islington, Burial Fees* (1891), *Trist.* 149.

**370. Evidence—Separate churches—Lands intermixed.]**—Two parishes, the lands of which were intermixed, had each a separate church, with one patron & one incumbent, who celebrated divine service in each church once each Sunday morning or evening alternately, & christened the children in either irrespective of the residence of the parents. There was also one parish clerk, one communion plate, & one burial ground. There had always been overseers, churchwardens, & surveyors of highways appointed for each parish separately, but the same poor rate in amount had always been assessed in both parishes, & when collected, the amount was thrown into one fund, & applied to the poor of both parishes indiscriminately:—*Held*: the preponderance of evidence was in favour of these being distinct & separate parishes, & therefore, a joint appointment of overseers for the united parishes was invalid.—*R. v. TOMBLESON* (1803), 1 *New Rep.* 524; 27 *J. P.* 150.

**371. Effect of division of existing parish—On right to choose churchwardens—Private Act.]**—As a rule, existing customs or rights are not to be taken away by mere general words in an Act of Parliament. But without words especially abrogating them, they may be abrogated by plain directions to do something which is wholly inconsistent with them. And this may be the case though the Act is a private Act of Parliament, & though the particular custom may have been confirmed, years before, by a verdict in a ct. of law.

A parish consisted of four townships or hamlets, D., W., M., & B. D. contained the parish church,

*Sect. 7.—Constitution of the Church into parishes ;  
Sub-sect. 1, D., E., F. & G.]*

& gave the name to the whole parish. One of the churchwardens of D. was appointed by the rector, the other was elected by the parishioners. The two persons who, in the township or hamlet of M., performed the various duties of churchwardens & overseers, were elected by the inhabitants of M., which hamlet raised & administered its rates quite independently of D., & the churchwardens of D. proper never interfered; & this custom of election in M. by the inhabitants, had been confirmed by a verdict in a ct. of law many years ago. A private Act of Parliament was passed creating D. & W. into one parish, M. into another, & B. into a third. The Act contained a provision that when the three parishes had been constituted, the churchwardens of each should be chosen as those of D. had been chosen & appointed:—*Held*: though there were no particular words in the Act expressly putting an end to the custom of the inhabitants of the hamlet of M. electing the churchwardens, there were words clearly directing something else to be done entirely inconsistent with that custom, which, therefore, on M.'s being constituted a parish, ceased, & the rector of the new parish of M. became entitled, as the rector of D. had always been, to appoint one of the churchwardens, while the other was elected by the parishioners at large, for that the Act had made D. the model on which the newly created parishes were formed, & were to be governed.—*GREEN v. R.* (1876), 1 App. Cas. 513; 35 L. T. 495; 41 J. P. 196, H. L.; *reversing S. C. sub nom. R. v. GREEN* (1871), 31 L. T. 543, Ex. Ch.

*E. Consolidated Chapelries.*

**372. Formation—By Order in Council—Whether enrolment in Chancery of name, boundaries, etc., necessary.]**—The formation of a district or chapelry on the requisition of the Ecclesiastical Comrs., by an Ord. in Council, under Church Building Act, 1815 (c. 70), s. 9, is valid, without any enrolment in Chancery of the name, boundaries, etc., as required by Church Building Act, 1819 (c. 134), s. 6.—*R. v. SOUTH WEALD OVERSEERS* (1864), 5 B. & S. 301; 4 New Rep. 323; 33 L. J. M. C. 103; 10 L. T. 498; 28 J. P. 708; 10 Jur. N. S. 1009; 12 W. R. 873; 122 E. R. 876.

**373. — Effect of—Assimilation to district chapelry.]**—(1) Consolidated chapelries & district chapelries, though differing in origin, are, when once formed, precisely similar in character.

(2) Consolidated chapelries are within New Parishes Act, 1856 (c. 104), s. 14.

(3) Where an ecclesiastical district has been formed out of several parishes, the incumbent of the chapelry in the new district will not be entitled to the fees of marriages, etc. within sect. 12 of above Act until after the next avoidance, or the relinquishment of fees by the incumbents of all the parishes out of which the chapelry has been formed. The incumbent of two parishes from which portions were taken in order to form a consolidated chapelry, appeared to have made no formal resignation of fees accruing in respect of such portions of the chapelry, but stated that when they gave up the right to the parish they considered that they had given up everything:—*Held*: there was sufficient evidence of a relinquishment of such fees within the sect.

(4) A deft. is not bound to appeal from an interlocutory decree, though he might so have raised the whole question at issue.—*JONES v. GOUGH* (1865), 3 Moo. P. C. C. N. S. 1; 12 L. T. 31; 29

J. P. 196; 11 Jur. N. S. 251; 13 W. R. 509; 16 E. R. 1; *sub nom. GOUGH v. JONES*, 5 New Rep. 381, P. C.; *affg. S. C. sub nom. GOUGH & CARTWRIGHT v. JONES* (1863), 9 L. T. 610; *previous proceedings, sub nom. GOUGH & CARTWRIGHT v. JONES* (1862), 7 L. T. 566.

*Annotation*:—*As to* (2) *Reid. Cronshaw v. Wigan Burial Board* (1873), L. R. 8 Q. B. 217.

**374. — Whether within New Parishes Act, 1856 (c. 104), s. 16.]**—*JONES v. GOUGH*, No. 373, *ante*.

*See, generally*, Sub-sect. 1, G., *post*.

**375. — Right of inhabitants to choose churchwardens in original parish.]**—Contiguous portions of parishes of B. & S. formed into a consolidated chapelry for all ecclesiastical purposes, & assigned to the consecrated church of St. J.:—*Held*: those ratepayers residing within that part of the parish of B. lying within the consolidated chapelry, had a right to vote in the election of churchwardens for the ancient parish of B.—*NEWMAN v. KING* (1870), 34 J. P. 358.

*See, generally*, Sub-sect. 6, D., *post*.

**Right of incumbent to fees.]**—*See Part VII., Sect. 10, sub-sect. 1, post*.

*F. District Chapelries.*

**376. Whether message within—Admissibility of evidence.]**—Upon an issue whether a certain message is situated within a chapelry, a person who occupies rateable property within the chapelry is a competent witness to prove that it is.—*MARSDEN v. STANSFIELD* (1828), 7 B. & C. 815; 1 Man. & Ry. K. B. 609; 1 Man. & Ry. M. C. 358; 6 L. J. O. S. K. B. 159; 108 E. R. 927.

*Annotations*:—*Mentd. Doe d. Hobbs v. Cockell* (1836), 4 Ad. & El. 478; *Wormald v. Mackintosh* (1840), 5 My. & Cr. 5; *R. v. Adderbury East* (1843), Dav. & Mcr. 324; *R. v. Martin* (1848), 6 State Tr. N. S. 925.

**377. Whether part of parish—Evidence.]**—A chapelry may form part of a parish although the inhabitants of the chapelry have never been assessed for church rates or repairs, or taken any part in the election of churchwardens of the parish church, & although owing to the magnitude of the parish the chapelry has always appointed separate overseers & levied separate poor rates under Poor Relief Act, 1662 (c. 12). The fact that the vicar of the parish receives the vicarial tithe of the chapelry & that residents in the chapelry are in the habit of being married at the parish church is almost conclusive evidence that the chapelry is part of the parish.—*Re SANDBACH SCHOOL & ALMSHOUSE FOUNDATION, A-G. v. CREWE (EARL)*, [1901] 2 Ch. 317; 70 L. J. Ch. 604; 84 L. T. 815; 49 W. R. 647.

**378. — Annexation of endowment.]**—*HUGHES v. DENTON*, No. 3444, *post*.

**379. Creation—Authority of Ecclesiastical Commissioners.]**—*TUCKNESS v. ALEXANDER*, No. 3752, *post*.

**380. Constitution as new parish—Effect of—On identity.]**—*HUGHES v. DENTON*, No. 3444, *post*.

**381. — By Order in Council under Church Building Act, 1839 (c. 49)—Original parish regulated by local Act—Whether valid.]**—The rule of construction, that a general Act of Parliament does not repeal or affect a prior special Act of Parliament without express words of reference, applies to the Church Building Acts.

(1) Where a local Act regulated the ecclesiastical arrangements of the parish of St. Pancras:—*Held*: not to be affected by above Act.

(2) An Ord. in Council, purporting, under sect. 3 of the latter, with the consent of the

bishop alone, upon the representation of the Ecclesiastical Comrs., to order the assignment of a district to a parochial chapel built under the former Act:—*Held: ultra vires.*

(3) The insertion in a general Act of Parliament of a saving clause, providing, that the Act shall not apply to a special case which had previously been regulated by a special Act of Parliament not otherwise referred to, will not prevent the application of the rule of construction mentioned above.

(4) The incumbent of a district parish created such by a private Act of Parliament, will not be allowed to restrain the incumbent of the mother church from publishing banns & celebrating marriages between persons resident in the district parish, nor from receiving ecclesiastical dues.—*FITZGERALD v. CHAMPNEYS* (1861), 2 John. & H. 31; 30 L. J. Ch. 777; 5 L. T. 233; 7 Jur. N. S. 1006; 9 W. R. 850; 70 E. R. 958.

*Annotations:—As to (4) Held. Tuckness v. Alexander* (1863), 2 Drew. & Sim. 614. *Generally, Held. Stewart v. West Derby Burial Board* (1886), 34 Ch. D. 314. *Mentel Thorpe v. Adams* (1871), L. R. 6 C. P. 125; *Garnett v. Bradley* (1878), 3 App. Cas. 944; *Re Smith's Estate, Clements v. Ward* (1887), 35 Ch. D. 589; *Baird v. Tunbridge Wells Corp.*, [1894] 2 Q. B. 867; *Hornsey District Council v. Smith*, [1897] 1 Ch. 843; *R. v. Local Government Board, Ex p. South Stoneham Union*, [1908] 2 K. B. 368; *Jenkins v. G. C. Ry.*, [1912] 1 K. B. 1.

**382. — Effect on prior trust deed—Construction of Order in Council.**—By a deed of 1840 a certain chapel was vested in trustees, upon trust to permit same to be used as a chapel of ease, dependent upon the parish church, & to permit the vicar for the time being or his curates to officiate as ministers thereof, & to allow the vicar & churchwardens to let the pews, & to permit the churchwardens to receive the pew rents & other emoluments for the benefit of the vicar, after paying the necessary expenses; & the vicar & churchwardens were authorised to appoint the clerk, pew openers & other officers of the chapel. By an Ord. in Council, dated Oct. 1860, the chapel was constituted a district chapel, & it was ordered that marriages, baptisms, etc., should be solemnised & performed in the chapel, & that the fees should belong to the minister of such chapel for the time being, subject to a proviso that so long as the existing vicar remained vicar the fees should be paid to him, but the Ord. did not mention or affect to deal with the pew rents:—*Held: (1)* the effect of the Ord. in Council was to withdraw the chapel from all the purposes included in the trust deed; *(2)* to constitute the district chapel a benefice; & *(3)* to deprive the vicar & churchwardens of the parish church of all right to receive the pew rents, or to nominate the officers of the church. *Qu.:* whether after the creation of the district chapel the pews of the chapel could lawfully be let & the pew rents received for the benefit of the minister of the chapel.—*FITZGERALD v. FITZPATRICK* (1864), 4 New Rep. 87; 33 L. J. Ch. 670; 10 L. T. 477; 28 J. P. 645; 10 Jur. N. S. 913; 12 W. R. 771.

*Annotation:—As to (1) Held. Chichester & Enbrook Estate Trustees v. Woodward, Sandgate Faculty Case* (1888), Trist. 180.

*See, also, No. 373, ante.*

**383. Formation under Church Building Acts, 1819, 1839, & 1856—Distinguished from parish formed under Church Building Act, 1818—Parish clerk's right to fees.**—A district chapel, created by an Ord. in Council, under Church Building Acts, 1819 (c. 134), & 1839 (c. 49), & 19 & 20 Vict., c. 55, is not equivalent to a district parish created under Church Building Act, 1818 (c. 45), & the parish clerk of such a district chapel is not

entitled as of right to the parish clerk's fees within the district chapel as against a clerk of the original parish, whose appointment dates prior to the creation of the district chapel. In such a case, the bishop may, under 19 & 20 Vict., c. 55, s. 14, award compensation to the parish clerk in lieu of fees.—*HAMPSTEAD PARISH CLERK'S FEE CASE, Re LANGMEAD* (1876), Trist. 54.

**Right of incumbent to fees.**—*See Part VII., Sect. 10, sub-sect. 1, post.*

#### G. New Parishes.

**384. Creation.**—*CRONSHAW v. WIGAN BURIAL BOARD*, No. 389, *ante*.

**385. —**—The ancient parish of St. Mary comprised, *inter alia*, the district parish of St. Mark, attached to the district church of which was a churchyard wherein the remains of the inhabitants of St. Mark were interred. In 1852 a burial board was formed for the whole of the parish of St. Mary, & in 1853 the churchyard of the district parish of St. Mark was closed by order of the Secretary of State, & the remains of the inhabitants of St. Mark's were thenceforth interred in the burial ground provided by the burial board of St. Mary. Such burial ground was consecrated in 1854, & from that time became the burial ground of St. Mary. In 1875 a church called St. James was built & consecrated in the district parish of St. Mark, & a district, part of the district parish of St. Mark, assigned to it by Ord. in Council. By the sentence of consecration & Ord. in Council authority was given to solemnise & perform burials, etc., at the church of St. James, the fees to arise therefrom to be paid & belong to the minister of such church for the time being. The incumbent of St. James' having brought an action claiming to perform the burial service in depts.' burial ground over the bodies of the inhabitants of St. James' buried therein, & to receive the fees for such services:—*Held:* the district of St. James was a "new parish" within Burial Act, 1857 (c. 81), s. 5.—*HARRIS v. LAMBETH BURIAL BOARD* (1883), 47 J. P. 501, D. C.

**386. Distinguished from district constituted under Church Building Act, 1831 (c. 38).**—By sect. 16 of above Act, two churchwardens are to be appointed for every church or chapel built under the provisions of that Act; one by the incumbent, & the other by the renters of pews. Marriage Act, 1836 (c. 85), s. 26, empowers the bishop of a diocese, by license under his hand & seal, to authorise the solemnisation of marriages in a district chapel, for persons residing within the district. By sect. 32 the bishop may, with the consent of the Archbishop of the province, revoke this license. New Parishes Act, 1843 (c. 37), s. 15, enacts that when any church or chapel shall be built in any district, & consecrated as the church or chapel of such district, the district shall, from & after such consecration, be & be deemed to be a new parish for ecclesiastical purposes. &, by sect. 17, in every such case of a district so becoming a new parish, two churchwardens are to be chosen for it; one by the perpetual curate of the new parish & the other by the resident inhabitants having a similar qualification to that which would entitle inhabitants to vote at the election of churchwardens for the principal parish. New Parishes Act, 1850 (c. 104), s. 11, empowers the Ecclesiastical Comrs., upon the application of the incumbent of a district church or chapel, with the written consent of the bishop of the diocese, to make an order under their seal, authorising the publication of banns

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of matrimony & the solemnisation therein of marriages, baptisms, churchings, & burials; all the fees for the performance of which offices are to be payable & to be paid to the incumbent. & by sect. 14, whosoever or as soon as banns of matrimony & the solemnisation of marriages, churchings, & baptisms, are authorised to be published or performed in any consecrated district church or chapel, such district not being at the time of the passing of that Act a separate & distinct parish for ecclesiastical purposes, & the incumbent of which is, by such authority, entitled for his own benefit to the entire fees for the performance of such offices, without any reservations thereout, such district shall become & be a separate & distinct parish for ecclesiastical purposes, such as is contemplated by New Parishes Act, 1843 (c. 37), s. 15; the church of the district shall be the church of such parish; & all the provisions of New Parishes Act, 1843 (c. 37), relative to new parishes, upon their becoming such, & to the matters & things consequent thereon, shall extend & apply to the said parish & church as fully & effectually as if it had become a new parish under the provisions of that Act. The church of C. was built, & had a district assigned to it, under Church Building Act, 1831 (c. 38). In the year 1840 the bishop of the diocese granted, under Marriage Act, 1836 (c. 85), s. 20, his license for the publication of banns & the solemnisation of marriages in the church, & for taking the same fees in respect thereof as were taken in the mother church by the minister & incumbent thereof for the time being; to which the fees for churchings, baptisms, & burials were afterwards added. From the consecration of the church down to the issuing of the writ of *mandamus* in the present case, two churchwardens were chosen for the church in the manner directed by Church Building Act, 1831 (c. 38), s. 16; one by the incumbent, & the other by the pew renters. Upon demurrer to the return to a *mandamus* to the incumbent of the district to convene a meeting of the inhabitants to elect a churchwarden, the return alleging that the incumbent & the pew renters had the privilege of electing the churchwardens, & that sect. 15 of New Parishes Act, 1843 (c. 37), & sect. 14 of New Parishes Act, 1856 (c. 104), were inapplicable:—*Held*: the return was good. The authority contemplated by New Parishes Act, 1856 (c. 104), s. 14, was not a revocable license by the bishop, but an authority under an order of the Comrs. under sect. 11 of that Act; therefore the district was not brought within the operation of sect. 14 of the Act. *Semle*: New Parishes Act, 1843 (c. 37), s. 15, is inapplicable to the case of a district constituted, not under that Act, but under Church Building Act, 1831 (c. 38), with a license by the bishop under Marriage Act, 1836 (c. 85).

This authority, if it had been granted by the order of the Comrs., would be of a permanent & irrevocable character; but it has not been granted, & we are of opinion that the revocable authority or license of the bishop is not enough to bring this district within sect. 14 of New Parishes Act, 1856 (c. 104) (*per Cur.*).—*R. v. PERRY* (1861), 3 E. & E. 640; 30 L. J. Q. B. 141; 3 L. T. 885; 25 J. P. 229; 7 Jur. N. S. 655; 9 W. R. 383; 121 E. R. 583.

**PART III. SECT. 7, SUB-SECT. 1.—H.**  
**g. Parish registers—Amendment—**  
**Jurisdiction of court to order.]—Where**  
**application was made for an order**

authorising the amendment of the entry as to appert's baptism in a church register of baptisms by making certain additions thereto:—*Held*: as such

387. Whether "place having a known & defined boundary"—Local Government Act, 1858 (c. 98), sect. 12—Parts of two townships each maintaining own poor & highways.]—A district formed for ecclesiastical purposes under New Parishes Act, 1843 (c. 37), consisting of parts of two townships, each of which townships separately maintains its own poor & its own highways, was "a place having a known & defined boundary" within sect. 12 of above Act, & was not a less place included within a greater within the meaning of sect. 14. Preliminary proceedings under sects. 14 & 16 were therefore unnecessary, & the district might at once adopt the Act, at a meeting of owners & ratepayers, convened by the churchwardens; & an order of the Secretary of State confirming such adoption was valid.—*R. v. NORTHOWRAM & CLAYTON (RATEPAYERS)* (1865), L. R. 1 Q. B. 110; 7 B. & S. 110; 35 L. J. Q. B. 90; 30 J. P. 181.

*Annotations*:—*Mentd.* *R. v. Hardy* (1868), L. R. 4 Q. B. 117; *R. v. Local Government Board* (1873), L. R. 8 Q. B. 227.

**Rights of inhabitants—Burial.]—See BURIAL,**  
**Vol. VII., p. 527, No. 74.**

**H. Parish Records and Documents.**

**388. Parish registers—Right of inspection.]—**  
**ANON. (1733), 2 Barn. K. B. 269; 94 E. R. 493.**

**389. — Duty of incumbent to make copies.]—**  
**ANON. (1733), 2 Barn. K. B. 269; 94 E. R. 493.**

*See, now, Births & Deaths Registration Act, 1836 (c. 86), s. 35.*

**390. — Entries in—On whom duty lies.]—**  
 An entry in the register book by the minister of the parish of the baptism of a child, which had taken place before he became minister or had any connection with the parish, & of which he received information from the parish clerk, is not admissible in evidence, nor is the private memorandum of the fact made by the clerk who was present at the baptism.

Registers should be made up promptly, & by the person whose duty it is to make them up. The register of baptism, in this case, purports to bear date Feb. 6, 1776, but it was not made up till June, 1777, & then it was made up—not by the person who was minister of the parish at the time of the baptism, or by a person who appeared at that time to have any connection with the parish—but by one who afterwards became the minister of the parish. It must be taken, therefore, that he made this entry after the death of the minister of the parish who was present at the baptism. . . . I think, therefore, the register itself clearly ought not to have been received in evidence (*BAYLEY, J.*).—*DOE d. WARREN v. BRAY* (1828), 8 B. & C. 813; 3 Man. & Ry. K. B. 428; 2 Man. & Ry. M. C. 66; 7 L. J. O. S. K. B. 161; 108 E. R. 1245.

*Annotation*:—*Reid. Lyell v. Kennedy* (1887), 56 L. T. 647.

**391. — Time for making.]—DOE d. WARREN v. BRAY, No. 390, ante.**

*See Parochial Registers Act, 1812 (c. 140), s. 3.*

**392. — Custody.]—**Where a rectory is in fact void, although one has acted as rector & appointed an officiating chaplain, this ct. will not grant a *mandamus*, at the instance of one of the churchwardens, to compel a mere wrong doer to give up the register books of the parish to the churchwardens, as there is another remedy. When a benefice is full, the incumbent is the proper

register was not a public record, the ct. could not authorise the amendment.—*Ex p. REEVE* (1912), C. P. D. 194.—**S. AF.**



custodian of the parish books; *semble*: if void, the churchwardens.—*Ex p. HOLLOWAY* (1855), 24 L. T. O. S. 255; 19 J. P. Jo. 99; *sub nom. R. v. CUMLEY, Ex p. HOLLOWAY*, 3 W. R. 247.

— *Forgery of & damage to.*—*See CRIMINAL LAW*, Vol. XV.

*Terriers—As evidence.*—*See EVIDENCE*.

— *Of boundaries.*—*See BOUNDARIES*, Vol. VII., p. 318, Nos. 379, 380.

*Vestry books.*—*See Nos. 619, 620, post.*

*Parish books & papers—Discovery of.*—*See CORPORATIONS*, Vol. XIII., p. 424, Nos. 1455–1457.

— *Papers in charge of vestry clerk.*—*See No. 621, post.*

— *As evidence of boundaries.*—*See BOUNDARIES*, Vol. VII., p. 318, No. 381.

#### SUB-SECT. 2.—THE INCUMBENT.

##### A. In General.

**393. Estate in benefice—Rectory.**—*HUNTLEY v. RUSSELL*, No. 3719, *post*.

**394. Duties—Whether bound to preach.**—*TAYLOR v. GAY* (1669), 1 Sid. 409; 82 E. R. 1185.

— *At archdeacon's visitation.*—*See Sect. 5, sub-sect. 5, C., ante.*

— *Necessity for licence.*—*See Part V., Sect. 2, sub-sect. 4, A., post.*

— *In relation to vestries.*—*See Sub-sect. 4, post.*

— *Cure of souls.*—*See Part V., Sect. 8, sub-sect. 2, post.*

— *Residence.*—*See Part V., Sect. 8, sub-sect. 3, post.*

**395. Rights—Subordinated to spiritual duties.**

— *Claim*: that pltf. was vicar of a parish; that a chapel was erected within it & endowed & consecrated for the administration of the sacraments & the performance of all other divine offices according to the rites of the Church of England; that pltf. as such vicar was entitled to nominate & present, & had nominated & presented a clerk to the chapel, but another clerk had been licensed, instituted, & admitted by deft. bishop on the nomination & presentation of certain other defts., who thereby hindered pltf. in the exercise of his right; & he claimed to have his right established & declared. Defence of the last mentioned defts.: That certain freeholders had erected the chapel & conveyed to the Ecclesiastical Comrs., & applied to them under Church Building Act, 1851 (c. 97), to declare the right of nomination to be in defts. who had endowed the chapel, & that before making such declaration a copy of the application was according to the Act, sent by the Comrs. to pltf., he being both patron & incumbent of the parish; that if he had ceased to be patron he stood by & knowingly allowed those defts. to endow the chapel & procure the same to be consecrated in the belief entertained by them as he well knew that he was patron, & that the sending of such copy to him was in fact a sending of a copy both to the patron & incumbent, as required by the Act, & pltf. was therefore estopped from denying that he was patron; & that the right of nomination had been declared to be in those defts., who afterwards nominated. On demurrer to the allegation of estoppel:—*Held*: (1) it was bad, because the rights of the vicar were not merely private but were accompanied by spiritual & other duties in which his parishioners were interested, & he could not therefore waive or divest himself of those rights & duties by the conduct imputed to him; (2) the

claim was bad, inasmuch as it did not allege that the chapel was a chapel of ease, or otherwise show any right in the vicar to nominate and present a clerk to it.

(3) Defts. claiming relief over against the Ecclesiastical Comrs. served upon them a notice under R. S. C., Ord. 18, r. 18. They entered an appearance under r. 20, & an order was afterwards made at chambers, under r. 21, that they should be at liberty to appear & defend this action so far as related to the question whether all things required to be done by them, in order to enable them as against pltf. to make a valid declaration of the right of nomination & to vest that right in defts., were done by them, & that they should be bound by the finding upon that question. The pltf. then obtained an order on the Ecclesiastical Commissioners for discovery of documents:—*Held*: the third parties having appeared in the action to litigate with pltf., he was entitled to discovery from them, & the order for it was right.

The vicar of a parish as such, has only the right to present to a public consecrated chapel within his parish, when such chapel is a chapel of ease, though he has the right to forbid any person to officiate within his parish without his consent, unless he has been deprived of such right by some statute or some arrangement binding on the bishop of his diocese, the patron of the mother church, & the patron thereof.—*MACALLISTER v. ROCHESTER* (Bp.) (1880), 5 C. P. D. 194; 49 L. J. Q. B. 114, 443; 42 L. T. 22, 481; 28 W. R. 584, D. C.

*Annotations*:—*As to* (3) *Distd. Molloy v. Kilby* (1880), 15 Ch. D. 162. *Folld. Eden v. Wardale Iron & Coal Co.* (1887), 34 Ch. D. 223. *Redd. Miller v. Roberts* (1882), 21 Ch. D. 198.

**396. —Consistent with those of parishioners.**

—The incumbent has only such rights as are consistent & co-equal with the rights of the parishioners (*LORD COLERIDGE, C.J.*).

No one can lawfully read a service over a corpse in a churchyard, & for this purpose the consecrated portion of a cemetery is the same thing as a churchyard, unless he is the incumbent or some clergyman duly authorised by him... speaking generally, no clergyman can perform sacred rites in the parish of another clergyman without the consent of the incumbent; to do so would be an ecclesiastical offence (*LORD COLERIDGE, C.J.*).

Consecration is effected by the decree of a competent ecclesiastical etc., that is to say, the act or sentence of consecration, signed by the bishops, setting aside the ground or building in *sanctus usus* (*LORD COLERIDGE, C.J.*).—*WOOD v. HEADINGLEY-CUM-BURLEY BURIAL BOARD*, [1892] 1 Q. B. 713; 66 L. T. 90; 56 J. P. 326; 40 W. R. 300; 8 T. L. R. 217; 36 Sol. Jo. 201, D. C.

*Annotations*:—*Mentd. Williams v. Briton Ferry Burial Board*, [1905] 2 K. B. 565; *Sutton v. Bowden*, [1913] 1 Ch. 518.

**397. —Relief from rates—Under Ecclesiastical Tithe Rentcharge (Rates) Act, 1920 (c. 22), s. 1 (2)—How total income arising from benefice calculated.**—In the above sub-sect. the words "total income arising from the benefice" mean the total income arising from the benefice to the incumbent thereof for the time being as owner of the tithe rentcharge; & therefore, the incumbent of a benefice, in arriving at the total income arising therefrom to be shown in a statutory declaration made by him under the sub-sect., is entitled to deduct from the total gross revenue of the benefice sums paid by him to the incumbents of other parishes pursuant to Ords. in Council charging the tithes & hereditaments of the benefice with the



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payment thereof, & a sum paid to his own predecessor pursuant to a declaration of vacancy directing payment thereof out of the revenue of the benefice.—*R. v. LATCHINGDON OVERSEERS, Ex p. HEARN*, [1922] 2 K. B. 14; 91 L. J. K. B. 429; 126 L. T. 504; 86 J. P. 43; 20 L. G. R. 114, D. C.

**Incumbent of two benefices.]—**

**See No. 2437, post.**

**Fees.]—See Part VII., Sect. 10, sub-sect.**

**1, post.**

**As chairman of vestry meeting.]—See Sub-sect. 4, C. (c) ii., post.**

**Nomination of churchwardens.]—See Nos. 670–679, post.**

**Whether corporation sole.]—See, generally, CORPORATIONS, Vol. XIII., p. 276, Nos. 58–60, 61.**

**398. — Perpetual curate.]—Where a perpetual curacy is augmented from Queen Anne's bounty fund the incumbent becomes, by statute, a corp'n. capable of taking in perpetuity. The incumbent of a perpetual curacy not so augmented took in exchange, to him & his successors for ever, land of more than 40s. annual value:—*Held*: a subsequent incumbent was entitled to a county vote in respect of this land as equitable freeholder.—*WALLIS v. BIRKS* (1870), L. R. 5 C. P. 222; 1 H. P. & C. 365; 39 L. J. C. P. 100; 22 L. T. 268; 34 J. P. 343; 18 W. R. 734.**

**See, generally, Part V., Sect. 3, sub-sect. 4, post.**

**399. Standard of conduct.]—*WILLIAMS v. HALL, WILLIAMS v. FURLAY*, No. 1412, post.**

**Parish surrounding cathedral—Sub-dean of cathedral vicar of parish.]—See No. 317, ante.**

**B. Rights and Liabilities in regard to Property.**

**(a) The Church.**

**i. In General.**

**400. Nature of estate.]—*R. v. MARCH* (1663), 1 Sid. 101; 82 E. R. 995; sub nom. *R. v. LARKING*, 1 Keb. 438.**

**Annotation:—*Reid. Burton v. Henson & Kerboy* (1812), 11 L. J. Ex. 348.**

**401. — Possession with churchwardens.]—All persons ought to understand that the sacred edifice of the church is under the protection of the ecclesiastical laws as they are administered in these cts.; that the possession of the church is in the minister & the churchwardens; & that no person has a right to enter it when it is not open for divine service, except with their permission, & under their authority. That pews already erected cannot be pulled down without the consent of the minister & churchwardens, unless after cause shown by a faculty or licence from the ordinary (*SIR JOHN NICHOLL*).—*JARRATT v. STEELE* (1820), 3 Phillim. 167; 161 E. R. 1290.**

**Annotations:—*Apprvd. Griffin v. Dighton* (1864), 5 B. & S. 93. *Reid. Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113. *Reid. Cope v. Barber* (1872), 41 L. J. M. C. 137; *St. Michael, Boscushaw* (Rector, etc.) v. Parishioners of Same, [1893] P. 333; *Lee v. Hawtrey*, [1898] P. 63.**

**See, generally, Sub-sect. 6, post.**

**402. — Subject to purposes to which dedicated.]—*GREENSLADE v. DARBY*, No. 476, post.**

**403. The site.]—A grant by a rector to an individual of the exclusive right of burial for himself, his family, & friends, in a vault under the church, is a grant of an easement arising out of land & cannot be made by parol. No action will lie for the disturbance of such a right against a rector; if it would, case & not trespass would be the proper form. (1) *Semble*: a rector has no power to make such a grant, even by deed.**

The freehold of the church is in the rector; but the rector holds the freehold subject to the jurisdiction of the ordinary, & for general & public purposes, not for his own; for the benefit of the parishioners at large, not for his own sole benefit & emolument. The object is, that he shall be enabled to furnish all his parishioners from time to time with reasonable & convenient space for the purposes of burial, & if he had the power to grant to one individual an exclusive right of burial to an individual, not a parishioner, & his family such as plff. now claims, that object might be defeated because the greater portion of the church might become appropriated to wealthy individuals who could afford to pay largely to the rector for such a privilege, to the actual exclusion of the poorer parishioners. (2) *Semble*: such a right cannot be granted at all, except by means of a faculty, to a parishioner, & annexed to a mansion within the parish. In the case of a pew, a faculty is necessary for such a grant; (3) *Semble*: it is equally necessary in the case of a tomb or vault.

In both cases the governing principle ought to be, to regulate the accommodation according to the rights & wants of the parishioners; & a faculty can do no more than limit, in the one case the right of sitting, & in the other the right of burial, to inhabitants of the parish. Generally in the case of a pew, the faculty is confined to persons inhabiting a particular house within the parish, & if not, it is annexed to a parishioner, in the character of parishioner, supposing it may be so, still when the party removes from the parish, the exclusive privilege ceases, & the rights of other persons coming into the parish attach.—*BRYAN v. WHISTLER* (1828), 8 B. & C. 288; 2 Man. & Ry. K. B. 318; 6 L. J. O. S. K. B. 302; 108 E. R. 1050.

**Annotations:—As to (1) & (2) *Reid. Taplin v. Florence* (1851), 10 C. B. 744; *Ashby v. Harris* (1868), L. R. 3 C. P. 523; *Kerrison v. Smith* (1897), 66 L. J. Q. B. 762; *North Manchester Overseers v. Winstanley*, [1908] 1 K. B. 835. *Generally, Mend. Wood v. Leadbitter* (1845), 13 M. & W. 838.**

**404. —.]—*REDHEAD v. WAIT*, No. 1053, post.**

**405. —.]—*GREENSLADE v. DARBY*, No. 476, post.**

**406. — Conveyance accepted by Ecclesiastical Commissioners.]—By Church Building Act, 1845 (c. 70), s. 13, the freehold of the site of every church of which the Comrs. therein mentioned shall accept a conveyance under Church Building Acts, as to any church not yet consecrated, when the same shall be consecrated, shall vest in the incumbent.**

Land having been conveyed under above Acts to the Ecclesiastical Comrs. as a site for a church, a church was afterwards erected on a part of the land, & the church & part only of the land were consecrated:—*Held*: upon such consecration, the whole of the land so conveyed to the Comrs. vested in the incumbent.—*PLUMSTEAD DISTRICT BOARD OF WORKS v. ECCLESIASTICAL COMRS. FOR ENGLAND*, [1891] 2 Q. B. 361; 64 L. T. 830; 55 J. P. 791; 39 W. R. 700, D. C.

**407. The fabric.]—The property in all that is attached to & forms a portion of the fabric of a parish church is only well laid in an indictment as that of the person or persons who is or are in law the parson.—*R. v. MADELEY* (1843), 1 L. T. O. S. 504.**

**408. — Where benefice a vicarage.]—In an indictment under 7 & 8 Geo. 4, c. 29, s. 44, for stealing lead from the roof of a parish church where the benefice is a vicarage the lead is properly laid to be the property of the vicar.—*R. v. MILES* (1846), 6 L. T. O. S. 485; 1 Cox, C. C. 351.**

**409. Custody of key.]—REDHEAD v. WAIT, No. 1053, post.**

**410. — Subject to right of access to church.]—**(1) The minister has, in the first instance, the right to the possession of the key of the church, & the churchwardens have only the custody of the church under him: if he refuses access to the church on fitting occasions, he will be set right on application to higher authorities.

(2) Where the office of the judge is promoted, the whole transaction should be fairly stated in the arts., in order (3) that the judge may consider whether he ought to allow his office to be promoted, & (4) that deft. may be enabled, without injustice to himself, to give an affirmative issue.—**LEE v. MATTHEWS** (1830), 3 Hag. Ecc. 109; 162 E. R. 1119.

*Annotations:—As to (1) Apud. Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113. *Reid. Griffin v. Dighton* (1863), 33 L. J. Q. B. 39. *Evans v. Dodson* (1874), Trist. 26. *As to (3) Consd. R. v. Oxford Bp.* (1879), 4 Q. B. D. 525.

**411. Liability for repairs—Under Metropolitan Building Act, 1855 (c. 122)—Whether “owner.”—**The incumbent of a district church in the Metropolis, although the freehold of such church is vested in him under Church Building Acts, is not the “owner” of the church within the above Act, so as to be personally liable for the expenses incurred by the Metropolitan Board of Works in respect of such church as a dangerous structure.—**R. v. LEE** (1878), 4 Q. B. D. 75; 48 L. J. M. C. 22; 39 L. T. 605; 43 J. P. 302; *sub nom.* **R. v. PARTIDGE & LEE**, 27 W. R. 151, D. C.

*Annotation:—Mentd. Regent’s Canal & Dock Co. v. L. C. C.* (1909), 73 J. P. 276.

**412. Right to pew rents—Whether interest in land.]—**Where the right to receive for his own benefit the pew rents of a church is vested in the vicar by virtue of his office, even though such right arise merely by implication from the terms of the licence of the bishop when appointing the vicar, the pew rents may, in such circumstances, constitute an equitable freehold interest in land within Registration Act, 1420, c. 7.

*Qu.:* whether the mere actual receipt of pew rents by the vicar for his own use would of itself be sufficient to constitute an interest in land.—**VICKERS v. SELWYN** (1903), 89 L. T. 747; 68 J. P. 9; 52 W. R. 153; 48 Sol. Jo. 52; 1 Smith, Reg. Cas. 325, D. C.

*Annotation:—Reid. Wolfe v. Surrey County Council Clerk, Reeve v. Surrey County Council Clerk*, [1905] 1 K. B. 439.

**413. — Parish church erected under Church Building Acts—No special provisions in Order in Council or deed of consecration.]—**Legal possession of the freehold of a church by the vicar, coupled with the receipt of pew rents, is not sufficient to create an occupation within Representation of the People Act, 1832 (c. 45), s. 24; to create such an occupation, there must be actual, as well as legal, possession. *Semble:* the fact that, in the case of a new parish church erected under Church Building Acts, neither the Ord. in Council creating the new parish nor the deed of consecration of the church, contains the special provisions relating to pew rents embodied in Church Building Acts, does not render the collection & receipt of pew rents by, or on behalf of, the vicar, illegal.—**WOLFE v. SURREY COUNTY COUNCIL CLERK, REEVE v. SURREY COUNTY COUNCIL CLERK**, [1905] 1 K. B. 439; 74 L. J. K. B. 101; 92 L. T. 114; 69 J. P. 22; 53 W. R. 204; 21 T. L. R. 153; 3 L. G. R. 407; 1 Smith, Reg. Cas. 378, D. C.

*Annotation:—Distd. North Manchester Overseers v. Winstanley*, [1908] 1 K. B. 836.

*As to pews generally, see Part VII., Sect. 3, sub-sect. 9, post.*

## II. The Chancel.

**414. The site—Nature of estate in.]—ANON.** (1616), 1 Brownl. 45; 123 E. R. 655.

*Annotation:—Consd. Griffin v. Dighton & Davies* (1863), 33 L. J. Q. B. 39. The notion that the chancel is part of the rector’s glebe, though entertained by Lord Coke, is now exploded (**COCKBURN, C. J.**).

**415. — —.]—**The freehold of a church, including chancel & churchyard, is in the rector, but the right to the corporal possession is in the spiritual incumbent after induction; & therefore a lay rector has not, as against the vicar, any right to the possession or control of the chancel.

In contemplation of law, the freehold of the church, & therefore that of the chancel, which forms part of the church, as well as the freehold of the churchyard, is in the rector, whether spiritual or lay; but this naked & abstract right carries with it, in our judgment, no right of possession; the latter being in the incumbent, who is responsible to the Ordinary for the celebration of public worship (**COCKBURN, C. J.**).—**GRIFFIN v. DIGTON** (1863), 5 B. & S. 93; 2 New Rep. 270; 33 L. J. Q. B. 29; 8 L. T. 500; 27 J. P. 350; 10 Jur. N. S. 69; 11 W. R. 804; 122 E. R. 707; *affd.* (1864), 5 B. & S. 93, 108, Ex. Ch.

*Annotations:—Reid. Fowke v. Berrington*, [1914] 2 Ch. 308. *Mentd. Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113; *St. Michael, Bassishaw* (Rector, etc.) v. Parishioners of Same, [1893] 1 P. 233; *Morley v. Lowcroft*, [1896] 1 P. 92.

**416. — — As spiritual rector—Subject to use of parishioners.]—**(1) The lay rector is not entitled as of right to make a vault or affix tablets in the chancel without leave of the Ordinary, nor is he entitled to a faculty for such purposes without laying before the Ordinary such particulars as will afford the vicar & parishioners an opportunity of judging of it, & satisfy the Ordinary that such vaults or tablets will not interrupt the parishioners in the use & enjoyment of the chancel: nor has the vicar an absolute veto, though he may show cause against the grant of a faculty.

*Semble:* the consent of the lay rector must precede the leave of the Ordinary for the construction of a vault or the erection of tablets in the chancel.

(2) Though the freehold of the chancel be in the rector, lay or spiritual, the use of it belongs to the parishioners & the Ordinary, as protector of their rights, must see that neither their present nor future accommodation be unduly prejudiced.

(3) No fee to the vicar for consent to interments in the chancel is due of common right; & any special custom to such effect must limit the amount, & be strictly proved.—**RICH v. BUSHNELL** (1827), 4 Hag. Ecc. 164.

*Annotations:—As to (1) Reid. Moody v. Randolph* (1874), 38 J. P. 324. *As to (2) Consd. Griffin v. Dighton* (1863), 2 New Rep. 270. *Apud. Nickalls v. Briscoe*, [1892] 1 P. 269. *As to (3) Consd. Neville v. Bridger* (1874), 30 L. T. 690. *Generally, Mentd. Kingmill v. Ruge* (1867), 16 L. T. 640; *Kellett v. St. John’s, Burscough Bridge* (1910), 32 T. L. R. 571.

**417. Right to construct vault—Where rector only.]—COUSSMAKER v. LONDON (BP.)** (1731), 2 Wood, 359.

**418. Liability for repairs.]—**At common law, the parishioners of every parish are bound to repair the church; but by the canon law, the parson is obliged to do it; & in London the parishioners by particular custom repair both church & chancel; though the freehold is in the parson. Here those of a chapelry may prescribe to be exempt from repairing the mother church, where it buries & christens within itself, & has never contributed to it; but in this case it appears that the chapel was only a latter erection in case & favour of them of the chapelry, they having buried at the mother



sued for & recovered accordingly; & in the meantime, & until the balance & interest should be paid, W. should have a lien on the organ; & in default of any or either of such payments at the time thereinbefore mentioned, W. might either dispose of or remove the organ as he might think proper:—*Held*: the property in the organ remained in A. until the instalments were paid.

The instalments being unpaid, A. demanded the organ of the vicar of C. & the churchwardens. The vicar kept the church door locked, & refused to allow the organ to be removed, claiming a lien upon it. The churchwardens did nothing:—*Held*: (2) the vicar was liable in trover, & not the churchwardens. *Semble*: (3) the absence of a faculty for the removal of the organ was no answer to plff.'s claim.—*WALKER v. CLYDE* (1861), 10 C. B. N. S. 381; 142 E. R. 500.

(b) *The Churchyard or Parish Cemetery.*

**431. The churchyard—Estate in.**—(1) Articles having been admitted against churchwardens for making a new footpath across a churchyard, etc., an allegation in reply, pleading facts showing that the churchwardens acted *bonâ fide* & for the benefit of the parishioners, was rejected, as not setting up a legal defence.

(2) As to the churchyard, by the common law the rector has the freehold therein, qualified undoubtedly by the rights of the parishioners, but subject thereto he may bring an action for trespass if his right be unjustly invaded (*DR. LUSHINGTON*).

(3) The churchwardens by virtue of their office are bound to see that the footpaths are kept in proper order & the fences in repair (*DR. LUSHINGTON*).

(4) Individuals may by prescription have a right of way; & parishioners have the same right for the purpose of attending divine worship, vestries, & other fit occasions. The public may also have a right of way which is not to be infringed upon (*DR. LUSHINGTON*).

(5) Neither the rector nor the churchwardens can make a new path without a faculty from the Consistory Ct. In strictness that is by law required. The consent of the rector is necessary by reason of his common law right. The churchyard being consecrated ground, this ct. has cognisance of the matter, & it is the duty of the ct. to protect it against any unauthorised or illegal invasion whatever (*DR. LUSHINGTON*).—*WALTER v. MOUNTAGUE & LAMPRELL* (1836), 1 Curt. 253; 163 E. R. 85.

*Annotations*:—*As to* (2) *Reid*. *St. Stephen, Walbrook* (Rector & Churchwardens) & Grocers Co. v. Sun Fire Office Trustees (1883), Trist. 103. *As to* (3) *Reid*. *St. Stephen, Walbrook* (Rector & Churchwardens) & Grocers Co. v. Sun Fire Office Trustees (1883), Trist. 103. *As to* (5) *Apld*. *Batten v. Gedyo* (1889), 41 Ch. D. 507; *St. John the Baptist, Cardiff* (Vicar) v. *St. John the Baptist, Cardiff* (Parishioners), [1898] P. 155. *Reid*. *St. Mary Abbots, Kensington* (Vicar & Churchwardens) v. *St. Mary Abbots, Kensington* (Inhabitants & Parishioners) (1873), Trist. 17; *Re St. George-in-the-East* (1876), 1 P. D. 311; *St. Stephen, Walbrook* (Rector & Churchwardens) & Grocers Co. v. Sun Fire Office Trustees (1883), Trist. 103; *St. Nicholas, Leicester* (Vicar) v. Langton, [1899] P. 19; *Re Blideford Parish, Ex p. Blideford* (Rector, etc.), [1900] P. 314. *Generally*, *Mentd*. *Davey v. Hinde*, [1901] P. 95.

**432. — Rights in regard to—To cut timber—For repair of church.**—*BELLAMIE v. —*, No. 3710, *post*.

**433. — — — — — For repair of parsonage or chancel.**—A rector may cut down timber for the

repairs of the parsonage house, or chancel, but not for any common purpose.

He is also entitled to votes for repairing barns & outhouses belonging to the parsonage (*LORD HARDWICKE, C.*).—*STRACHY v. FRANCIS* (1741), 2 Atk. 217; 26 E. R. 534.

*Annotations*:—*Reid*. *Greenlade v. Darby* (1868), L. R. 3 Q. B. 421. *Reid*. *Marlborough v. St. John* (1852), 5 De G. & Sm. 174.

**434. — — — Control over—Footpaths.**—*WALTER v. MOUNTAGUE & LAMPRELL*, No. 431, *ante*.

**435. — — — — — Inscriptions.**—(1) Inscriptions proposed to be placed on the tombstones in a parish churchyard are in the first instance subject to the control of the incumbent of the parish, but any decision come to by him may be reviewed by the Ordinary on proper application being made to the ecclesiastical ct. of the diocese.

(2) The solrs. in ecclesiastical suits are, as officers of the ct., personally responsible for & bound to pay into the registry the ct. fees incurred by them on behalf of their respective clients; but the solr. having so paid the fees is entitled, if his client is unsuccessful in the suit, to obtain an order on the unsuccessful party to recoup him for the payments made by him.—*PEARSON v. STEAD, STEAD v. PEARSON*, [1903] P. 66; 18 T. L. R. 331.

**436. — — — — — Liabilities in respect of—Repair of fences.**—The court refused to grant a rule *nisi* for a new trial after a verdict for deft. [an incumbent], upon an indictment for non-repair of a churchyard fence which was moved, on the ground of the verdict being against evidence.

It is very clear that you may indict deft. again if the fences have continued out of repair since the last indictment (*LORD ELLENBOROUGH, C.J.*).—*R. v. REYNELL* (1805), 6 East, 315; 2 Smith, K. B. 406; 102 E. R. 1307.

*Annotations*:—*Mentd*. *R. v. Mann* (1815), 4 M. & S. 337; *R. v. Bottled* (1854), 18 J. P. 741.

**437. Parish cemetery—Nature of occupation.**—The rector of a parish has a beneficial occupation of a parish cemetery, & is liable to be rated on the profit accruing to him from burial & other fees, such profit being incidental to his occupation, not to his office.—*WINSTANLEY v. NORTH MANCHESTER OVERSEERS*, [1910] A. C. 7; 79 L. J. K. B. 95; 101 L. T. 616; 74 J. P. 40; 26 T. L. R. 90; 54 Sol. Jo. 80; 8 L. G. R. 75, H. L.; *affy*. S. C. *sub nom.* *NORTH MANCHESTER OVERSEERS v. WINSTANLEY*, [1908] 1 K. B. 835.

*Annotations*:—*Mentd*. *West Kent Main Sewerage Board v. Dartford Union Assmt. Com.* (1911), 104 L. T. 357; *Lord Advocate v. Walker Trustees*, [1912] A. C. 95; *Liverpool Corp. v. Chorley Union Assmt. Com. & Withnell Overseers*, [1913] A. C. 197; *Re New Parish of Haigh with Aspull*, [1919] P. 143; *Poplar Assmt. Com. v. Roberts*, [1922] 2 A. C. 93; *Harper v. Hodges*, [1923] 2 K. B. 314.

**Burial fees.**—*See* Part VII., Sect. 10, sub-sect. 1, D., *post*.

(c) *The Parsonage.*

*See* Part VII., Sect. 6, sub-sect. 2, *post*.

(d) *Church Funds.*

**438. Control of—Aims collected in chapel in parish.**—(1) A chapel being shortly before 1735 built by private subscription, & the subscribers agreeing, out of the pew rents, to pay the rector of the parish a yearly stipend for performing divine service, a licence was obtained from the bishop to the rector & his successors, who, from time to time, performed therein parochial duties, but there

PART III. SECT. 7, SUB-SECT. 2.—  
B. (d).

1. *Right to participate—Not affected by salary paid to curate.*—The

income arising from an endowment fund in connection with the Church of England was payable to a certain class of clergyman whose incomes were not in excess of £250.—*Held*: the

salary paid to a curate associated with plff. in the work of his parish could not be accounted part of plff.'s income for the purpose of excluding him from participation in the income arising from

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was no proof of consecration, nor of any composition, between the patron, incumbent, & ordinary; such chapel is merely proprietary, & the minister, nominated by the rector of the parish & licensed by the bishop, cannot perform parochial duties therein, nor distribute the alms collected at the Lord's supper.

(2) Proprietary chapels are anomalies unknown to the constitution, & to the ecclesiastical establishments of the Church of England, & can possess no parochial rights.

(3) The performance of baptisms, marriages, & burials, in a chapel existing from time immemorial, might possibly be presumptive evidence of consecration, & of a composition: *aliter* as to a chapel, the origin of which is ascertained.

(4) Alms, collected in chapels as well as in parish churches during the reading of the offertory, are by the direction of the rubric at the disposal of the incumbent of the parish & the churchwardens thereof, & not of the minister or proprietors of the chapel.—*MOYSEY v. HILLCOAT* (1828), 2 Hag. Ecc. 30; 162 E. R. 775.

*Annotations:—As to (1) Refd. Down & Connor & Dromore, Lord Bp. v. Miller, Same v. Potter* (1861), 5 L. T. 30. *As to (2) Refd. Williams v. Brown* (1835), 1 Curt. 53. *As to (3) Follid. A. G. v. St. Cross Hospital* (1856), 8 De G. M. & G. 38. *As to (4) Follid. Dowdall v. Hewitt* (1864), 10 L. T. 823. *Apld. Liddell v. Rainsford* (1868), 38 L. J. Ecc. 15. *Generally, Mend. Trower v. Hurst* (1847), 6 Notes of Cases 160, 382; *Richards v. Fincher* (1874), L. R. 4 A. & E. 255.

**439. — Alms collected in chapel in district not constituted separate parish.**—An unconsecrated chapel was locally situated within the district of a chapel of ease with a district chapelry belonging thereto:—*Held*: the incumbents & churchwardens of the chapel of ease, notwithstanding that the incumbent had sole & exclusive cure of souls within the district chapelry, were not entitled to claim the sacramental alms collected at such unconsecrated chapel.—*LIDDELL v. RAINSFORD* (1868), 38 L. J. Ecc. 15; 33 J. P. 407.

*Annotation:—Refd. Richards v. Fincher* (1873), L. R. 4 A. & E. 107.

**440. — Fund collected in church for specific charity — Charity carried on by incumbent.**—*R. v. O'NEILL, Ex p. OLIVER* (1867), 31 J. P. Jo. 742.

*Annotation:—Consd. Howell v. Holdroyd*, [1897] P. 198.

**441. — Offertory at Holy Communion.**—(1) Money given at the offertory in the communion office must still be disposed of, as directed by the rubric, to such pious & charitable uses as the minister & churchwardens shall think fit; or, in case of disagreement, as the ordinary shall appoint. (2) An announcement of the objects beforehand is not obligatory, but is not unlawful. Collections in church, during morning or evening prayer, may lawfully be made & announced, at the discretion of the incumbent. But the allocation of money so collected is now a matter for the joint decision of the incumbent & the parochial church council. (3) It is not an ecclesiastical offence in the case of the Holy Communion being combined with, or following, another service, to take two collections, one at the offertory, from the same gathering. (4) Churchwardens never had, & parochial church councils have not now, any voice in the disposal of money collected at extra-legal services or meetings held under the authority of the incumbent elsewhere than in church, unless such money has been allocated to "church

purposes" within Parochial Church Councils (Powers) Measures, 1921, [No. 1], s. 4 (1), (ii.) (a). Money collected at such services or meetings, unless so allocated, must be applied to the objects (if any) announced by the incumbent: *Semble*: (5) in a criminal suit in the Arches Ct. the arts. exhibited should state *seriatim* the particular laws alleged to have been infringed. Such arts. should also be signed by counsel, the ancient practice of the ct., which required the signature of an advocate, being now satisfied by the signature of a barrister.—*MARSON v. UNMACK*, [1923] P. 163; 39 T. L. R. 555.

**442. — Collections at extra legal services & meetings.**—*MARSON v. UNMACK*, No. 441, *ante*.

— *By parochial church council.*—*See, now, Parochial Church Councils (Powers) Measure, 1921* [No. 1], sects. 4 (1), 7; No. 441, *ante*.

**443. Gift for substantial repairs of church — Discretion in application.**—(1) A church rate carried by a majority of one, was, *inter alia*, questioned on the alleged ground that the vicar & occupiers of the church lands were not entitled to vote, as they were not liable to pay church rate:—*Held*: the vicar & occupiers of church lands were entitled to vote, & the opponent to the rate had failed in his objections & the rate would be pronounced for with costs.

(2) It had been decided to undertake certain repairs to a church, & the vicar was given by an anonymous donor a sum of money towards the "substantial repairs":—*Held*: the parishioners had no right to direct the particular application of such money; the money was deposited with the vicar for a special purpose & was clearly intended to be applied at the vicar's discretion, & that discretion might be exercised by him in replacing stone mullions, etc., which were decayed.

(3) For an omission to rate persons liable to be rated to the church rate to render that unequal, it must be shown that in consequence thereof, an unjust burden, that can be appreciated, has been thrown on the complainant.

(4) A parishioner ought to have an opportunity of comparing the church rate with the poor rate book, when the former does not contain a specification of the properties, in order to satisfy himself that he is fairly charged with reference to other persons assessed (SIR HERBERT JENNER PUST).—*IRANSON & KNOTT v. CAMPKIN* (1851), 2 Rob. Ecc. 370.

**C. Control of Ministrations in Parish.**

**Duty to provide.**—*See Part VI., Sect. 1, sub-sect. 2, post.*

**Right to nominate curate to chapel of ease.**—*See Part V., Sect. 4, sub-sect. 1, E., post.*

**444. Stranger officiating—Whether permission of incumbent necessary—Preaching.**—*TURTON v. REIGNOLDS* (1700), 12 Mod. Rep. 433; *Holt, K. B.* 527; 88 E. R. 1431; *sub nom. ANON.*, 12 Mod. Rep. 420.

*Annotation:—Refd. Down & Connor & Dromore, Lord Bp. v. Miller, Same v. Potter* (1861), 5 L. T. 30.

**445. — Where stranger licensed by ordinary.**—*PORTLAND (DUKE) v. BINGHAM*, No. 1361, *post*.

**446. — — — — —.**—(1) A bishop cannot consecrate a chapel, or authorise a person to preach in it, without the consent of the incumbent of the parish. (2) The office of the judge allowed to be promoted, not upon the merits of a case, but

the fund, he being otherwise entitled thereto. — *RYCHIE v. NOVA SCOTIA DIOCESAN SYNOD* (1889), 21 N. S. R. 309; 17 S. C. R. 705.—*CAN.*

**PART III. SECT. 7, SUB-SECT. 2.—C.**  
*m. Rector — Instituted but not inducted—Right to preside at meetings.*—*Where a priest*

England, in holy orders, has been nominated under 32 Vict. c. 6, to fill the office of rector of a parish, & has been duly presented to the bishop &

from the nature of the suit.—*CARR v. MARSH* (1814), 2 Phillim. 198.

*Annotations*.—*As to* (1) *Fold*. *Freeland v. Neale* (1848), 6 Notes of Cases 252. *Reid*. *Barnes v. Shore* (1846), 8 Q. B. 640; *Down & Connor & Dromore, Lord Bp. v. Miller, Same v. Potter* (1861), 5 L. T. 30. *As to* (2) *Reid*. *Williams v. Brown* (1835), 1 Curt. 53; *R. v. Chichester, Bp.* (1859), 2 E. & E. 209; *R. v. Oxford, Bp.* (1879), 4 Q. B. D. 525.

447. ————]—*WILLIAMS v. BROWN*, No. 1937, *post*.

448. ———— *Permission given by late incumbent.*]—The bishop of a diocese granted a licence to a clerk in holy orders to officiate as minister in an unconsecrated proprietary chapel in a parish within the diocese; the licence was granted with the consent of the incumbent of the parish. Afterwards the bishop died, & the incumbent of the parish died, & the succeeding incumbent forbade the clerk to minister in the parish. The clerk insisted on his right to officiate in the said chapel, & the succeeding incumbent promoted criminal proceedings against the clerk under Church Discipline Act, 1840 (c. 86), & prayed that he should be monished to abstain from officiating in the chapel:—*Held*: (1) the licence was invalid as against the promotor, & did not, under the circumstances, authorise doct. to officiate in the chapel; (2) that the clerk could not be considered as a curate, & was not entitled to the benefit of Pluralities Act, 1838 (c. 106), s. 95.—*RICHARDS v. FINCHER* (1874), 1 L. R. 4 A. & E. 255; 43 L. J. Ecc. 21; 39 J. P. 116.

449. ———— *Burial.*]—*WOOD v. HEADINGLEY-CUM-BURLEY BURIAL BOARD*, No. 306, *ante*.

——— *Permission given by incumbent—Licence given by bishop—Effect of death of incumbent.*]—*See* No. 448, *ante*.

——— *Without permission of incumbent—As offence.*]—*See* Nos. 1389, 1494, *post*.

450. *Election of lecturer—Whether consent of incumbent necessary—Apart from custom to elect without consent.*]—The ct. will not grant a *mandamus* to a bishop to licence a lecturer, without the consent of the rector, where such lecturer is supported by voluntary contributions, unless an immemorial custom to elect without such consent be shown.—*R. v. LONDON (Bp.)* (1780), 1 Term Rep. 331; 90 E. R. 1123.

*Annotations*.—*Reid*. *R. v. Exeter, Bp.* (1802), 2 East, 462; *R. v. Oxford, Bp.* (1806), 3 Smith, K. B. 341; *R. v. London, Bp.* (1811), 13 East, 419.

451. ————]—*Mandamus* to the rector to certify to the bishop the election of a lecturer refused; there being no immemorial custom for the lecturer to use the pulpit without the rector's consent, & the lecturer being paid out of the poor rates.—*R. v. FIELD* (1791), 4 Term Rep. 125; 100 E. R. 930.

*Annotations*.—*Fold*. *R. v. Exeter, Bp.* (1802), 2 East, 462. *Reid*. *R. v. London, Bp.* (1811), 13 East, 419.

452. ————]—Where no immemorial custom appeared to appoint a lecturer in a parish church, & on the contrary it appeared that the lectureship was founded in 1658, when the episcopal constitution was suspended, & consequently there could not be the joint assent of the bishop, the rector, & the vicar to the endowment, a *mandamus* to the bishop to licence a lecturer without the assent of the vicar was denied; though it appeared that the lectureship was originally endowed by the rector with an annual stipend payable out of the impropriate rectory, & that several lecturers had from time to time been accepted by the bishop

& vicar for the time being.—*R. v. EXETER (Bp.)* (1802), 2 East, 462; 102 E. R. 445.

*Annotation*.—*Reid*. *R. v. London, Bp.* (1811), 13 East, 419.

453. ————]—No person can be a lecturer [in a parish church] although elected by the parishioners without the rector's consent, unless there be an immemorial custom to elect without his consent.—*CLINTON v. HATCHARD* (1822), 1 Add. 90.

454. *Use of pulpit by lecturer—Election of lecturer governed by statute.*]—*R. v. KING* (1859), 23 J. P. Jo. 420; *sub nom. Re KING*, 33 L. T. O. S. 222.

455. *Erection of chapel—Whether consent of incumbent necessary.*]—*PORTLAND (DUKE) v. BINGHAM*, No. 1361, *post*.

456. ————]—Under the general law the erection of a new public chapel, properly so called, requires the joint consent of patron, incumbent, & ordinary, & generally, a compensation to future incumbents. The whole cure of souls, & all the emoluments of a parish, belong under the original endowment, to the incumbent & his successors, & not in the existing incumbent by institution & induction.—*BLISS v. WOODS* (1831), 3 Hag. Ecc. 480.

*Annotations*.—*Reid*. *Williams v. Brown* (1835), 1 Curt. 53; *Down & Connor & Dromore, Lord Bp. v. Miller, Same v. Potter* (1861), 5 L. T. 30; *MacAllister v. Rochester, Bp.* (1880), 5 C. P. D. 194.

457. *Consecration of chapel—Whether consent of incumbent necessary.*]—*CARR v. MARSH*, No. 446, *ante*.

*Proprietary chapel—Application for licence for marriages—Without concurrence of incumbent of parish.*]—*See* No. 151, *ante*.

*See, also*, No. 438, *ante*.

*Officiating in workhouse chapel—Whether consent of incumbent necessary.*]—*See* No. 4064, *post*.

458. *Right to perform—Marriage of inhabitants of district parish.*]—*FITZGERALD v. CHAMPNEYS*, No. 381, *ante*.

#### SUB-SECT. 3.—LAY RECTORS.

459. *Nature of appropriation.*]—*PORTLAND (DUKE) v. BINGHAM*, No. 1361, *post*.

460. *Whether having cure of souls.*]—*PORTLAND (DUKE) v. BINGHAM*, No. 1361, *post*.

461. *Right to nominate vicar—Covenant to "find."*]—*MALLET v. THIGG*, No. 1938, *post*.

462. *Duty to maintain priest—Where no vicarage endowed.*]—Impropriator of the small tithes bound to maintain a priest, where there is no vicarage endowed, & in such case the King may assign to the curate such proportion of the small tithes as he thinks fit. Otherwise where there is an endowment, though never so small.—*BONSEY v. LEE* (1684), 1 Vern. 247; 23 E. R. 445.

463. ————]—*Where vicarage endowed—Though endowment small.*]—*BONSEY v. LEE*, No. 402, *ante*.

464. *Nature of estate in chancel or church.*]—*RICH v. BUSHNELL*, No. 416, *ante*.

465. ————]—(1) The ecclesiastical ct. having full jurisdiction to entertain an action & grant relief in respect of the interference with a churchway—such as a pathway within a parish churchyard—forming an approach for the parishioners to their parish church, the High Ct. will not exercise jurisdiction in respect of such an interference at the suit of a parishioner.

instituted, & a mandate has issued to induct him, & he has actually entered on the duties of rector of such parish,

he is the legal rector, though he may not have been inducted, & is entitled by law to preside at the meeting for

election of churchwardens & vestrymen.—*Re TAYLOR, Ex p. CHANDLER* (1873), 1 Pug. 354.—*CAN*,



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was no proof of consecration, nor of any composition, between the patron, incumbent, & ordinary; such chapel is merely proprietary, & the minister, nominated by the rector of the parish & licensed by the bishop, cannot perform parochial duties therein, nor distribute the alms collected at the Lord's supper.

(2) Proprietary chapels are anomalies unknown to the constitution, & to the ecclesiastical establishments of the Church of England, & can possess no parochial rights.

(3) The performance of baptisms, marriages, & burials, in a chapel existing from time immemorial, might possibly be presumptive evidence of consecration, & of a composition: *aliter* as to a chapel, the origin of which is ascertained.

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*Annotations:—As to (1) Refd. Down & Connor & Dromore, Lord Bp. v. Miller, Same v. Potter* (1861), 5 L. T. 30. *As to (2) Refd. Williams v. Brown* (1855), 1 Curt. 53. *As to (3) Fidd. A. G. v. St. Cross Hospital* (1856), 4 Do G. M. & G. 38. *As to (4) Fidd. Dowdall v. Hewitt* (1864), 10 L. T. 823. *Apid. Liddell v. Rainsford* (1868), 38 L. J. Ecc. 15. *Generally, Morda. Trower v. Hurst* (1847), 6 Notes of Cases 160, 382; *Richards v. Fincher* (1874), L. R. 4 A. & E. 255.

**439. — Alms collected in chapel in district not constituted separate parish.**—An unconsecrated chapel was locally situated within the district of a chapel of ease with a district chapelry belonging thereto:—*Held*: the incumbents & churchwardens of the chapel of ease, notwithstanding that the incumbent had sole & exclusive cure of souls within the district chapelry, were not entitled to claim the sacramental alms collected at such unconsecrated chapel.—*LIDDELL v. RAINSFORD* (1868), 38 L. J. Ecc. 15; 33 J. P. 407.

*Annotation:—Refd. Richards v. Fincher* (1873), L. R. 4 A. & E. 107.

**440. — Fund collected in church for specific charity.—Charity carried on by incumbent.**—*R. v. O'NEILL, Ex p. OLIVER* (1867), 31 J. P. Jo. 742.

*Annotation:—Consd. Howell v. Holdroyd*, [1897] P. 198.

**441. — Offertory at Holy Communion.**—

(1) Money given at the offertory in the communion office must still be disposed of, as directed by the rubric, to such pious & charitable uses as the minister & churchwardens shall think fit; or, in case of disagreement, as the ordinary shall appoint.

(2) An announcement of the objects beforehand is not obligatory, but is not unlawful. Collections in church, during morning or evening prayer, may lawfully be made & announced, at the discretion of the incumbent. But the allocation of money so collected is now a matter for the joint decision of the incumbent & the parochial church council. (3) It is not an ecclesiastical offence in the case of the Holy Communion being combined with, or following, another service, to take two collections, one at the offertory, from the same gathering. (4) Churchwardens never had, & parochial church councils have not now, any voice in the disposal of money collected at extra-legal services or meetings held under the authority of the incumbent elsewhere than in church, unless such money has been allocated to "church

purposes" within Parochial Church Councils (Powers) Measures, 1921, [No. 1], s. 4 (1), (ii.) (a). Money collected at such services or meetings, unless so allocated, must be applied to the objects (if any) announced by the incumbent: *Semble*: (5) in a criminal suit in the Arches Ct. the arts. exhibited should state *seriatim* the particular laws alleged to have been infringed. Such arts. should also be signed by counsel, the ancient practice of the ct., which required the signature of an advocate, being now satisfied by the signature of a barrister.—*MARSON v. UNMACK*, [1923] P. 163; 30 T. L. R. 555.

**442. — Collections at extra legal services & meetings.**—*MARSON v. UNMACK*, No. 441, *ante*.

— **By parochial church council.**—*See, now*, Parochial Church Councils (Powers) Measure, 1921 [No. 1], sects. 4 (1), 7; No. 441, *ante*.

**443. Gift for substantial repairs of church—Discretion in application.**—(1) A church rate carried by a majority of one, was, *inter alia*, questioned on the alleged ground that the vicar & occupiers of the church lands were not entitled to vote, as they were not liable to pay church rate:—*Held*: the vicar & occupiers of church lands were entitled to vote, & the opponent to the rate had failed in his objections & the rate would be pronounced for with costs.

(2) It had been decided to undertake certain repairs to a church, & the vicar was given by an anonymous donor a sum of money towards the "substantial repairs":—*Held*: the parishioners had no right to direct the particular application of such money; the money was deposited with the vicar for a special purpose & was clearly intended to be applied at the vicar's discretion, & that discretion might be exercised by him in replacing stone mullions, etc., which were decayed.

(3) For an omission to rate persons liable to be rated to the church rate to render that unequal, it must be shown that in consequence thereof, an unjust burden, that can be appreciated, has been thrown on the complainant.

(4) A parishioner ought to have an opportunity of comparing the church rate with the poor rate book, when the former does not contain a specification of the properties, in order to satisfy himself that he is fairly charged with reference to other persons assessed (*SIR HERBERT JENNER FUST*).—*RANSON & KNOTT v. CAMPKIN* (1851), 2 Rob. Ecc. 370.

**C. Control of Ministrations in Parish.**

**Duty to provide.**—*See* Part VI., Sect. 1, sub-sect. 2, *post*.

**Right to nominate curate to chapel of ease.**—*See* Part V., Sect. 4, sub-sect. 1, E., *post*.

**444. Stranger officiating—Whether permission of incumbent necessary—Preaching.**—*TURTON v. REIGNOLDS* (1700), 12 Mod. Rep. 433; *Holt*, K. B. 527; 88 E. R. 1431; *sub nom. ANON.*, 12 Mod. Rep. 420.

*Annotation:—Refd. Down & Connor & Dromore, Lord Bp. v. Miller, Same v. Potter* (1861), 5 L. T. 30.

**445. — Where stranger licensed by ordinary.**—*PORTLAND (DUKE) v. BINGHAM*, No. 1361, *post*.

**446. — — — — —**—(1) A bishop cannot consecrate a chapel, or authorise a person to preach in it, without the consent of the incumbent of the parish. (2) The office of the judge allowed to be promoted, not upon the merits of a case, but

the fund, he being otherwise entitled thereto.—*RITCHIE v. NOVA SCOTIA DIOCESAN SYNOD* (1889), 21 N. S. R. 309; 17 S. C. R. 705.—*CAN.*

**PART III. SECT. 7, SUB-SECT. 2.—C.**  
*m. Rector.—Instituted but not inducted—Right to preside at meetings.*—Where a priest of the Church of

England, in holy orders, has been nominated under 32 Vict. c. 6, to fill the office of rector of a parish, & has been duly presented to the bishop &



from the nature of the suit.—*CARR v. MARSH* (1814), 2 Phillim. 198.

*Annotations*.—As to (1) *Folld. Freeland v. Neale* (1848), 6 Notes of Cases 252. *Reid. Barnes v. Shore* (1846), 8 Q. B. 640; *Down & Connor & Dromore, Lord Bp. v. Miller, Same v. Potter* (1861), 5 L. T. 30. As to (2) *Reid. Williams v. Brown* (1835), 1 Curt. 53; *R. v. Chichester, Bp.* (1859), 2 E. & E. 209; *R. v. Oxford, Bp.* (1879), 4 Q. B. D. 525.

447. ————]—*WILLIAMS v. BROWN*, No. 1937, *post*.

448. ————]—**Permission given by late incumbent.**—The bishop of a diocese granted a licence to a clerk in holy orders to officiate as minister in an unconsecrated proprietary chapel in a parish within the diocese; the licence was granted with the consent of the incumbent of the parish. Afterwards the bishop died, & the incumbent of the parish died, & the succeeding incumbent forbade the clerk to minister in the parish. The clerk insisted on his right to officiate in the said chapel, & the succeeding incumbent promoted criminal proceedings against the clerk under Church Discipline Act, 1840 (c. 86), & prayed that he should be monished to abstain from officiating in the chapel:—*Held*: (1) the licence was invalid as against the promotor, & did not, under the circumstances, authorise deft. to officiate in the chapel; (2) that the clerk could not be considered as a curate, & was not entitled to the benefit of Pluralities Act, 1838 (c. 106), s. 95.—*RICHARDS v. FINCHER* (1874), L. R. 4 A. & E. 255; 43 L. J. Eccl. 21; 39 J. P. 116.

449. ————]—**Burial.**—*WOOD v. HEADINGLEY-CUM-BURLEY BURIAL BOARD*, No. 396, *ante*.

— **Permission given by incumbent—Licence given by bishop—Effect of death of incumbent.**—*See* No. 448, *ante*.

— **Without permission of incumbent—As offence.**—*See* Nos. 1389, 1494, *post*.

450. **Election of lecturer—Whether consent of incumbent necessary—Apart from custom to elect without consent.**—The ct. will not grant a *mandamus* to a bishop to licence a lecturer, without the consent of the rector, where such lecturer is supported by voluntary contributions, unless an immemorial custom to elect without such consent be shown.—*R. v. LONDON (Bp.)* (1786), 1 Term Rep. 331; 99 E. R. 1123.

*Annotations*.—*Reid. R. v. Exeter, Bp.* (1802), 2 East, 462; *R. v. Oxford, Bp.* (1806), 3 Smith, K. B. 341; *R. v. London, Bp.* (1811), 13 East, 419.

451. ————]—**Mandamus to the rector to certify to the bishop the election of a lecturer refused**; there being no immemorial custom for the lecturer to use the pulpit without the rector's consent, & the lecturer being paid out of the poor rates.—*R. v. FIELD* (1791), 4 Term Rep. 125; 100 E. R. 930.

*Annotations*.—*Folld. R. v. Exeter, Bp.* (1802), 2 East, 462. *Reid. R. v. London, Bp.* (1811), 13 East, 419.

452. ————]—**Where no immemorial custom appeared to appoint a lecturer in a parish church, & on the contrary it appeared that the lectureship was founded in 1658, when the episcopal constitution was suspended, & consequently there could not be the joint assent of the bishop, the rector, & the vicar to the endowment, a mandamus to the bishop to licence a lecturer without the assent of the vicar was denied**; though it appeared that the lectureship was originally endowed by the rector with an annual stipend payable out of the impropriate rectory, & that several lecturers had from time to time been accepted by the bishop

& vicar for the time being.—*R. v. EXETER (Bp.)* (1802), 2 East, 462; 102 E. R. 445.

*Annotation*.—*Reid. R. v. London, Bp.* (1811), 13 East, 419.

453. ————]—**No person can be a lecturer [in a parish church] although elected by the parishioners without the rector's consent, unless there be an immemorial custom to elect without his consent.**—*OLINTON v. HATCHARD* (1822), 1 Add. 96.

454. **Use of pulpit by lecturer—Election of lecturer governed by statute.**—*R. v. KING* (1859), 23 J. P. Jo. 420; *sub nom. Re KING*, 33 L. T. O. S. 222.

455. **Erection of chapel—Whether consent of incumbent necessary.**—*PORTLAND (DUKE) v. BINGHAM*, No. 1361, *post*.

456. ————]—**Under the general law the erection of a new public chapel, properly so called, requires the joint consent of patron, incumbent, & ordinary, & generally, a compensation to future incumbents.** The whole cure of souls, & all the emoluments of a parish, belong under the original endowment, to the incumbent & his successors, & not in the existing incumbent by institution & induction.—*BLISS v. WOODS* (1831), 3 Hag. Ecc. 486.

*Annotations*.—*Reid. Williams v. Brown* (1835), 1 Curt. 53; *Down & Connor & Dromore, Lord Bp. v. Miller, Same v. Potter* (1861), 5 L. T. 30; *MacAllister v. Rochester, Bp.* (1880), 5 C. P. D. 194.

457. **Consecration of chapel—Whether consent of incumbent necessary.**—*CARR v. MARSH*, No. 446, *ante*.

**Proprietary chapel—Application for licence for marriages—Without concurrence of incumbent of parish.**—*See* No. 151, *ante*.

*See, also*, No. 438, *ante*.

**Officiating in workhouse chapel—Whether consent of incumbent necessary.**—*See* No. 4064, *post*.

458. **Right to perform—Marriage of inhabitants of district parish.**—*FITZGERALD v. CHAMPNEYS*, No. 381, *ante*.

#### SUB-SECT. 3.—LAY RECTORS.

459. **Nature of appropriation.**—*PORTLAND (DUKE) v. BINGHAM*, No. 1361, *post*.

460. **Whether having cure of souls.**—*PORTLAND (DUKE) v. BINGHAM*, No. 1361, *post*.

461. **Right to nominate vicar—Covenant to "find."**—*MALLET v. TRIGG*, No. 1938, *post*.

462. **Duty to maintain priest—Where no vicarage endowed.**—*Impropriator of the small tithes bound to maintain a priest, where there is no vicarage endowed, & in such case the King may assign to the curate such proportion of the small tithes as he thinks fit. Otherwise where there is an endowment, though never so small.*—*BONSEY v. LEE* (1684), 1 Vern. 247; 23 E. R. 445.

463. ————]—**Where vicarage endowed—Though endowment small.**—*BONSEY v. LEE*, No. 462, *ante*.

464. **Nature of estate in chancel or church.**—*RICH v. BUSHNELL*, No. 416, *ante*.

465. ————]—(1) The ecclesiastical ct. having full jurisdiction to entertain an action & grant relief in respect of the interference with a churchway—such as a pathway within a parish churchyard—forming an approach for the parishioners to their parish church, the High Ct. will not exercise jurisdiction in respect of such an interference at the suit of a parishioner.

instituted, & a mandate has issued to induct him, & he has actually entered on the duties of rector of such parish,

he is the legal rector, though he may not have been inducted, & is entitled by law to preside at the meeting for

election of churchwardens & vestrymen.—*Re TAYLOR, Ex p. CHANDLER* (1873), 1 Pug. 354.—*CAN.*

*Sect. 7.—Constitution of the Church into parishes :  
Sub-sects. 3 & 4, A., B. & C. (a).]*

The incumbent & churchwardens of a parish church removed, but without having obtained a faculty, or the consent of the justices under Church Building Act, 1819 (c. 134), s. 39, certain ancient steps leading down from the churchyard to the adjoining high road. These steps had been included in the churchyard, being recessed within the churchyard wall, & they had formed one of the approaches to a path in the churchyard leading to the church door. An action was thereupon brought by four parishioners against the incumbent & churchwardens for a mandatory injunction to compel the restoration of the steps. One of these plffs. was also the lay rector of the parish, but in fact sued only as a parishioner:—*Held*: the ct. would not exercise jurisdiction by granting a mandatory injunction, on the grounds: (a) that the steps constituted a churchway, the right to use which was solely in the parishioners, & not a footway common to the public, & the ct. would not exercise jurisdiction in respect of the interference with a churchway within the churchyard at the suit of a parishioner, a jurisdiction which was vested in the ecclesiastical ct.; & (b) that, even if a mandatory injunction were granted, it might be rendered nugatory by a faculty confirming the acts of the incumbent & churchwardens.

(2) The lay rector of a parish, in respect of his freehold property in the parish church & churchyard, can maintain an action in the High Ct. against a trespasser.

(3) A person not resident in a parish but owning property within it, in respect of which he pays parish rates, is a "parishioner" & entitled to sue as such.—*BATTEN v. GEDYE* (1889), 41 Ch. D. 507; 58 L. J. Ch. 549; 60 L. T. 802; 53 J. P. 501; 37 W. R. 540; 5 T. L. R. 415.

*Annotation*:—*Reid*, *Kensit v. St. Ethelburga, Bishopsgate Within*, [1900] P. 80.

**466. Rights as to chancel.—Right to chief seat.**—*HALL v. ELLIS* (1609), Noy. 133; 74 E. R. 1096.

*Annotation*:—*Reid*, *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

**467. ——— Extends to lessee.**—*HALL v. ELLIS* (1609), Noy. 133; 74 E. R. 1096.

*Annotation*:—*Mentz*, *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

**468. ——— Whether confined to single seat.**—*STILEMAN-GIBBARD v. WILKINSON*, No. 3290, *post*.

**469. ——— Whether right to grant a part.**—A grant of part of the chancel of a church by a lay impropriator to A., his heirs & assigns, is not valid in law; & therefore such grantee, or those claiming under him, cannot maintain trespass for pulling down his or their pews, there erected.—*CLIFFORD v. WICKS* (1818), 1 B. & Ald. 498; 106 E. R. 183.

*Annotations*:—*Reid*, *Griffin v. Dighton* (1864), 5 B. & S. 93; *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

**470. ——— As to vaults—& fixing tablets.**—*RICH v. BUSHNELL*, No. 416, *ante*.

**471. Liability to repair chancel.**—*HALL v. ELLIS* (1609), Noy. 133; 74 E. R. 1096.

*Annotation*:—*Reid*, *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

**472. ———**—*DAVIES' CASE* (1620), 2 Roll. Rep. 211; 81 E. R. 757.

*Annotation*:—*Reid*, *Morley v. Leacroft*, [1896] P. 92.

*See, note*, Ecclesiastical Dilapidations Measure, 1923 (No. 6), s. 52.

**473. ——— Jurisdiction of ecclesiastical courts in respect of.**—The arts. in a criminal suit promoted by the churchwardens of a parish against the lay rector of a parish church, charged that the chancel of the church was in a very dilapidated

condition, & that resp., though legally bound to repair it, had for four years refused & neglected to do so. On resp. giving an affirmative issue to the arts. & submitting to judgment, the ordinary pronounced that resp. had offended against the ecclesiastical law, & admonished him to do the repairs required.—*MORLEY v. LEACROFT*, [1896] P. 92.

**474. ———**—*—*—*—*—The ecclesiastical cts. have no jurisdiction to entertain a criminal suit against a lay rector who has neglected to perform his duty of repairing the chancel of the church of which he is the rector, unless the chancel was out of repair at the time of the institution of the suit.—*NEVILLE v. KIRBY*, [1898] P. 160.

**475. Liability to repair body of church.**—*DAVIES' CASE* (1620), 2 Roll. Rep. 211; 81 E. R. 757.

*Annotation*:—*Reid*, *Morley v. Leacroft*, [1896] P. 92.

**476. Rights in churchyard—As against incumbent.**—(1) An impropriate rectory, after its surrender to the Crown on the dissolution of monasteries, was granted by Queen Elizabeth to lay impropriators. Up to 1826 the impropriators appointed a curate with a yearly stipend of £31 10s.; in that year the curacy was augmented out of Queen Anne's Bounty, & the then lay impropriator charged the rectory, glebe land, tithes, etc., with the yearly rentcharge of £31 10s., payable to the curate for the time being; the curacy then became a perpetual benefice by force of Queen Anne's Bounty Act, 1714 (c. 10). Pltf. was duly nominated, licensed & instituted to the benefice in 1852. From the time of the grant of Elizabeth the lay impropriators had had exclusive possession of all the tithes & glebe lands; & during living memory these lands had been let to tenants together with the right of depasturing the churchyard with sheep, & the tenants had exercised this right without interruption till 1860, when pltf. gave defft., the present tenant, notice not to trespass, & then brought an action. On a case stating the above facts, the ct. having power to draw inferences of fact:—*Held*: the action was not maintainable: for that though pltf. had possession of the churchyard for spiritual purposes, it was not such a possession as excluded the lay impropriator, or his tenants, in whom the soil & herbage were still vested.

The freehold was vested in the rector & he was entitled to the land, including the grass, herbage & everything else, as fully as the original owner had been; but as the land had been set apart by consecration for the church & churchyard, the right which the rector as the owner of the freehold had in the profits was proportionately diminished, because he could not desecrate it, or use it for any purpose which was inconsistent with the object of its consecration (*BLACKBURN, J.*).

(2) Historical origin of vicarages discussed by *BLACKBURN, J.*—*GREENSLADE v. DARBY* (1808), L. R. 3 Q. B. 421; 9 B. & S. 428; 37 L. J. Q. B. 137; 18 L. T. 463; 32 J. P. 437; 16 W. R. 898.

*Annotations*:—As to (1) *Conad. Winstanley v. North Manchester Overseers*, [1910] A. C. 7. *Reid*, *Wallis v. Birks* (1870), L. R. 5 C. P. 222; *Fowke v. Berington*, [1914] 2 Ch. 308.

*See, also*, No. 478, *post*.

**477. ——— As against trespasser.**—*BATTEN v. GEDYE*, No. 465, *ante*.

**478. Action against incumbent—Claiming freehold of chancel & churchyard—What interrogatories allowed.**—In an action by the lay rector of a parish claiming the freehold in the chancel & churchyard against the vicar of the parish & his churchwardens, interrogatories were disallowed

which went to inquire into the evidence of pltt.'s title.—*GARLAND v. ORAM* (1890), 55 J. P. 374; 7 T. L. R. 80, D. C.

#### SUB-SECT. 4.—THE VESTRY.

##### A. Constitution.

**479. Qualification of vestryman—Tenement owner—Assessed to poor rate instead of occupier.]**—The effect of Vestries Acts, 1818 (c. 69), & 1819 (c. 85), although there are no privative words, is to make rating to the poor rate the exclusive qualification for voting in all parish vestries.

Where, therefore, Small Tenements Act, 1850 (c. 99), has been adopted in a parish, the occupiers of small tenements, not being rated to the poor rate, although still liable to the church rate, are not entitled to vote at a vestry held for the purpose of making a church rate.

Vestries Act, 1818 (c. 69), s. 3, gave to persons assessed to the last poor rate one vote for every £25 value, "so, nevertheless, that no inhabitant shall be entitled to give more than six votes"; by Small Tenements Act, 1850 (c. 99), s. 6, the owner of a small tenement, rated under the Act "shall have the same right to vote in vestry as if he were an occupier duly rated in respect of the same tenement":—*Held*: the owner of more than six small tenements, rated under the latter Act, was entitled to no more than six votes by force of the proviso in the former Act.—*RICHARDSON v. GLADWIN* (1858), E. B. & E. 138; 27 L. J. M. C. 192; 31 L. T. O. S. 97; 22 J. P. 688; 4 Jur. N. S. 377; 6 W. R. 473; 120 E. R. 460. *Annotation*:—*Consd.* *Lambe & Clarke v. Gieves* (1862), 26 J. P. 327.

**480. — Occupier—Where tenement owner rated to poor rate.]**—*RICHARDSON v. GLADWIN*, No. 479, *ante*.

**481. — Residence—Temporary absence with intention to return.]**—Temporary absence with an intention & right to return does not prevent a qualification for vestryman being obtained by residence during twelve months.—*STANFORD v. WILLIAMS* (1899), 80 L. T. 490; 15 T. L. R. 316; 43 Sol. Jo. 419, D. C.

*Annotation*:—*Reid*. *R. v. Townson, Ex p. Broderip* (1908), 72 J. P. 368.

**482. — Value of rated property—Part of property sublet.]**—Where a person is rated as the occupier of premises of the requisite value for qualifying for the office of vestryman, he is not disqualified from election to & acting in such office, merely because his personal occupation is reduced below the qualifying value by reason of his having sublet portions of the premises.—*HILTON v. HAYNES* (1894), 11 T. L. R. 8; 39 Sol. Jo. 12; 15 R. 41.

##### B. Functions.

*See, now*, Local Government Act, 1894 (c. 73), ss. 6 (1), 19 (4); London Government Act, 1890 (c. 14), s. 23 (1); Parochial Church Councils (Powers) Measure, 1921 (No. 1).

**483. Former duties.]**—The vestry being the body mentioned in Burial Act, 1857 (c. 81), s. 4, is beyond all doubt a body which enjoyed powers & owed duties divisible into two classes, namely those which do, & those which do not, relate to the affairs of the church (*BUCKLEY, I.J.*).—*WEST-*

*MINSTER CORPN. v. ST. GEORGE, HANOVER SQUARE* (RECTOR & CHURCHWARDENS), [1909] 1 Ch. 592; 78 L. J. Ch. 581; 100 L. T. 546; 73 J. P. 259; 25 T. L. R. 393; 53 Sol. Jo. 357; 7 L. G. R. 774, C. A.; *reversd.* on other grounds, *sub nom.* *ST. GEORGE, HANOVER SQUARE* (RECTOR & CHURCHWARDENS) *v.* *WESTMINSTER CORPN.*, [1910] A. C. 225, H. L.

*Annotation*:—*Mentd.* *Re Hyde Park Place Charity* (1911), 80 L. J. Ch. 593.

— **Duties transferred to borough & district councils.]**—*See* LOCAL GOVERNMENT; METROPOLIS.

**484. Powers—Alteration of church ornaments.]**—*SHERFIELD'S CASE* (1832), 3 State Tr. 519.

*Annotation*:—*Reid*. *Faulkner v. Litchfield* (1845), 3 Notes of Cases, 511.

**485. — Election of churchwarden—On release of existing churchwarden.]**—I know of no authority to the effect that because a vestry first fixes upon one person & subsequently sees some good & reasonable cause . . . to excuse him, it may not rescind that election & proceed to a new election. Nor do I know of any authority that because the vestry has, even for some bad reason, excused the individual first fixed upon, a proper person, subsequently chosen at the same meeting, is not duly elected nor liable to serve (*SIR JOHN NICHOIL*).—*BIRNIE v. WELLER & ELLIOTT* (1831), 3 Hag. Ecc. 474; 162 E. R. 1231.

**486. — Rescission of election.]**—*BIRNIE v. WELLER & ELLIOTT*, No. 485, *ante*.

**487. — As to church rates—Sole authority to grant.]**—Where churchwardens duly summoned a meeting of parishioners in vestry, for the purpose of making a rate for the repairs of the parish church, & for the expenses incidental to the execution of their office for the remainder of the year of their office, & the parishioners assembled accordingly, but refused to make or grant a rate; & the churchwardens thereupon made one of their own authority:—*Held*: (1) such rate, so made, was illegal, the churchwardens had no such authority; (2) the parishioners in vestry were the only parties legally authorised to grant or withhold a church rate.—*VELEY v. BURDER* (1841), 12 Ad. & El. 265; Arn. & H. 194; 10 L. J. Ex. 532; 5 J. P. 401; 5 Jur. 1013; 113 E. R. 813, Ex. Ch.; *affg.* *S. C. sub nom.* *BURDER v. VELEY* (1840), 12 Ad. & El. 233; *previous proceedings, sub nom.* *VELEY & JOSLIN v. BURDER* (1837), 1 Curt. 372.

*Annotations*:—*As to* (1) *Dist.* *Veley & Joslin v. Gosling* (1813), 3 Curt. 253; *Gosling v. Veley* (1853), 4 H. L. Cas. 679. *Reid*. *Still & Hunn v. Palfrey* (1841), 2 Curt. 692. *As to* (2) *Consd.* *Gosling v. Veley* (1853), 4 H. L. Cas. 679. *Generally, Reid*. *Scale v. Veley* (1841), 1 Notes of Cases, 170; *Varty & Mopsey v. Nunn* (1841), 2 Curt. 877; *R. v. Thomas* (1842), 3 Q. B. 589; *Francis v. Stoward* (1844), 5 Q. B. 984; *Rose v. Watson* (1894), 63 L. J. M. C. 108. *Mentd.* *Ex p. Story* (1852), 8 Exch. 195; *Westerton v. Liddell* (1857), Moore's Special Report; *White v. Steele* (1862), 12 C. B. N. S. 383; *London Corpn. v. Cox* (1867), L. R. 2 H. L. 239; *Mackonochie v. Penzance* (1881), 6 App. Cas. 424.

*See, generally*, Part VII., Sect. 14, *post*.

**Opposition to faculty—Whether ground for refusing.]**—*See* Nos. 1763, 1764, 3091, 3096, *post*.

##### C. Meetings.

###### (a) Summoning Meetings.

**488. Who may summon—Whether civil court will take judicial notice.]**—*Mandamus* to churchwardens to call a vestry to elect churchwardens refused.

**PART III. SECT. 7, SUB-SECT. 4.—A.**  
**a. Qualification of vestryman—Par holder—By purchase or lease.]**—Under 3 Vict. c. 74, ss. 2, 3, 6, a vestry capable of electing churchwardens

must be composed of persons holding pews in the church by purchase or lease, or holding sittings therein by lease from the churchwardens. The churchwardens of a church where the

sittings were wholly free, were therefore held not liable on a contract made by their predecessors for building the church.—*ANDERSON v. WORKERS* (1882), 32 C. P. 659.—*CAN.*

**Sect. 7.—Constitution of the Church into parishes:**  
*Sub-sect. 4, C. (c) i., ii. & iii.]*

of defts. after removal of the case by *certiorari*.—*R. v. THOMPSON* (1831), 2 B. & Ad. 287; 9 L. J. O. S. M. C. 81; 109 E. R. 1150.

*See, generally, CROWN PRACTICE, Vol. XVI., pp. 455 et seq.*

**509. Quorum.—Whether attendance of vicar necessary.]—***MAWLEY v. BARRET*, No. 537, *post*.

**510. Control of election.—Where no presiding officer.]—**Where there is no regular presiding sworn officer at an election, *e.g.* of churchwarden, one of whom by custom was chosen by parishioners paying scot & lot, & the other appointed by the rector, which latter in fact presided, the control of the election devolves at common law upon the electors themselves; but unless there be a custom to regulate the time for making such election, it is not competent to a majority of the electors assembled at the time of such election to narrow the period which the common law would allow; & therefore a resolution by them that it shall conclude at a given time must at least limit a time reasonable in itself with respect to numbers & distance, & be of sufficient notoriety. But whether a resolution by a majority of the vestry on the first day of the election to close the poll at 4 o'clock on the next day in a parish where the number of electors did not exceed 180, & where the affidavits stated a custom for 200 years not to keep the poll open for more than two days, & no instance within living memory of extending it beyond 4 o'clock on the second day, were sufficient to warrant the closing of the poll, at that time, while some of the voters were still coming in to poll, & others had no notice of the resolution; was a fit question to be tried upon a *mandamus*.—*R. v. WINCHESTER, BISHOP'S COMMISSARY COURT* (1806), 7 East, 573; 103 E. R. 222.

*Annotations:—Consd. Baker & Downing v. Wood* (1837), 1 Curt. 507. *Reid. Westerton v. Davidson* (1854), 1 Ecc. & Ad. 385; *R. v. Goole* (Incumbent & Churchwardens) (1861), 4 L. T. 322.

**511. Latitude of discussion allowed.]—**In a vestry meeting for civil purposes, as a full latitude of discussion must be allowed mere coarse expressions do not constitute brawling.—*HOILE v. SCALES* (1820), 2 Hug. Ecc. 506; 102 E. R. 958.

**512. Formalities.—Whether strict formality necessary.]—**(1) The observance of strict formality in putting motions & amendments thereon to vestry meetings is unnecessary; it is enough if conflicting propositions be so put to such a meeting, that those present understand what it is that they are called on to decide.

(2) At a meeting in vestry of the inhabitants of the parish of H. held under a local Act for the purpose of determining the application "to some public purpose, beneficial to the inhabitants," of moneys paid by two railway cos. in compensation of certain commonable rights of the inhabitants, a proposition was made that the money should be applied partly to a district church, & partly to almshouses. The proposition was met by an amendment to the effect that the money be applied to almshouses only. The chairman having inquired whether any one else wished to address the meeting, & no third proposition having been made, the amendment was put & carried. A poll was then demanded; & at the polling place the inhabitants were called on to vote for "the district church & almshouses," or for "the almshouses only." The result was in favour of the proposition for the district church & almshouses:—*Held*: the vestry must be taken to have agreed that the money should be applied in one of the two methods

proposed, & the poll was rightly so taken as to determine the question which of these two methods was preferred by the majority of the parishioners.

(3) Though a poll must not be so taken as to prevent a scrutiny, & therefore must not be taken by ballot, a voter has no right to insist on a scrutiny.—*R. v. HAMMERSMITH (VICAR & CHURCHWARDENS)* (1852), 3 B. & S. 504, n.; 19 L. T. O. S. 203; 122 E. R. 190; *sub nom. Re HAMMERSMITH VESTRY, Ex p. STEVENS*, 16 J. P. 632.

*Annotations:—As to (2) Consd. St. Michael, Oxford v. Luff* (1858), 7 W. R. 20. *Reid. R. v. Roberts* (1863), 3 B. & S. 495.

**513. Control by court.—What court has jurisdiction.]—**The Ecclesiastical Ct. has jurisdiction, *ratione loci*, over the order & proceedings of vestry meetings, held in a church; & therefore, where a rector had libelled, in that ct., a parishioner, for preventing him from presiding as chairman at such a meeting, a prohibition was refused.

It is pleaded in the arts. & on their admissibility must be taken as true, that the minister's presiding at vestry meetings "is observed in & throughout the whole realm." The fact of such general usage for the minister so to preside is notorious, & has not been denied even in argument. Now such an usage, unless absurd or improper, I take to found a common law right (SIR JOHN NICHOLL).—*WILSON v. M'MATH* (1819), 3 B. & Ald. 241; 3 Phillim. 67; 100 E. R. 650.

*Annotations:—Consd. Sanders v. Head* (1843), 3 Curt. 565; *R. v. Salisbury Bp.*, [1901] 1 K. B. 573. *Reid. Ranson & Knott v. Campkin* (1851), 2 Rob. Ecc. 370; *Martin v. Mackonochie, Flamank v. Simpson* (1868), L. R. 2 A. & E. 116; *Holy Trinity, Stepney* (1902), 18 T. L. R. 789; *L. C. C. v. Dundas*, [1901] 1 P. 1. *Mentd. St. Albans Bp. v. Fillingham*, [1906] P. 163.

**514. Evidence of proceedings.]—***R. v. ELY (ARCHDEACON)*, No. 729, *post*.

ii. *The Chairman.*

**515. Right of incumbent to preside.]—***WILSON v. M'MATH*, No. 513, *ante*.

**516. — Vestry for election of churchwardens.]—***R. v. D'OYLY, R. v. HEDGER*, No. 498, *ante*.

**517. Irregularity in nomination.—Effect of.]—**Irregularities at the meeting at which the rate was made in the nomination of chairman & wrong announcement of the numbers on each side, acquiesced in, & no poll being demanded, will not vitiate the rate.—*CORNWALL v. WOODS* (1816), 4 Notes of Cases 555; 7 L. T. O. S. 189.

*Annotation:—Expld. St. Michael, Oxford v. Luff* (1858), 7 W. R. 20.

**518. Refusal to put resolution.—Assumed election of another chairman.]—***R. v. STEPHENS (CHANCELLOR OF BANGOR)* (1870), *Prideaux's Churchwardens' Guide*, 16th ed., p. 201.

**519. — Amendment.]—**At a meeting of the vestry to elect churchwardens, D. was proposed to be re-elected, when parishioners moved an amendment that before electing a churchwarden a certain correspondence between the Charity Comrs. & the churchwardens as to some parish charity funds should be produced. The vicar refused to put the amendment, & declared D. duly elected:—*Held*: (1) the vicar was wrong in refusing to put the amendment; (2) he was wrong in not putting to the meeting whether D. should be elected.—*R. v. HAGBOURNE (VICAR)* (1886), 51 J. P. 276; 2 T. L. R. 809, D. C.

**520. — Resolution out of order.—Qualification of candidate not contemplated by statute.]—***PEDLEY & LOVELL v. CHAPMAN* (1891), 7 T. L. R. 396.

**Power to adjourn meeting.]—***See Sub-sect. 4, C. (d), post*.

**Power to grant poll.]—**See Sub-sect. 4, C. (c), *post*.

**Under Metropolis Management Acts.]—**See METROPOLIS.

### iii. Resolutions and Voting.

**521. Right to vote—General rule.]—**RICHARDSON v. GLADWIN, No. 479, *ante*.

**522. — In respect of church rate — Occupiers of small tenements not rated to poor rate.]—**RICHARDSON v. GLADWIN, No. 479, *ante*.

**523. — In respect of what property — Property held jointly with another as executor.]—**Where a person is assessed to the poor rate in respect of his own property, & is also exor. of a person whose exors. are assessed in respect of property of the deceased, he is entitled to vote at a vestry under Vestries Act, 1818 (c. 69), if the two assessments amount to £25.—*R. v. KIRBY* (1861), 1 B. & S. 647; 31 L. J. Q. B. 3; 5 L. T. 280; 26 J. P. 196; 10 W. R. 13; 121 E. R. 855. *Annotations:—Held.* Lambe & Clarke v. GRIEVES (1862), 26 J. P. 327. *Mentd.* R. v. Burrows, [1892] 1 Q. B. 399.

**524. — Voter's rates paid by another.]—**It is no legal ground for refusing a vote tendered at the poll that the voter's rates had been paid, not by himself but by other persons in order to enable him to vote; but in order to vitiate the rate on that ground, the rejected voter ought to have tendered his vote.—*RICHARDS v. BIRLEY* (1864), 2 Moo. P. C. C. N. S. 96; 10 L. T. 142; 28 J. P. 420; 15 E. R. 838, P. C.

**525. — Voter entitled to more than one vote — Limitation of number of votes.]—**RICHARDSON v. GLADWIN, No. 479, *ante*.

**526. — — — — — ]—**Where Small Tenements Act, 1850 (c. 99), has been adopted in a parish, & parties are rated as owners under that Act, & also as occupiers in their own right, they are entitled on voting in vestry to add the amount of the ratable value of both capacities, & to give one vote for every £25 of annual rent, but so that they claim no more than six votes in all. But they are not entitled to vote separately for each class of property so as to exceed the number of votes which would be allowed by the above mode of computation.—*LAMBE & CLARKE v. GRIEVES* (1862), 26 J. P. 327; 8 Jur. N. S. 288.

**527. — — — — — Property held in own right & property held jointly as executor.]—***R. v. KIRBY*, No. 523, *ante*.

**528. — — — — — How calculated.]—***LAMBE & CLARKE v. GRIEVES*, No. 526, *ante*.

**529. — On election of people's churchwarden — Incumbent nominating other warden.]—**An incumbent of a parish, who, upon the failure of himself & the parishioners to agree upon the choice of churchwardens, exercises his right of appointing one churchwarden, is not entitled either by the common law or under Vestries Act, 1818 (c. 69), s. 3, in his capacity as a ratepayer to vote at the election of the second churchwarden.

The 80th Canon of the Canons of 1603 is declaratory of the common law. In this canon the parishioners are mentioned in such a way as to show that, in case the vestry cannot agree, the minister is to choose his own churchwarden, & the parishioners, as opposed to & distinguished from

him, are to choose their churchwarden. The term "parishioners" in the Canon means, in fact, the minister's parishioners, & would not include the minister himself (A. L. SMITH, M.R.).—*R. v. SALISBURY (Bp.)*, [1901] 2 K. B. 225; 70 L. J. K. B. 593; 65 J. P. 531; 49 W. R. 529; 17 T. L. R. 405; *sub nom.* *R. v. SALISBURY (Bp.)*, *Ex p. VINE*, 84 L. T. 553, C. A.

**530. Improper rejection of vote—Whether resolution vitiated—Result of election not affected.]—**Where, upon the election of a churchwarden, the chairman of the vestry meeting had rejected votes which were alleged to be admissible, but it did not appear that the rejection had caused any difference in the result, the ct. refused to grant a *mandamus* ordering a fresh election. Though the persons, whose votes had been rejected, were parties to the application.—*Ex p. MAWBY* (1854), 3 E. & B. 718; 18 Jur. 906; 118 E. R. 1310; *sub nom.* *Ex p. JOYCE*, 23 L. J. M. C. 153; *sub nom.* *R. v. BOURNE* (VICAR, ETC.), 23 L. T. O. S. 143; *sub nom.* *Ex p. WOODING*, ETC., 18 J. P. 824; *sub nom.* *Ex p. HARDING*, 2 W. R. 473.

*Annotation:—Apld.* Shaw v. Thompson (1876), 3 Ch. D. 233.

**531. — — — — — ]—***RICHARDS v. BIRLEY*, No. 524, *ante*.

**532. Numbers wrongly announced by chairman — Effect of.]—***COPWALL v. WOODS*, No. 517, *ante*.

**533. Resolutions — Whether valid — Refusal by incumbent as chairman to put resolution — Assumed substitution of new chairman.]—***R. v. STEPHENS* (CHANCELLOR OF BANGOR), No. 518, *ante*.

**534. — — — — — Of majority — Whether binding on minority — Matter within jurisdiction of vestry.]—***ST. JOHN'S, MARGATE (CHURCHWARDENS) v. ST. JOHN'S, MARGATE (PARISHIONERS, ETC.)*, No. 1749, *post*.

**535. — — — — — Departure of voters voting with majority—Negating resolution carried by minority.]—**A vestry having been convened, a survey & estimate of repairs [necessary for the parish church] & the expenses [thereof] was produced, & no objection made to either. A rate having been proposed & seconded, an amendment was moved & seconded, & on a show of hands, was carried. The majority of parishioners who had negatived the granting a rate having quitted the vestry, the churchwardens & the minority continued to remain in vestry, & re-proposed & carried the necessary rate:—*Held*: such rate was a legal & valid church rate.

The obligation of the parishioners to repair the churches is absolute; the performance of such obligation may be compelled; & the performance of it may be properly enforced by the ecclesiastical cts., subject to the control of the cts. of common law, when the ecclesiastical cts. exceed their jurisdiction, or attempt to enforce a rate which is illegal & invalid.—*VELEY & JOSLIN v. GOSLING* (1843), 3 Curt. 253; 2 Notes of Cases 278; 7 J. P. 418; 7 Jur. 286; 163 E. R. 720; *subsequent proceedings*, *sub nom.* *GOSLING v. VELEY* (1853), 4 H. L. Cas. 679, H. L.

*Annotations:—Held.* R. v. Thomas (1842), 3 Q. B. 589; Francis v. Steward (1844), 5 Q. B. 984.

**536. — — — — — Whether binding on ordinary—**

## PART III. SECT. 7. SUB-SECT. 4.—C. (c) III.

**a. Right to vote—Election of rector — Majority of qualified voters.]—**Where, at a meeting held for the purpose of nominating a rector, only a portion of those who voted were admitted to be qualified, there being a doubt as to the rest:—*Held*: if

two-thirds of the qualified voters present voted for the candidate presented, the election is good, though others who voted may not be qualified.—*Ex p. BEEK* (1873), 2 Eng. 66.—**CAN. p. Resolutions — Appeal to bishop — Vestryman's right to interim interjunction.]—**By the constitution of an episcopal chapel, the decisions of the

vestry were declared reviewable by the bishop. At a meeting of the vestry resolutions affecting the character of a vestryman were passed, against which he appealed to the bishop; but, notwithstanding the appeal, the other vestrymen proceeded to carry the resolutions into effect. The appt. then applied, pending his

**Sect. 7.—Constitution the Church into parishes:**  
*Sub-sect. 4, C. (xvi., (d) & (e) i. & ii.)*

**Matter subject of ordinary's discretion.]—**ST. JOHN'S, MARTE (CHURCHWARDENS) v. ST. JOHN'S, MARTE (PARISHIONERS, ETC.), No. 1749, *post*.

**537. — Whether binding on succeeding vestry.]—**The acts of one vestry are not absolutely binding on a succeeding vestry; & they may be confirmed or rescinded by such succeeding vestry; but the confirmation of the succeeding vestry is not necessary to make the acts of a preceding one valid. The acts of a vestry may be valid, though the vicar was not present; he is not an integral part of the vestry.—**MAWLEY v. BARBET** (1798), 2 Esp. 687, N. P.

**538. — Whether confirmation by succeeding vestry necessary.]—**MAWLEY v. BARBET, No. 537, *ante*.

**539. — Whether consent to borrowing within Church Building Act, 1818 (c. 45), s. 9.]—**R. v. WILLIAM, No. 355, *ante*.

**— Amendment.]—**See No. 510, *ante*.

**540. "Division" of a vestry — How taken.]—**A "division" of a vestry, "to be taken in the manner prescribed by Vestries Act, 1818 (c. 69)," may be taken by a poll of all the ratepayers, such poll being an adjournment of the vestry.

At such poll the original proposition & an amendment inconsistent with it, being the only one proposed, may be put to the vote, & affirmative & negative votes may be taken upon each, & in that way the sense of the votes may be ascertained.

Observations upon the best mode of taking the opinion of a meeting upon a resolution & amendment.—**ELT v. ST. MARY'S, ISLINGTON BURIAL BOARD** (1854), Kay, 449; 2 Eq. Rep. 1089; 18 J. P. 229; 69 E. R. 190.

**Annotation:—***Mentd.* Hewitt v. White (1865), 14 W. R. 220.

#### (d) Adjournment of Meetings.

**541. Right to adjourn — Whether in vestry or incumbent.]—**The adjournment of a vestry meeting is, of common right, vested in the parishioners at large; not in the vicar.—**STOUGHTON v. REYNOLDS** (1736), Fortes. Rep. 108; Lee temp. Hard. 274; 2 Stra. 1045; 92 E. R. 804.

**Annotations:—***Consd.* Wilson v. M'Math (1819), 3 B. & Ald. 244, n. *Repld. & Distd.* R. v. Chester (Archdeacon) (1834), 1 Ad. & El. 342; Baker & Downing v. Wood (1837), 1 Curt. 507. *Consd.* R. v. D'Oyly (1840), 12 Ad. & El. 139. *Repld.* R. v. Salisbury, Bp., (1901) 1 K. B. 573. *Mentd.* Bremner v. Hull (1866), L. R. 1 C. P. 748; Edney & Lunn v. Smallbones (1869), 21 L. T. 506.

**542. — Whether in chairman.]—**Where a meeting for the election of churchwardens takes place in the parish church, in pursuance of a notice that such meeting would be held at the parish church, & that in case a poll should be demanded the meeting would be immediately adjourned to the town hall, the chairman may, upon a poll being demanded, adjourn the meeting, although a majority of the voters present object to such adjournment. The right of adjourning the business in progress at a meeting, is vested in the persons assembled, & not in the chairman.—**R. v. CHESTER (ARCHDEACON)** (1834), 1 Ad. & El. 342; 3 Nev. & M. K. R. 413; 2 Nev. & M. M. C. 277; 3 L. J. M. C. 95; 110 E. R. 1236.

**Annotations:—***Consd.* Baker & Downing v. Wood (1837), 1 Curt. 507. *Mentd.* Campbell v. Maund (1836), 1 Nev. & P. K. B. 558; R. v. Birmingham (Rector, etc.) (1837), 7 Ad. & El. 354.

appeal, for suspension & interdict on the ground that no legal quorum was present at the meeting which passed

the resolutions, & because pending the appeal, the resolutions could not be enforced:—*Refused.*—**EDWARDS v.**

**543. — —.]—**R. v. D'OYLY, R. v. HEDGER, No. 498, *ante*.

**544. For scrutiny of votes — Enforcement by mandamus.]—**R. v. SHARPE (1845), 6 L. T. O. S. 158, 354; 9 J. P. Jo. 773; *subsequent proceedings, sub nom.* R. v. WAKEFIELD (VICAR) (1846), 7 L. T. O. S. 227.

#### (e) The Poll.

##### i. In General.

**545. Proper mode of taking vote.]—**The proper way of taking the vote at a vestry is by a poll, the meeting being adjourned for that purpose, if necessary or convenient.—**Re EGHAM BURIAL BOARD** (1857), 29 L. T. O. S. 343; 30 L. T. O. S. 163; 21 J. P. 563; 3 Jur. N. S. 956.

**546. Whether show of hands condition precedent.]—**One of two candidates for the office of churchwarden was elected at a vestry, & subscribed the declaration of office, but the election was alleged to have been so improperly conducted that the proceedings were void. To give the parties impugning the election an opportunity of trying its validity, the etc., considering a *prima facie* case to be presented, granted a *mandamus* calling on the rector & churchwardens to convene a vestry for electing a churchwarden for the remainder of the year. At an election in vestry, where the right of voting is regulated by Vestries Act, 1818 (c. 69), s. 3, it is no objection to the proceedings that the chairman directed a poll without first taking a show of hands: although a show of hands was demanded, & the poll was not demanded, but was objected to.—**R. v. BIRMINGHAM (RECTOR, ETC.)** (1837), 7 Ad. & El. 254; 1 J. P. 211; 1 Jur. 754; 112 E. R. 467.

**Annotations:—***Repld.* R. v. St. Martin's Grdn. (1851), 17 Q. B. 149; *Ex p.* Mawby (1854), 3 R. & B. 718. *Mentd.* *Re* Barlow (1861), 30 L. J. Q. B. 271.

**547. — Votes calculated in writing.]—**At a vestry to elect churchwardens, the chairman, after the minister had nominated his, & after two candidates had been proposed & seconded, refused, on a request & protest of ratepayers, to take a show of hands, but took down the names of those present, & their respective votes, & added them up, & then declared the one having a majority to be duly elected; whereupon a ratepayer demanded a poll, which was refused:—*Held:* (1) the proceedings were irregular, & a poll ought to have been granted; but (2) as the affidavits did not state that any ratepayers had been prevented from voting, a rule for a *mandamus* to re-assemble the vestry & proceed to a fresh election was refused.—**R. v. GOOLE (INCUMBENT & CHURCHWARDENS)** (1861), 4 L. T. 322; 25 J. P. 308.

**Annotation:—***As to* (2) *Consd.* R. v. Ward (1873), L. R. 8 Q. B. 210.

**548. Method of taking — With closed doors — Whether proper.]—**In the election of churchwardens, if a poll be demanded, the votes are to be given by the qualified inhabitants present; but all qualified inhabitants, whether they were present or not at the show of hands, have a right to be admitted into the vestry-room & vote during such poll: although the qualified inhabitants present at the time of granting the poll resolve that the poll shall be confined to those then present. (2) It is not a sufficient ground for impeaching such election (on motion for a *mandamus* to elect) that the poll was taken with closed doors, unless it be expressly sworn that some qualified person who meant to vote was thereby

**BEAUBIE** (1847), 9 Dunl. Ct. of Sess. 1384; 19 Sc. Jur. 608.—**SCOT.**

prevented from doing so. (3) *Semble*: if such an instance were shown, the ct. would grant a *mandamus*, without inquiring strictly whether the number of persons excluded was in fact such as to affect the result of the election.—*R. v. LAMBETH (RECTOR)* (1838), 8 Ad. & El. 356; 3 Nev. & P. K. B. 416; 1 Will. Woll. & H. 398; 2 J. P. 423; 2 Jur. 566; 112 E. R. 873; *subsequent proceedings*, *sub nom.* *R. v. D'OYLY*, *R. v. HEDGER* (1840), 12 Ad. & El. 139.

*Annotations*:—As to (1) *Reid*. *Westerton v. Davidson* (1854), 1 Ecc. & Ad. 385; *White v. Steele* (1862), C. B. N. S. 383; *R. v. How* (1863), 33 L. J. M. C. 53. As to (2) *Ald.* *R. v. Goole* (Incumbent & Churchwardens) (1861), 4 L. T. 322. *Consd.* *Shaw v. Thompson* (1876), 3 Ch. D. 233. *Reid*. *Westerton v. Davidson* (1854), 1 Ecc. & Ad. 385. As to (3) *Consd.* *R. v. Cousins* (1873), L. R. 8 Q. B. 216; *R. v. Ward* (1873), L. R. 8 Q. B. 210. *Reid*. *Re St. John's, Cardiff* (1847), 11 Jur. 183. *Generally*, *Mentl.* *Julius v. Oxford Bp.* (1880), 5 App. Cas. 214.

#### 549. — After show of hands — By ballot.]—

At an election of churchwardens, where, after a show of hands, a poll is demanded by or on behalf of a candidate, it is illegal to conduct the election by ballot.—*STORY v. COLK* (1848), 6 Notes of Cases, Supp. 33.

*Annotation*:—*Reid*. *Westerton v. Davidson* (1854), 1 Ecc. & Ad. 385.

550. — Sq as to prevent scrutiny.]—Though a poll must not be so taken as to prevent a scrutiny, & therefore must not be taken by ballot, a voter has no right to insist on a scrutiny.—*R. v. HAMMER-SMITH (VICAR & CHURCHWARDENS)* (1852), 3 B. & S. 504, n.; 19 L. T. O. S. 203; 122 E. R. 190; *sub nom.* *Re HAMMER-SMITH VESTRY*, *Ex p. STEVENS*, 16 J. P. 632.

*Annotations*:—*Reid*. *St. Michael, Oxford v. Luff* (1858), 7 W. R. 20; *R. v. Roberts* (1863), 3 B. & S. 495.

551. — Ruling by chairman contrary to resolution of meeting.—Whether election invalid.—No voters prevented from voting.]—The advowson of a parish church being vested in trustees who were bound to present the nominee of the parishioners & inhabitants, a vacancy occurred, & at a meeting of parishioners convened by the churchwardens & presided over by one of them, Aug. 30 was fixed upon for a meeting to proceed to the election of a vicar. Meanwhile, upon the requisition of certain inhabitants, a meeting of Aug. 25, summoned by the churchwardens, but at which they declined to preside, was held, at which resolutions were passed to the effect that the election should be by ballot, on one day only, & at several polling places, & that the poll should be open from 9 to 9. On Aug. 30 the meeting resolved upon was held, candidates were nominated, a show of hands taken, & a poll demanded, & one of the churchwardens, who was in the chair, announced that the poll would be taken by open voting, on the following & two successive days, at one polling place only, & that the poll would be kept open from 8 to 8. Upon a parishioner rising to move amendments similar to those of Aug. 25, the chairman left the chair, & declared the meeting at an end. After the churchwarden had left the chair, another chairman was chosen, & a series of resolutions similar to those of Aug. 25, were moved & carried. The poll having been taken in the way announced by the chairman of the meeting of Aug. 30:—*Held*: (1) the conduct of the churchwardens had been erroneous & illegal; (2) there being no evidence of any voter having been deprived of an opportunity of voting, the election could not be disturbed. *Semble*: (3) an election by ballot, if duly resolved upon, is not at the present day an illegal mode of election.—*SHAW v. THOMPSON* (1876), 3 Ch. D. 233; 45 L. J. Ch. 827; 34 L. T. 721.

*Annotation*:—*Mentl.* *Bebb v. Law Soc.*, [1914] 1 Ch. 286.

552. Amendment negating resolution.—Whether separate poll necessary.]—The churchwardens of C. gave notice that a vestry of the parish would be held to make a rate for the repair of the parish church: & in the notice it was stated that a show of hands would be taken on each proposition or amendment which might be submitted to the meeting, & if a poll should be demanded, the polling would be taken at an adjourned meeting on all the propositions & amendments made at the original meeting. At the meeting a rate of 2d. in the pound was proposed, & an amendment was moved "that no rate be granted." The majority were in favour of the amendment. Upon a poll being demanded, the vestry was adjourned for the purpose of taking it. At the poll the voting was "for the motion" & "for the amendment"; & at the close of it the chairman declared the motion to be carried, & no other amendment was allowed to be put:—*Held*: the amendment being a direct negative of the original motion, it was not necessary to take the poll on each; & no amendment could be brought forward after the close of the poll.—*R. v. ROBERTS* (1863), 3 B. & S. 495; 32 L. J. M. C. 153; 122 E. R. 186; *sub nom.* *R. v. SURREY JJ.*, 7 L. T. 822; 27 J. P. 709; *sub nom.* *ST. GILES, CAMBERWELL (CHURCHWARDENS) v. SURREY JJ.*, 11 W. R. 362.

553. — —.]—At a vestry meeting, a motion having been made & seconded that a rate be made, an amendment was proposed that it was not legal or expedient to make a church rate for the district. The amendment, & afterwards the original question, was put to the meeting: the first was negatived & the latter carried. A poll was demanded on the amendment only, & the vestry was adjourned for that purpose. On the day to which the vestry had been adjourned the chairman declared the state of the poll under the headings (1) the number for the amendment & against the rate, (2) the number against the amendment & for the rate, & declared the majority to be for the rate; & then dissolved the meeting without having put the original motion a second time:—*Held*: the proceedings, though irregular, were not sufficiently so to vitiate the rate.—*TARKS v. HUTTON* (1860), L. R. 1 A. & E. 270; 35 L. J. Eccl. 11; 31 J. P. 23; 12 Jur. N. S. 1013.

554. Right of chairman to have assessors.]—The vicar presiding at a poll for church rates may, if he pleases, call in an assessor to assist him in deciding upon the objections taken to the votes.—*R. v. WAKEFIELD (VICAR)* (1840), 7 L. T. O. S. 227; 10 J. P. Jo. 386.

555. Election of disqualified person.]—*ANTHONY v. SEGER* (1789), 1 Hag. Con. 9; 161 E. R. 457. *Annotations*:—*Consd.* *Adey v. Theobald* (1836), 1 Curt. 447; *R. v. Sarum, Bp.*, [1916] 1 K. B. 466. *Reid*. *Campbell v. Maund* (1836), 2 Har. & W. 467; *Storey v. Colk* (1848), 6 Notes of Cases Supp. 33; *Westerton v. Davidson* (1854), 1 Ecc. & Ad. 385; *St. Michael, Oxford (Churchwardens) v. Luff* (1858), 7 W. R. 20; *Tear v. Freebody* (1858), 4 C. B. N. S. 228; *R. v. St. Matthew, Bethnal Green Vestry* (1875), 32 L. T. 558; *Harrison v. Barrett* (1876), Trist. 43; *R. v. Wimbledon L. B.* (1882), 8 Q. B. D. 450.

#### ii. Right to and Demand of Poll.

556. The right to a poll.—Incident to election by show of hands.—Election of parish officer.]—The right to demand a poll is by law incident to the election of a parish officer by a show of hands. At the election of a churchwarden of the parish of P. (subsequently to Vestries Act, 1818 (c. 69)), the show of hands was in favour of M. A poll was demanded by a ratepayer present, who required that it should be taken according to sect. 3 of



*Sect. 7.—Constitution of the Church into parishes :  
Sub-sect. 4, C. (e) ii. & iii.]*

above Act (allowing plurality of votes to individuals in respect of property), to which mode an inhabitant present objected. The poll was taken by plurality of votes, by which H. & G. had the majority; they also had the majority at the poll, reckoning by single votes. During the poll, several parishioners protested against the mode of taking it, & did not vote. By sect. 8 of above Act, nothing in that Act is to change or affect the right or manner of voting in any vestry or meeting holden by virtue of any ancient or special usage or custom. By a local Act, vestrymen of the parish of P. are to be elected by ballot, by plurality of votes, as under Vestries Act, 1818 (c. 69), s. 3; elections of churchwardens are to be conducted in such manner as hath been usual in the same parish; & overseers are to be nominated by the vestry as may be done by parishioners in vestry in other cases. Before either Act passed, & ever since, churchwardens were elected in P. by show of hands, no poll ever having been demanded:—*Held*: (1) assuming Vestries Act, 1818 (c. 69), s. 3, to be inapplicable to the parish of P, G. & H. were duly elected, the irregularity in the form of demanding the poll, if any, having been waived by the poll being in fact taken without objection from either party to there being a poll; & H. & G. having a majority on the poll according to either way of reckoning the votes; (2) sect. 3 of above Act was applicable to P.; for that the fact of no poll ever having been demanded did not show that the usage *de facto* in P. excluded a poll, & the elections were, at the time of passing the local Act, subject to sect. 3 of Vestries Act, 1818 (c. 69), in the event of a poll being demanded; (3) a poll may be demanded at an election of parish officers, after the chairman has declared the result of a show of hands.—*CAMPBELL v. MAUND* (1836), 5 Ad. & El. 865; 2 Har. & W. 457; 1 Nev. & P. K. B. 558; 1 Nev. & P. M. C. 229; 6 L. J. M. C. 145; 111 E. R. 1394, Ex. Ch.

*Annotations*:—As to (1) *Refd.* Baker & Downing v. Wood (1837), 1 Curt. 507. As to (2) *Refd.* St. Michael, Oxford (Churchwardens) v. Luff (1858), 7 W. R. 20; R. v. Howe (1863), 33 L. J. M. C. 53; R. v. Wimbeldon L. B. (1882), 8 Q. B. D. 459. As to (3) *Consd.* Story v. Colk (1848), 6 Notes of Cases Supp. 33. *Refd.* Beechey v. Quentory (1812), 11 L. J. Ex. 418; Westerton v. Davidson (1854), 1 Ecc. & Ad. 385; White v. Steele (1862), 12 C. B. N. S. 383; R. v. St. Matthew, Bethnal Green Vestry (1875), 32 L. T. 558.

557. ——— Whether excluded by custom—No evidence of poll having been demanded.]—*CAMPBELL v. MAUND*, No. 556, *ante*.

558. ——— Conduct of elections governed by local Act.]—*CAMPBELL v. MAUND*, No. 556, *ante*.

559. ——— Objection to churchwardens' accounts.]—A vestry meeting was held for the purpose of passing the churchwardens' accounts; & upon the motion being proposed that such accounts should be allowed, an amendment was proposed by an inhabitant, who objected to certain items, that such accounts should not be allowed. Upon this a show of hands was taken, when the chairman declared that the original motion was carried. Hereupon a poll was demanded, which the chairman refused to grant:—*Held*: he was wrong, & a *mandamus* was granted for the purpose of taking such poll.—*R. v. ROBINSON*, *Ex p. OXFORD* (1856), 27 L. T. O. S. 110; 20 J. P. 311.

560. ——— Of whole parish—Effect of agreement.]—At a vestry, held under Vestries Act, 1818 (c. 69), for the purpose of electing surveyors of highways, of which public notice had been given, it was agreed that the vote should be taken by a

show of hands, leaving it open to any one to propose that the votes should be taken according to the statute. A. & B. were respectively proposed & seconded for the office of surveyor; & on a show of hands, A. had a majority. It was then proposed & seconded, on behalf of B., that the votes should be taken according to the statute. No objection was made; & on the votes being so taken, B. had a majority, & was declared duly elected. A. then demanded a poll of the whole parish:—*Held*: (1) the meeting having agreed to a poll being taken according to the statute, no one was entitled afterwards to demand a poll of the whole parish; (2) the election of B. was valid; (3) a *mandamus* for another meeting to elect would not lie.—*R. v. HILLINGDON* (VICAR, ETC.) (1852), 18 Q. B. 718; 19 L. T. O. S. 184; 16 J. P. Jo. 374; 118 E. R. 271.

*Annotations*:—As to (1) *Distd.* R. v. Cooper (1870), 39 L. J. Q. B. 273. *Refd.* St. Michael, Oxford (Churchwardens) v. Luff (1858), 7 W. R. 20.

561. ———.]—*R. v. GOOLE* (INCUMBENT & CHURCHWARDENS), No. 517, *ante*.

*See, also*, No. 755, *post*.

Enforcement of right—By *mandamus*.]—*See* No. 559, *ante*; & Nos. 566–569, *post*.

562. ——— No practical injustice.]—*R. v. GOOLE* (INCUMBENT & CHURCHWARDENS), No. 547, *ante*.

563. Time of demand—After declaration of result of show of hands.]—*CAMPBELL v. MAUND*, No. 556, *ante*.

564. ——— During calculation of votes after abortive show of hands.]—A vestry was duly summoned to consider as to the mode of raising money to pay for rebuilding the parish church. A resolution was moved & seconded that an application should be made to the comrs. of public works, to which an amendment was moved & seconded, that "this vestry refuses to sanction the application." It being difficult to tell the numbers on a show of hands, the chairman suggested that the names be taken down in writing, to which no objection was made. The supporters of the amendment, however, seeing the numbers would be against them, one of them demanded during the reckoning that a poll be taken, & moved "that the vestry be kept open till Saturday." The chairman refused to grant a poll, on the ground that there was a resolution pending & not disposed of:—*Held*: the poll ought to have been granted, there being substantially a demand for it, & *mandamus* granted accordingly to the rector to re-assemble the vestry & grant a poll.—*R. v. WALTERS* (1860), 24 J. P. 421.

565. Irregularity in demand—Waiver.]—*CAMPBELL v. MAUND*, No. 556, *ante*.

566. Effect of refusal—Election imperfect.]—On the election of a surveyor of highways for a parish, the chairman of the vestry took a show of hands, but refused to allow a poll which was demanded. On an application on behalf of the person who appeared successful on the show of hands, the ct. granted a rule *nisi* for a *mandamus*, commanding the inhabitants to meet in vestry & take a poll, on the ground that the election was imperfect.—*Ex p. GROSSMITH* (1841), 5 Jur.; 551 *sub nom.* *Ex p. GROSSMITH*, 10 L. J. Q. B. 359.

567. ———.]—Highway Act, 1835 (c. 50), s. 18, enacts, that "if it shall be determined by a majority of two-thirds of the votes of the vestrymen present at the meeting," to form a highway board for the parish, it shall be lawful for the vestry to nominate & elect a certain number of persons to form the board. The majority of two-thirds of the vestrymen present at a vestry meeting of a

parish having voted for the appointment of such a board, a poll was demanded by the minority, which the chairman refused, & a board were then nominated & appointed:—*Held*: (1) a poll was demandable of common right; (2) the right was not excluded by the words of the statute; (3) the board were therefore not duly elected.—*R. v. How* (1863), 33 L. J. M. C. 53; 9 L. T. 385; 27 J. P. 773.

*Annotations*:—*As to* (1) *Consd. R. v. Wimbledon L. B.* (1882), 8 Q. B. D. 459. *Reid. R. v. St. Matthew, Bethnal Green Vestry* (1875), 39 J. P. 502. *As to* (2) *Consd. R. v. Wimbledon L. B.* (1882), 8 Q. B. D. 459.

#### 568. — Proceedings void—Church rate.]—

At a duly assembled vestry A. proposed a church rate of twopence in the pound, & was seconded by B., C. proposed, as an amendment, a halfpenny rate, & was seconded by D. On show of hands the amendment was negatived; C. then demanded a poll, which the chairman refused; the original motion was then put & carried on show of hands. D. demanded a poll, the result of which was that the original motion was carried by 43 to 42:—*Held*: all proceedings subsequent to the refusal of the poll on the amendment were null, & the ct. pronounced against the rate.—*St. Michael, Oxford (Churchwardens) v. Luff* (1858), 31 L. T. O. S. 358; 7 W. R. 20.

569. — — — — —.]—(1) The only legitimate way in which a parish can express its desire to do an act is, by convening a vestry, & duly conducting the proceedings therein to their legal determination, viz., by show of hands, or by a poll when a poll is duly demanded. (2) A meeting of vestry was held for the purpose of considering the propriety of purchasing an additional burial-ground for the parish of P. A resolution to that effect having been put & agreed to by the majority of those present, a poll was demanded, & refused. The resolution of the vestry was communicated to the church building comrs., who thereupon authorised the parish to purchase the land & to levy rates to defray the expenses, under Church Building Act, 1819 (c. 134), s. 25, & Church Building Act, 1822 (c. 72), s. 26. Money was accordingly borrowed by the churchwardens, & a rate made. A parishioner declining to pay the rate, on the ground of invalidity, the churchwardens instituted against him a suit in the Consistory Ct., in which suit the respondent tendered a responsive allegation, stating that at the vestry a poll had been duly demanded, & refused. The judge of the Consistory Ct. having declined to admit this responsive allegation, the respondent appealed to the Ct. of Arches, by which ct. the decision of the ct. below was confirmed. Upon an application to this ct. for a writ of prohibition, on the ground that the judge of the Consistory Ct. had improperly refused to receive the responsive allegation, anet was directed to declare in prohibition; & on having so done:—*Held*: there had been no legal expression of the desire of the parish, & the responsive allegation ought to have been admitted to proof in the ecclesiastical ct. (3) An appeal from the Consistory Ct. to the Ct. of Arches is no application for a prohibition.—*White* (1862), 12 C. B. N. S. 383; 31 L. J. C. P.

*L. R. 2 H. L. 239; Rippin v. Bastin* (1869), L. R. 2 A. & E. 386.

570. — — — — — Costs.]—E., the vicar of a parish, at an election of churchwardens, refused to grant a poll demanded by D., one of two candidates. A rule nisi for a *mandamus* was obtained on June 11, J.—VOL. XIX.

& afterwards made absolute on June 21, & then a writ of *mandamus* issued, to which E. made a return that he had obeyed the rule. E. had on June 16, before the rule was made absolute, given notice that he had refused the poll under a mistake, but would hold another vestry, & grant a poll, which he forthwith did:—*Held*: D. was not entitled to his costs of the rule & writ of *mandamus*, because on E.'s submission after the rule nisi was obtained, he had done all in his power to correct the mistake, & the further prosecution of the rule was quite unnecessary.—*R. v. ETTY* (1877), 42 J. P. 36.

#### iii. Time, Place, and Duration.

571. Time & place of holding— Who may fix.]—*R. v. D'OYLY, R. v. Hedger*, No. 498, *ante*.

572. Place of holding—Private property—Whether proper place—Town Hall.]—Notice having been given of a meeting in vestry for the purpose of granting a church rate, & that if a poll should be demanded, that a meeting would be immediately adjourned to the town hall. The meeting being held & a poll demanded, the chairman immediately adjourned the meeting to the town hall, where the poll was taken:—*Held*: (1) the proceeding was regular, no business having been interrupted by it, & the adjournment being part of the original appointment; (2) the town hall was not an improper place to take the poll, by reason of its being private property, no person having been prevented from voting on that account; (3) the time for taking the poll being limited to eleven hours, such time was sufficient if due diligence had been used, 785 persons being the greatest number proved to have voted on any occasion.—*BAKER & DOWNING v. WOOD* (Curt. 507).

*Annotation*:—*As to* (3) *Folld. Westerton v. Davidson* (1854), 1 Ecc. & Ad. 385.

573. — — — — — Convenient place—Late voters prevented from voting by crowd—Whether ground for *mandamus*.]—Where at a vestry meeting a poll is demanded, if the time & place for taking such poll are convenient, it is no ground for a *mandamus* to hold another vestry for the same purpose, that in consequence of the crowded state of the place where the poll was taken, a number of voters were unable to give their votes. Voters should use diligence in voting, & if they hold back until a late period, & then in consequence of the crowd of voters, some of them are unable to vote before the poll closes, this ct. will not assist them.

*Semble*: when it is publicly announced by the chairman that the poll will continue for a certain length of time, he has no power to prolo. *R. v. SUTTON, LANCAIRE (Churchwarden Overseers)* (1864), 29 J.

574. Duration—Reasonable period.]—*R. v. WINCHESTER, BISHOP'S COMMISSARY COURT, N* 510, *ante*.

575. — — — — — What period is reasonable—Number of voters.]—*BAKER & DOWNING v. WOOD*, No. 572, *ante*.

576. — — — — — Electors prevented from voting.]

The that the poll should close at seven o'clock, which was accordingly done, & thereby some qualified electors were prevented from recording their votes. Election void.—*WESTERTON v. DAVIDSON* (1854), 1 Ecc. & Ad. 385.

577. — — — — — Whether alleged customary period

**Sect. 7.—Constitution of the Church into parishes:**  
*Sub-sect. 4, C. (e) iii. & iv., D., E. & F. (a) & (b).]*

**reasonable—How ascertained.]—R. v. WINCHESTER, BISHOP'S COMMISSARY COURT, No. 510, ante.**

**578. — Grounds for closing—Whether riot or disturbance.]—R. v. ASTON-JUXTA-BIRMINGHAM (RECTOR) (1843), 1 L. T. O. S. 313.**

**579. — — — — —.]—The chairman of a vestry meeting, held for the purpose of taking a poll for the election of a churchwarden, has no power to close the poll on account of disturbance.—R. v. GRAHAM (1861), 25 J. P. 437; 9 W. R. 738.**

**580. — Right of chairman to prolong.]—R. v. SUTTON, LANCASHIRE (CHURCHWARDENS & OVERSEERS), No. 573, ante.**

**581. — Discretion of incumbent.]—A vestry meeting of the parish of H., of which meeting notice had been posted on the church door, was held for the election of churchwardens. The rector nominated one churchwarden, & there were two candidates for the office of parishioners' churchwarden, one being the existing churchwarden, & the other a candidate put forward by a party dissatisfied with the administration of the parish charities. The show of hands was in favour of the last-named candidate. The poll was closed by the rector at five o'clock on the day of the election, when there appeared a majority of votes for the existing churchwarden. The validity of the election was questioned by a rule for a *mandamus* to the rector & churchwardens, to hold a new election:—*Held*: (1) the closing of the poll was a matter in the discretion of the rector, which had not been shown to be unreasonably exercised; (2) it had not been shown that, had the poll been kept open, the result of the election would have been different; (3) there had been too great delay in questioning the election. Rule discharged.—R. v. HANDBOROUGH (CHURCHWARDENS) (1877), 37 L. T. 400; 41 J. P. 807.**

**582. — Poll improperly closed—Costs of mandamus for new election.]—Where the ct granted a *mandamus* to a vicar & churchwarden to proceed to the election of a churchwarden, on the ground that the vicar had improperly closed the poll, but no corrupt motive was imputed to defts. & prosecutor failed at the election, the ct. refused to make defts. pay the costs of the *mandamus*.—R. v. ASTON (VICAR & CHURCHWARDEN) (1844), 2 L. T. O. S. 308; 8 J. P. Jo. 120.**

**583. — — — — —.]—Where a poll was closed too soon, the main cause of it being a great disturbance caused by the agent of one of the candidates, who also succeeded in getting a *mandamus* for a new election, the ct. refused to give costs of the *mandamus* against the churchwardens, on the ground that the party who obtained it was chiefly blamable.—R. v. GRAHAM (1862), 26 J. P. 103.**

#### iv. Voting.

**584. Who entitled to vote—Qualified inhabitants—Though not present at show of hands.]—R. v. LAMBETH (RECTOR), No. 548, ante.**

**585. Scrutiny—Whether demandable as of right.]—R. v. HAMMERSMITH (VICAR & CHURCHWARDENS), No. 512, ante.**

#### D. Under Local Laws or Customs.

**586. Effect of custom as to assessment of property—Plurality of votes.]—By Vestry Act, 1818 (c. 69), s. 3, persons rated to the poor in respect of any annual rent, profit or value, not amounting to £50, shall be entitled to one vote**

**& no more at vestry meetings, & to an additional vote in respect of every additional £25, to which they shall be rated, not exceeding six votes in the whole. Where, however, in the parish of St. M. the poor rates had, according to ancient custom been always assessed without regard to the annual value of property in the parish, but according to the supposed ability of the person assessed:—*Held*: persons so rated were not within the benefit of sect. 3 of the above Act, as to the plurality of votes, although assessed in respect of property exceeding £50 in amount.—NIGHTINGALE v. MARSHALL (1823), 2 B. & C. 313; 3 Dow. & Ry. K. B. 549; 2 L. J. O. S. K. B. 43; 107 E. R. 400.**

**587. Local Act—Election of guardians—Effect of Vestries Act, 1818 (c. 69)—Plurality of votes.]—A local Act passed before Vestries Act, 1818 (c. 69), for the regulation of parish vestries, created the office of guardians of the poor for a particular parish, & enacted, that vacancies should be annually filled up by the rated inhabitants assembled in the vestry room, who should elect persons in the room of those going out:—*Held*: after the passing of the above Act the inhabitants ought to be allowed in such election the number of votes, in proportion to their respective assessments, defined in the latter Act; for the local Act did not give this vestry such a peculiar constitution as to bring it within sect. 8 of the above Act, which preserved to vestries holden under any special Act, the powers & rights of voting which they previously enjoyed.—R. v. ST. JAMES, (CLERKENWELL (CHURCHWARDENS) (1834), 1 Ad. & El. 317; 3 L. J. M. C. 99; 110 E. R. 1226.**

**588. — Trusteeship of church funds—Erection of house for minister—Mandamus to account on application by minister.]—A local Act provides, that if there should be a surplus from fees & payments received by vestry of a parish on account of certain district churches, the surplus should be put aside by the vestry to form a fund, to erect a residence for the minister. A *mandamus* was granted against the vestry to return the accounts relating to a church on the application of the minister, when there were affidavits both as to the existence & non-existence of a surplus.—R. v. ST. MARYLEBONE VESTRY (1838), 2 J. P. 344.**

**589. — Election of officers—"Most proper & convenient" method—Power to select.]—A local Act enacted, that at a vestry meeting to be held on Easter Tuesday in every year, all the vacancies in the list of governors & guardians of the poor should "be filled up by poll or ballot, or in such way of election as should be deemed most proper & convenient." At a vestry meeting held accordingly, the mode of election pursued was as follows: Two candidates were proposed for each vacancy; on a show of hands being taken, the one, in whose favour it appeared to be, was declared elected; & then two other candidates were proposed for the next vacancy; & so on, till all the vacancies were filled up. One of the rejected candidates demanded a poll of the inhabitants of the parish, which was refused by the chairman, who proceeded to complete the elections according to the mode above described:—*Held*: (1) this mode of election could not be sustained; (2) it was the meeting itself, & not the chairman, which was to pronounce what was the "most proper & convenient" mode of election; the right to determine the mode of election being limited to a choice among such modes as might best fulfil the object of the section, which was to secure the filling up of the vacancies by a real**

election made by the inhabitants in vestry assembled.—*R. v. St. Mary Newington (Governors & Guardians) (1818) 6 Dow. & L. 162; Cripps' Church Cas. 117; 2 Saund. & C. 303; 17 L. J. Q. B. 220; 11 L. T. O. S. 205; 12 Jur. 918.*  
**Select vestries.]—***See Sub-sect. 4, F., post.*

#### *E. In New Parishes.*

**590. Quorum—Majority must be present.]—**The comrs. for building & enlarging churches having, pursuant to Church Building Act, 1818 (c. 45), & a local Act, appointed 26 persons to be a select vestry, for the care & management of a church, & all matters relating thereto:—*Held:* in order to constitute a good assembly of the select vestry so appointed, there must be present a majority of the number named in the appointment; & therefore, a rate for the repair of the church, made at a meeting where there was not such a majority, was illegal, & payment of such a rate could not be enforced in the ecclesiastical ct.—*BLACKET v. BLIZARD (1829), 9 B. & C. 851; 4 Man. & Ry. K. B. 641; 2 Man. & Ry. M. C. 309; 109 E. R. 317; sub nom. FREEMAN v. MEYMOOT, BLACKETT v. BLIZARD, 8 L. J. O. S. K. B. 85.*

*Annotations.—Held. R. v. Fenton (1841), 1 Gal. & Dav. 17; R. v. Christchurch Overseers (1857), 26 L. J. M. C. 68; R. v. Leeds JJ., Ex p. Binns (1900), 95 L. T. 916. Mentd. Hall v. Maule (1838), 7 Ad. & El. 721; Attenborough v. Kemp & Page (1860), 6 Jur. N. S. 1354; R. v. Chester, Bp. (1901), 17 T. L. R. 533.*

**591. Notice of meeting—Three clear days after publication on Sunday unnecessary.]—**(1) By Vestries Act, 1818 (c. 69), no vestry or meeting of inhabitants in vestry of or for any parish shall be holden until public notice shall have been given of such vestry, three clear days at least before the day to be appointed for holding such vestry, by the publication of such notice on the parish church or chapel on some Sunday during or immediately after divine service, & by fixing the same, fairly written or printed, on the principal door of such church or chapel:—*Held:* this statute does not apply to a vestry of an ecclesiastical district formed under the Church Building Acts.

(2) Where, therefore, notice of a vestry to choose a churchwarden for such an ecclesiastical district was given on Good Friday for the following Tuesday:—*Held:* such notice was good.—*R. v. BARROW (1809), 1 L. R. 4 Q. B. 577; 10 B. & S. 674; 20 L. T. 760; 33 J. P. 487; 17 W. R. 928.*

#### *F. Select Vestries.*

##### *(a) In General.*

**592. Power to constitute.]—***BERRY v. BANNER, No. 169, ante.*

**593. Notice of meeting—Omission to notify one member—Whether meeting invalidated.]—**To an action of trespass for an assault, debts. pleaded that they were overseers of the poor, & that a select vestry of the parish was duly assembled & holden in a certain school room within the parish, & that debts, as overseers, were present; that pltf. unlawfully entered the room, & debts. expelled him; it was proved that one of the five members who constituted the select vestry, had not been summoned, or received any previous notice of the meeting:—*Held:* the plea was not proved, as the meeting was not a legally constituted vestry, so as to support the allegation, that the selected vestry was duly assembled.—*DOBSON v. FUSSEY (1831), 7 Bing. 305; 2 Man. & Ry. M. C. 470; 5 Moo. & P. 112; 9 L. J. O. S. C. P. 72; 131 E. R. 117.*

**594. Appointment of members—Appointment by justices after election by parishioners—Whether**

**discretionary.]—**The justices have no discretionary power as to the appointment of persons nominated & elected by the parishioners as members of the select vestry, under Poor Relief Act, 1819 (c. 12), s. 1, but are bound to appoint those whose names are returned to them; even though a person returned may hold an office, the duties of which may be inconsistent with the duties of a select vestryman, as if he be a magistrate acting within the district in which the parish lies.—*R. v. KENT JJ. (1834), 4 L. J. M. C. 7.*

**595. — Member holding office inconsistent with duties as vestryman.]—***R. v. KENT JJ., No. 594, ante.*

**596. Application for faculty—Whether resolution of select vestry necessary.]—***RICHMOND (VICAR) & ST. MATTHIAS, RICHMOND (CHAPELWARDENS) v. ALL PERSONS HAVING INTEREST, ETC., No. 2859, post.*

##### *(b) By Custom.*

**597. Custom for select vestry—Whether good.]—***BATT v. WATKINSON (1690), 2 Lut. 1027; 125 E. R. 572.*

**598. — Indefinite numbers of members—Members co-opted.]—**A custom that there shall be a select vestry of an indefinite number of persons, continued by election of new members made by itself, & not by the parishioners, is valid in law. *Semble:* it must be part of such custom that there should always be a reasonable number, & that the reasonableness of the number must be decided with reference to long established usage, & to the population of the parish; such a custom having existed from time immemorial in a parish.—*GOLDING v. FENN (1828), 7 B. & C. 765; 1 Man. & Ry. K. B. 647; 1 Man. & Ry. M. C. 303; 6 L. J. O. S. K. B. 178; 108 E. R. 909.*

*Annotation.—Mentd. R. v. Staffordshire JJ. (1837), 1 Nov. & P. K. B. 260.*

**599. — Proof of custom—Pleading.]—***BERRY v. BANNER, No. 169, ante.*

**600. Constitution—Proof—Number of vestry alleged to be certain.]—***BERRY v. BANNER, No. 169, ante.*

**601. — Number of vestrymen alleged to be indefinite—Whether valid.]—***GOLDING v. FENN, No. 598, ante.*

**602. — Co-option of new members by existing members—Whether valid.]—***GOLDING v. FENN, No. 598, ante.*

**603. — New members elected from limited class only.]—**By ancient custom a select vestry was to consist of the rector, churchwardens, & those who had served the office of upper churchwarden, & other parishioners to be elected by the vestrymen. The practice in modern times had been to elect as vestrymen those parishioners only who had been fined for not serving the office of upper churchwarden:—*Held:* they were good vestrymen.—*R. v. BRAIN (1832), 3 B. & Ad. 614; 1 L. J. M. C. 53; 110 E. R. 224.*

**604. — Appointment of additional members by parishioners.]—**Although a parish be governed by a select vestry by prescription, & confirmed by local Acts, the parishioners have a right to exercise the powers of Poor Relief Act, 1819 (c. 12), in all matters not interfering with the previous powers; & for that purpose they may appoint additional select vestrymen.—*R. v. ST. MARTIN-IN-THE-FIELDS (CHURCHWARDENS & OVERSEERS) (1832), 3 B. & Ad. 907; 1 L. J. M. C. 96; 110 E. R. 333.*

**605. — Evidence of custom.]—**In the parish of S., in London, there was a select vestry, consisting of the parson & those persons who had served the office of churchwarden, or paid a fine





**Sect. 7.—Constitution of the Church into parishes:**  
*Sub-sect. 4, F. (b), (c) & (d) & G.; sub-sects. 5*

for not doing so; & by this body the churchwardens were elected. From the earliest records of the parish, commencing in 1648, it appeared that a fresh churchwarden was annually elected to serve the office of junior churchwarden, & the junior churchwarden for the preceding year became the senior churchwarden for that year. This custom had been acted upon from the year 1648 up to the great fire of London, when two persons acted as junior & senior churchwardens during five years; the custom was then renewed & acted upon up to the year 1734, & during the interval from that year to 1775 there were no records; from the latter year to 1824 the same course was pursued, with four exceptions. Upon a case, on which it was agreed that the ct. should have the power of drawing inferences in the same manner as a jury:—*Held*: there was a custom that a parishioner, not a member of the select vestry, should be elected every year to serve the office of junior churchwarden, who in the next ensuing year should succeed to the office of senior churchwarden, & at the expiration of that year should become a member of the select vestry, by which means its members would be supplied; & the election of G., a member of the select vestry, who had served previously the offices of junior & senior churchwarden, to serve the office of junior churchwarden in 1844, was void.—(*GIBBS v. FLIGHT* (1840), 3 C. B. 581; 16 L. J. M. C. 73; 8 L. T. O. S. 213; 11 Jur. 19; 136 E. R. 232.)

*Annotation*:—*Mentd.* *Newbold v. Colman* (1840), 16 L. T. O. S. 488.

**606. Powers. Proof of custom to elect churchwardens—Admissibility of evidence.**—*BERRY v. BANNER*, No. 109, *ante*.

**607. — To elect another select vestry. Under Poor Relief Act, 1819 (c. 12).**—A select vestry for the management of the parish affairs existing by ancient custom, cannot elect another select vestry for the management of the poor within the above Act.—*R. v. WOODMAN* (1821), 4 B. & Ald. 507; 100 E. R. 1023.

*Annotation*:—*Refd.* *R. v. St. Bartholomew the Great* (1831), 2 B. & Ald. 506.

**608. — Whether vestry within Poor Relief Act, 1819.**—To a *mandamus* calling on churchwardens & overseers to summon a meeting for the purpose of establishing a select vestry for the concerns of the poor, pursuant to the above Act, a return was made, stating that there was by custom, an ancient vestry in the parish, which had from time immemorial consulted & deliberated on parochial matters, & acted as a select vestry for the concerns of the poor; & that they had immemorially been accustomed to perform the duties imposed on select vestries by the statute:—*Held*: the return was bad, since the statute imposes some duties, as the management of money raised by poor rates, & making orders for the government of overseers, which could not have existed before Poor Relief Act, 1801 (c. 2).—*R. v. ST. BARTHOLOMEW THE GREAT* (1831), 2 B. & Ald. 506; 109 E. R. 1230.

**609. Rights of parishioners under—Exercise of powers under Poor Relief Act, 1819 (c. 12).**—*It. v. ST. MARTIN-IN-THE-FIELDS* (CHURCHWARDENS & OVERSEERS), No. 604, *ante*.

(c) *Under Local Acts.*

**610. Adoption of Vestries Act, 1831 (c. 60)—Joint vestry for two parishes.**—The ancient parish

of St. Giles in the Fields was divided under certain Acts of Parliament into two parishes, St. Giles in the Fields & St. George, Bloomsbury, which were made separate & distinct for all purposes except as to church, highway, & poor. Separate vestrymen were appointed for the new parish. By local Acts for regulating the affairs of the joint parishes of St. Giles & St. George, & of the separate parishes of St. Giles & St. George, the vestry of each parish was to be composed of 42 persons, besides the rector & churchwardens, elected by the vestrymen duly qualified; each vestry was to appoint its own churchwardens & auditors & make its own church rates, & to manage some other affairs of the separate parish; & the vestrymen of the two parishes were to be the joint vestry of the parishes, & to appoint overseers & directors & other officers to manage the relief of the poor of the joint parish, to make its poor rates, & to exercise other powers relative to the poor & concerning the parishes jointly. Questions before the joint vestry were to be decided by a majority of the vestrymen present:—*Held*: the parishioners of one of the parishes could not separately adopt the provisions of the above Act for the election of their own vestry.—*R. v. BASSIST* (1851), 17 Q. B. 332; 117 E. R. 1307.

**611. Voting.—Statutory majority—Constructive of Act—Members present but not voting.**—By a local Act, the management of the affairs of a parish was confided to a select vestry, consisting of an indefinite body. The Act provided that the vestry at their meetings, "or the major part of such of them as shall be assembled at such meetings," might do whatever could be done by an ordinary vestry. By a subsequent Act, power was given to the vestry "or them" to appoint & dismiss a collector of the poor rate. B. was appointed a collector of the poor rate. A charge being brought against him, a meeting of the vestry was duly convened to consider. The vestry then consisted of eight persons; 35 attended the meeting. A motion was made to dismiss B., sixteen voted for it, & eleven voted against it. It was declared to be carried & B. was dismissed:—*Held*: although the motion was carried by a majority of those voting, yet, not being carried by a majority of those present, it was not carried by a majority of those assembled; the vestrymen declining to vote not being considered in point of law absent; consequently, the dismissal was not effectual.—*R. v. CHRISTCHURCH OVERSEERS* (1857), 7 E. & B. 409; 27 L. J. M. C. 23; 29 L. T. O. S. 328; 21 J. P. 533; 3 Jur. N. S. 1074; 5 W. R. 755; 119 E. R. 1209, Ex. Ch.

**Provision of burial grounds under Burial Acts.**—*See BURIAL*, Vol. VII., p. 511, Nos. 206, 207.

(d) *Under Vestries Act, 1831.*

**612. Whether parish "divided into districts."**—A parish is not "divided into districts for ecclesiastical or other purposes" within sect. 22 Vestries Act, 1831 (c. 60), where a small portion of the parish is annexed to a chapelry created, an adjoining parish, or where the parish has been divided for the convenience of collecting the poor rates into four districts, which districts have been adopted by the returning officer of a borough within which the parish is situated, for the purpose of taking the poll at an election for members of parliament.—*R. v. ST. PANCRAS* (CHURCHWARDENS) (1834), 1 Ad. & El. 80; 3 Nev. & M. K. B. 42; 2 Nev. & M. M. C. 281; 3 L. J. M. C. 90; 110 E. R. 1138.

*Annotations*:—*Mentd.* *R. v. Hertford College* (1878) Q. B. D. 693; *R. v. Soutter*, [1891] 1 Q. B. 57.



(1663), 1 Lev. 112; 83 E. R. 323; *sub nom.* Bis v. HOLT, 1 Sid. 158.

(b) *Appointment.*

218. By whom appointed.]—SUTTON'S CASE, No. 213, *ante*.

219. —.]—GLANVIL'S CASE (1627), Palm. 450; 81 E. R. 1166.

220. Qualifications.]—GLANVIL'S CASE (1627), Palm. 450; 81 E. R. 1166.

221. — Examination as to.]—SUTTON'S CASE, No. 213, *ante*.

222. Appointment of two jointly—Whether valid.]—Judicial office may be granted to two; but if one dies, it shall not survive, unless said to the survivor.—JONES v. BEAU (1691), 4 Mod. Rep. 16; 12 Mod. Rep. 10; 1 Show. 288; 87 E. R. 236; *sub nom.* JONES v. PUGH, 2 Salk. 465; *sub nom.* JONES v. BEW, Carth. 213.

Annotations:—*Reid.* Trevlawney v. Winchester, Bp. (1757), 1 Burr. 219; Bell v. Holtby (1873), L. R. 15 Eq. 178.

223. Appointment with reservations—Whether valid.]—A grant of the office of vicar-general, with a reservation to the bishop, is void.—ANON. (1705), 11 Mod. Rep. 46; 88 E. R. 874.

224. — Reservation of certain causes.]—By letters patent appointing a chancellor for a diocese the bishop gave him power, in the absence of the bishop from his Consistory Ct., to determine certain causes, "Nevertheless first consulting us & our successors, & having our consent in case either party earnestly crave our judgment." A suit was promoted for the removal of certain ornaments from a church in the diocese, & the respondents in their reply asked that the bishop should be first consulted & his consent had, & earnestly craved his judgment. The chancellor heard the suit, & delivered a judgment in which he held that he had jurisdiction & dealt with the merits of the case. It appeared from the judgment, though not so stated in terms, that he had not consulted the bishop or obtained his consent either to the hearing of the suit or the terms of the judgment. On appeal from a refusal to direct the issue of a writ of prohibition:—*Held*: the limitation in the patent was not illegal; it did not relate to procedure, but had the effect of excluding the jurisdiction of the chancellor over the excepted causes; the absence of jurisdiction sufficiently appeared on the face of the proceedings; & as the objection to the hearing of the suit by the chancellor had not been abandoned or waived, a writ of prohibition should issue.—R. v. TRISTRAM, [1902] 1 K. B. 816; 71 L. J. K. B. 418; 86 L. T. 515; 50 W. R. 477; 18 T. L. R. 406, C. A.

Annotations:—*Reid.* Smythe v. Wiles, [1921] 2 K. B. 66; St. Magnus, etc. Parochial Church Council v. London Diocese Chancellor, [1923] P. 38.

See, also, No. 2768, *post*.

(c) *Jurisdiction.*

225. Issue of commission to tax parishioners—For repairs of church.]—The chancellor of the diocese cannot grant a commission to tax parishioners for the repairs of the church.—ANON. (1674), 1 Freem. K. B. 286; 89 E. R. 206.

See, generally, Part VII., Sect. 3, sub-sect. 5, *post*.

226. Where separate commissary appointed—Archdeaconry of Buckinghamshire.]—(1) The chancellor of Lincoln cannot exercise jurisdiction within the jurisdiction of the Archdeacon & Commissary of Buckinghamshire.

(2) Commissaries are ancient officers & were instituted, not so much for the ease of the chan-

cellors or vicars-general, as for the benefit of the subject, that justice might be done them near home (SIR GEORGE LEE).—HILLYER v. MILLIGAN (1754), 2 Lec. 8.

Annotation:—*Generally*, *Reid.* R. v. Tristram, [1902] 1 K. B. 816.

227. In what capacity exercised—As representative of bishop.]—THORPE v. MANSELL (1810), 1 Hag. Con. 4, n.

Annotations:—*Reid.* Prankard v. Deacle (1828), 1 Hag. Ecc. 169; R. v. Canterbury, Archbp., [1902] 2 K. B. 503; Bowman v. Lax, [1910] P. 300.

228. —.]—ST. SEPULCHRE (VICAR) v. ST. SEPULCHRE (CHURCHWARDENS), No. 747, *post*.

229. Improper exercise of jurisdiction—Liability in damages.]—(1) An action upon the case was held not to lie against the vicar-general of the bishop for excommunicating pltf. with the greater excommunication, for contumacy in not taking upon him administration of an intestate's effects, to whom pltf. was next of kin, & had intermeddled with the goods, etc., although the citation by which pltf. was cited was void, by reason that it required him to appear & take administration, etc., without leaving him an option to renounce it, & the proceedings thereupon had been set aside upon appeal; for the vicar-general had jurisdiction over the subject-matter, *viz.* the granting administration, & there was no malice.

(2) This action is not maintainable if the ecclesiastical ct. had a general jurisdiction over the subject-matter, & that it had general jurisdiction over the subject-matter, & in regard to some of the particulars mentioned in the citation, there can be no doubt. I accede however to the decision of the Ct. of Delegates that this citation must be considered as a nullity. It has left no election to the party cited but obedience to its requisitions (LORD ELLENBOROUGH, C.J.).—ACKERLEY v. PARKINSON (1815), 3 M. & S. 411; 105 E. R. 605.

Annotations:—*As to* (2) *Reid.* Martin v. Mackonochie (1870), 4 Q. B. D. 697. *Generally*, *Mentd.* Britain v. Kinnaird (1819), 1 Brod. & Bing. 432; Palmer v. Liverpool Oil Gas Light Co. (836), 2 Har. & W. 233; Wingate v. Waite (1840), 6 M. & W. 739; Watson v. Rodell (1845), 14 M. & W. 57; Pease v. Chaytor (1863), 3 H. & S. 620.

230. In particular dioceses—Chichester.]—DAVEY v. HINDE, No. 2768, *post*.

231. — Lincoln—Archdeaconry of Buckinghamshire.]—HILLYER v. MILLIGAN, No. 226, *ante*.

232. — London—To license to lecture.]—SMITH v. LOVEGROVE, No. 155, *ante*.

233. How lost—Bishop interested in cause.]—It is no ground for prohibiting a cause before the chancellor of a diocese in the Consistorial Ct. of the diocese, that the bishop of the diocese is interested in the cause.—*Ex p.* MEDWIN (1853), 1 E. & B. 609; 17 Jur. 1178; 118 E. R. 560; *sub nom.* RAWLINSON v. MEDWIN, *Ex p.* MEDWIN, 22 L. J. Q. B. 169; *sub nom.* RAWLINSON v. MEDWIN & HURST, 21 L. T. O. S. 5; *sub nom.* RAWLINSON v. MEDWIN & WEST, 17 J. P. 160.

Annotations:—*Apld.* Lee v. Flack, [1896] P. 138; R. v. Tristram, [1902] 1 K. B. 816. *Mentd.* Fagg v. Lee (1873), L. R. 4 A. & E. 135; R. v. Taunton Corp'n. (1887), 4 T. L. R. 87.

(d) *Termination of Office.*

234. By removal—Whether capable of removal.]—SUTTON'S CASE, No. 213, *ante*.

235. —.]—JONES v. LANDAFF (Bp.), No. 214, *ante*.

236. — Grounds for.]—SUTTON'S CASE, No. 213, *ante*.

237. —.]—GLANVIL'S CASE (1627), Palm. 450; 81 E. R. 1166.

*Sect. 5.—Constitution of the Church into dioceses: Sub-sect. 3, A. (d), B. (a) & (b) & C.]*

**238. By death of one of two joint holders—Form of grant.]—**JONES v. BEAU, No. 222, *ante*.

**239. Effect of pardon.]—**A pardon of a sentence in the spiritual ct. of fine, imprisonment, & deprivation, for bribery in the office of chancellor of a province, discharges not only the sentence but the consequent disabilities.—BENNET v. BASEDALE (1626), Cro. Car. 55; 79 E. R. 651. *Annotation:—Mentl. Hay v. London Tower Division JJ. (1890), 24 Q.-B. D. 561.*

### *B. The Registrar.*

#### *(a) In General.*

**240. Nature of office—Whether within Sale of Offices Act, 1552 (c. 16).]**—TREVOR'S CASE, No. 212, *ante*.

**241. — Freehold.]—**(1) The registrar of a spiritual ct. cannot sue there for his fees.

(2) The office of registrar or archdeacon is a freehold (HOLT, C.J.).—BALLARD v. GERARD (1702), 12 Mod. Rep. 608; Holt, K. B. 596; 1 Malk. 333; 88 E. R. 1553; *sub nom.* POLLARD v. GERARD, 1 Ld. Raym. 703.

*Annotations:—As to (1) Reid. Shepherd v. Payne (1862), 31 L. J. C. P. 297; Voley v. Portwee (1870), L. R. 5 Q. B. 573. Generally, Mentl. Mills v. Colchester Corp'n. (1867), L. R. 2 C. P. 476; Lawrence v. Hitch (1868), L. R. 3 Q. B. 521.*

**242. Appointment—In reversion—Whether valid.]—**(1) A grant by the bishop of the office of a diocese, in reversion after the death of the tenant for life, to an infant of eleven years of age, *exercendum per se vel deputatum sufficientem*, is good, notwithstanding the infancy; but if he make an insufficient deputy, it is a forfeiture of the office.

(2) The office of registrar of a diocese or any other office usually granted for life in possession or reversion may be granted in reversion by every bishop; & if confirmed by the dean & chapter will bind his successors.—YOUNG v. FOWLER (1639), Cro. Car. 555; March, 38; 79 E. R. 1078.

*Annotations:—As to (1) Reid. Eddleston v. Collins (1852), 10 Hare, 99. As to (2) Reid. Ridley v. Pownell (1675), Freeman, K. B. 394; Trelawney v. Winchester, Bp. (1757), 1 Burr. 219. Generally, Mentl. Thredneedlo v. Linum (1674), Freeman, K. B. 179; R. v. Koupe (1695), 1 Ld. Raym. 49; Cluridge v. Evelyn (1821), 5 B. & Ald. 81.*

**243. — — — Reversioner an infant—Of full age at death of predecessor.]—**ROCHESTER'S (Bp.) CASE (1607), Jenk. 121; 145 E. R. 85.

**244. — — — Power under grant to exercise by deputy.]—**YOUNG v. FOWLER, No. 242, *ante*.

**245. — — — For three lives—Whether valid.]—**The office of registrar may be granted for three lives, whether the bishopric be an old or a new one, if it was usually so granted before 1 Eliz. c. 19.—RIDLEY v. POWNELL (1675), 1 Freeman, K. B. 394; 2 Lev. 136; 3 Keb. 472, 506; 89 E. R. 203; *subsequent proceedings*, 3 Keb. 540, 560.

*Annotation:—Reid. Trelawney v. Winchester, Bp. (1757), 1 Burr. 219.*

**246. Recovery of fees—In what court.]—**BALLARD v. GERARD, No. 241, *ante*.

**247. — Registrar acting as proctor—Whether within 54 Geo. 3 (c. 68), s. 10.]—**(1) Above Act, sect. 9, prohibits a proctor from permitting or suffering "his name to be in any manner used in any suit, the prosecution or defence of which shall appertain to the office of a proctor, or in obtaining probates of will, letters of administration, or marriage licenses" for the benefit of any other person. Sect. 10 enacts, "that in case any

person shall, in his own name, or in the name of any other person, make, do, act, exercise, or perform any act, matter, or thing whatsoever, in any way appertaining or belonging to the office, function, or practice of a proctor, for or in consideration of any gain, fee, or reward, or with a view to participate in the benefit to be derived from the office, function, or practice of a proctor, without being admitted & enrolled, he shall forfeit £50":—*Held: construing these two sections together, the acts intended by the latter section to be prohibited were those which were legally incident to the office of a proctor; not those which, though usually performed by him, were not of right incident to his office.*

(2) Therefore, a registrar of an ecclesiastical ct., who, in cases where there was no testamentary contest, had prepared the documents, & done the acts necessary, for obtaining letters testamentary, & probates of wills, & other similar matters, had not thereby subjected himself to the penalty imposed by sect. 10.—STEPHENSON v. HIGGINSON (1851), 3 H. L. Cas. 638; 10 E. R. 252, H. L.

*Annotations:—Generally, Reid. Law Soc. of United Kingdom v. Shaw, Same v. Waterlow (1882), 51 L. J. Q. B. 249. Mentl. Income Tax Special Purposes Comrs. v. Pemsol, [1891] A. C. 531.*

**248. Termination of office—By forfeiture—Appointment of insufficient deputy by infant.]—**YOUNG v. FOWLER, No. 242, *ante*.

#### *(b) Deputy Registrar.*

**249. Nature of office—Whether within Sale of Offices Act, 1551 (c. 16).]**—LAKE v. PRIGEON (1633), Nels. 27; 21 E. R. 781.

**250. — Held at will.]—***Mandamus* lies for the principal registrar of the Archbishop's Ct. to admit & swear his deputy, but it will not lie for the deputy himself, he being an officer at will. It lies notwithstanding that this is a spiritual office. The writ need not aver that the person to whom it is directed, is the person to whom it appertains to admit & swear.—R. v. WARD (1731), 2 Stra. 893; 1 Barn. K. B. 294, 380, 411; Fitz-G. 123, 194; 93 E. R. 922.

*Annotations:—Mentl. R. v. Williams (1828), 8 B. & C. 681; R. v. Sowter (Archdeacon) (1900), 70 L. J. Q. B. 87.*

**251. — Spiritual office.]—**R. v. WARD, No. 250, *ante*.

**252. Admission—Whether mandamus will issue.]—**R. v. WARD, No. 250, *ante*.

**253. — Disapproval of bishop—Construction of registrar's patent of office.]—**The registrars of a diocese were authorised by their patent of office to appoint a deputy, to be "approved of & allowed by the bishop"; who, if he should not approve of & allow the deputy named & proposed to him, was empowered to nominate another, with a salary payable out of the profits of the registrarship. The registrars appointed a deputy, subject to the approbation & consent of the bishop, who on being informed of it, answered that "for good & sufficient reasons" he disapproved of the party nominated, but declined specifying his reasons. The ct. refused a rule nisi for a mandamus to the bishop to admit the deputy.—R. v. GLOUCESTER (Bp.) (1831), 2 B. & Ad. 158; 9 L. J. O. S. K. B. 228; 109 E. R. 1102. *Annotation:—Mentl. R. v. London Corp'n. (1832), 3 B. & Ad. 255.*

**254. Termination of office—Recovery of public books—Whether mandamus will arise—Termination of office disputed.]—**R. v. WHEELER (1735), Cunn. 155; *Lee temp. Hard. 99*; 94 E. R. 1123.

**255. Clerk to deputy registrar—Nature of office—Whether within Sale of Offices Act, 1551 (c. 16).]**

—The office of clerk to the deputy registrar in the Perogative Court of Canterbury is not office connected with the administration of justice, within the meaning of the above sect., so as to prevent its being aliened or charged. Nor is an alienation of or charge on the profits of the office, contrary to the policy of the law, restricting the alienation of the income of a public officer.—*ASTON v. GWINNELL* (1829), 3 Y. & J. 136; 148 E. R. 1125, Ex. Ch. in Eq.

*Annotation*:—*Mentd.* *Earl v. Browne* (1839), 3 Jur. 1146.

256. — *Alienation of or charge on profits of office—Whether contrary to public policy.*—*ASTON v. GWINNELL*, No. 255, *ante*.

#### C. Other Subordinate Officers.

257. *Commissary—Nature of office—Whether within Sale of Offices Act, 1552 (c. 16).*—*TREVOR'S CASE*, No. 212, *ante*.

258. — *Appointment—Who may be appointed.*—A person may be commissary to a bishop though he is not a doctor of laws.—*PRATT v. STOCKE* (1594), Cro. Eliz. 315; 78 E. R. 565.

259. — *Grant in reversion—Whether valid.*—Special verdict on an action on the case for disturbance in the offices, (1) Of official of an archdeaconry; (2) Of commissary to a bishop: & adjudged, that a grant of them in reversion is good.

37 Hen. 8, c. 17, does not restrain a lay person & bachelor of the civil law only from holding the offices of commissary, chancellor, or official to a bishop.

1 Eliz. c. 19, & 13 Eliz. c. 10, restrain bishops & archdeacons from granting the offices above-mentioned, so as to bind successors for a longer term than one life, unless usually granted in reversion.—*WALKER v. LAMB* (1632), Cro. Car. 258; 79 E. R. 825.

*Annotations*:—*As to* (2) *Refd.* *Threadneedle v. Linum* (1874), *Freem. K. B.* 179; *Hidley v. Pownell* (1875), *Freem. K. B.* 394.

260. — *Purpose of.*—*HILLYER v. MILLIGAN*, No. 226, *ante*.

261. — *Jurisdiction.*—*COOK v. WALL* (1807), Noy, 123; 74 E. R. 1087.

*Annotations*:—*Refd.* *Blanc v. Geraghty* (1866), 15 W. R. 133; *McGeath v. Geraghty* (1866), 15 W. R. 127.

262. — *Suspension by inhibition during visitation of bishop.*—*R. v. THOROGOOD*, No. 190, *ante*.

*See, also*, No. 220, *ante*.

263. *Surrogate—Appointment.*—(1) Upon an indictment for perjury before a surrogate in the Ecclesiastical Ct., the fact of the person who administered the oath having acted as surrogate is sufficient *prima facie* evidence of his being duly appointed, & having authority to administer the oath; (2) if it appear that the surrogate was appointed contrary to the canon which requires that no judicial act shall be speeded by any ecclesiastical judge, unless in the presence of the registrar or his deputy, or other persons by law allowed in that behalf, his appointment is a nullity, & the averment that he had authority to administer the oath is negated.—*R. v. VERELST* (1813), 3 Camp. 432.

*Annotations*:—*As to* (1) *Refd.* *Doe d. Bowley v. Barnes* (1846), 15 L. J. Q. B. 293; *R. v. Roberts* (1878), 38 L. T. 690.

*As to* (2) *Distd.* *Dale's Case*, *Enraght's Case* (1881), 6 Q. B. D. 376. *Generally, Refd.* *Parkes v. Parkes* (1852), 2 Rob. Eccl. 518. *Mentd.* *Faulkner v. Johnson* (1843), 11 M. & W. 581; *R. v. Chapman* (1849), 1 Den. 432; *Wolton v. Gavin* (1850), 16 Q. B. 48; *McMahon v. Lennard* (1858), 6 H. L. Cas. 970.

264. *Receiver—Restrained from performing alleged duties—Remedy.*—By a grant or patent, dated in 1801, the then Bishop of E. having, as the grant stated, "confidence in the probity, fidelity, care & industry of P." granted to P., who was a solicitor, "the office of receiver of all issues, profits, & sums of money, arising & issuing" from the possessions of the see, to hold to P. by himself or his sufficient deputy or deputies, to be approved of by the bishop & his successors, for his life. The office of receiver was an ancient office, & had been exercised before the restraining statute of 1 Eliz., c. 19. P. held the office under three successive bishops, during the whole of which time he not only received the rents, but negotiated the renewals of leases, & prepared the leases of the see, & likewise attended all searches for records in the bishop's muniment room, of which he kept a key; for the performance of which acts he received fees & emoluments. It appeared also that his predecessor in office, who had held the office since 1785, had done the same. Upon the accession of A. to the bishopric in 1836, he refused to admit P.'s claim of right to perform these last-mentioned acts; upon which P. filed his bill against the bishop, praying a declaration of the rights in question in his favour, that he might be quieted in the possession of the office, & that the bishop might be restrained by injunction from obstructing pltf. in the exercise of such rights, & from doing acts in contravention of them:—*Held*: (1) pltf.'s claims were not of such a nature as to induce this ct. to interfere to protect them, without being well satisfied (which the ct. was not) that his legal remedy was insufficient to do him complete justice; (2) the relief sought being analogous to the specific performance of an agreement, the bill must fail, on the ground of want of mutuality; the nature of the duties and services asserted by pltf. being such as to preclude the possibility of a decree in this ct. against him, compelling their specific performance.—*PICKERING v. ELY* (Bp.) (1843), 2 Y. & C. Ch. Cas. 249; 12 L. J. Ch. 271; 7 Jur. 479; 63 E. R. 109.

*Annotations*:—*As to* (2) *Refd.* *Brett v. East India & London Shipping Co.* (1864), 2 Hon. & M. 404; *Millican v. Sullivan* (1888), 4 T. L. R. 203. *Generally, Refd.* *Johnson v. Shrewsbury & Birmingham Ry.* (1853), 3 De G. M. & G. 914.

265. *Seal keeper—Tenure of office.*—Upon the trial of various issues raised upon a return to a writ of *mandamus*, commanding deft. to deliver up the seal of the Consistory Ct. of the diocese of L., it appeared that deft. had been appointed by the chancellor of 1821, by an instrument under seal, to hold the office of seal keeper "in as full & ample a manner as his predecessors had held it." It appeared that for many years, as far back as 1700, the office had been held for life, or during good behaviour, if the grantor should so long continue in the office of chancellor; but there was no record of such an office in the registry of the diocese in very ancient times, nor in very old books; & it appeared that in the cts. of the Archbishop of Canterbury & Bishop of London, the seal keeper was orally appointed during will & pleasure:—*Held*: this was evidence from which the ct., being placed in the situation of a jury, ought to infer, that the office of seal keeper was an ancient office, which might be granted to the holder for life, or during good behaviour, if the grantor should so long continue in the office of chancellor.—*R. v.*

#### PART III.—SECT. 5, SUB-SECT. 3.—C.

1. *Surrogate—Appointment—Oath of Office—Presumption.*—It will be pre-

sumed that a person acting as surrogate has taken the oath of office; but if he has not, his acts will not be invalid if he has been appointed to the

office.—*CROOKSHANK v. MCFARLANE* (1853), 2 All. 544; *approd.* *Re TRK-WITHIO MARSH*, 38 N. S. R. 28.—CAN.

*Sect. 5.—Constitution of the Church into dioceses: Sub-sect. 3, C.; sub-sects. 4 & 5, A., B., C. & D.; sub-sect. 6.]*

MORT (1849), 3 New Mag. Cas. 178; 13 L. T. O. S. 233; 13 J. P. Jo. 377.

**266. Summoner—Liability for false return.]—Held:** (1) an action on the case lay against a summoner of the spiritual ct., for returning one "warned" when he was not, on which excommunication followed; (2) it was not necessary to show the suit or the authority of the official.—*POWELL v. GODFREY* (1614), Cro. Jac. 351; 1 Roll. Rep. 63; 79 E. R. 300; *sub nom. POLE v. GODFREY*, 2 Bulst. 264; Moore, K. B. 835; *sub nom. ANON.*, 12 Co. Rep. 128.  
*Annotations:—Mentd. Iverson v. Moore* (1699), Holt, K. B. 10; *Ashby v. White* (1703), 2 Ld. Raym. 938.

#### SUB-SECT. 4.—DEANS AND CHAPTERS.

*See Sect. 6, post.*

#### SUB-SECT. 5.—ARCHDEACONS AND ARCHDEACONRIES.

##### A. In General.

**267. Nature of office—Freehold.]—BALLARD v. GERRARD**, No. 241, *ante*.

**268. Admission to office—Bye-law by dean & chapter requiring oath—Whether valid.]—A dean & chapter who have power to make bye-laws cannot make a bye-law that an archdeacon shall take the oath of canonical obedience before he is admitted into his office.—R. v. TRINITY CHAPEL, DUBLIN (DEAN & CHAPTER) (1722), 8 Mod. Rep. 27; 88 E. R. 21.**

**269. Glebe—No part of bishopric.]—The glebe of an archdeaconry is not any part of the possessions of the bishopric.—DENNY v. EAKENSTALL** (1595), Cro. Eliz. 430; 78 E. R. 670.

**270. Representation of archdeaconry in convocation—Qualification of candidate—Jurisdiction of temporal court.]—The Archbishop of Y. as President of the Convocation of his province having decided that a candidate who had been elected to represent an archdeaconry in the Lower House was disqualified:—*Held*: the ct. of Q. B. had no jurisdiction to grant a *mandamus* commanding the Archbishop to admit the candidate to Convocation.—R. v. YORK (ARCHBP.) (1888), 20 Q. B. D. 740; 57 L. J. Q. B. 396; 59 L. T. 443; 52 J. P. 709; 36 W. R. 718; 4 T. L. R. 483.**

**271. Refusal to admit churchwardens—Mandamus—Whether absolute in first instance.]—ANON.** (1815), No. 720, *post*.

**272. ———.]—Ex p. CLARK** (1867), 31 J. P. Jo. 739.

**Prebends annexed to archdeaconries.]—See Nos. 334, 338, *post*.**

##### B. Powers.

**273. Jurisdiction—Whether concurrent with episcopal jurisdiction.]—A person residing within a peculiar archdeaconry, cannot in general be sued in the Bishop's Ct. But where the archdeaconry is not peculiar, the bishop & archdeacon have concurrent jurisdiction.—ROBINSON v. GODSALVE** (1690), 1 Ld. Raym. 123; 91 E. R. 978.

**274. —Whether independent of diocesan chancellor.]—The Dean of Arches declined to accept letters of request presented jointly by the Archdeacon & Chancellor of N.**

The archdeacon has not a jurisdiction entirely independent of the chancellor of the diocese, but

an appeal lies from the archdeacon to the chancellor of the diocese, & from him to the Arches Ct. of Canterbury. The Archdeacon of N. has no separate jurisdiction, therefore it is not competent for him to sign letters of request to this ct.; his is not an exempt jurisdiction. The Chancellor of N. has jurisdiction, even if the archdeacon has no separate jurisdiction, & although the proceedings were commenced in his ct., there cannot be joint letters of request signed by the archdeacon & the chancellor of the diocese together to this ct. passing over the intermediate right of appeal. A delegated power is given to the chancellor, & it cannot be delegated to this ct.—*STEWART v. BATEMAN* (1842), 3 Curt. 201; 163 E. R. 702.

*Annotations:—Consd. Sheppard v. Bonnett* (1869), L. R. 2 A. & E. 335. *Refd. Parkes v. Parkes* (1852), 2 Rob. Eccl. 518. *Mentd. Fagg v. Lee* (1873), L. R. 4 A. & E. 135.

—*In peculiars.]—See No. 273, ante, & No. 287, post.*

**275. Control of clergy—Request to preach visitation sermon.]—HUNTLEY'S CASE** (1026), 4 Burn's Eccl. Law 27.

**276. As to fabric of churches—Report on alteration—Adoption by court.]—(1) Articles having been filed under the Church Discipline Act, 1840 (c. 86), against a clergyman for making certain alterations in his church without having first obtained a legal sanction to them, he gave an affirmative issue thereto. The ct. then requested the archdeacon of the district in which the church is situated to inspect such alterations, & to report to it as to their nature & propriety, which he did:—*Held*: the ct. would adopt the recommendation of such a report, unless it contained some grievous misstatements of fact, or erroneous conclusion of law.**

(2) The ct. ordered a confirmatory faculty to issue in regard to those alterations which met with the archdeacon's approval, & admonished the clergyman to restore the church in every other respect to the state it was in before he commenced the alterations.—*SIEVEKING & EVANS v. KINGSFORD* (1860), 36 L. J. Eccl. 1; 15 L. T. 300; *sub nom. EVANS v. KINGSFORD*, 31 J. P. 179.

*Annotations:—As to (2) Consd. Gardner v. Ellis* (1874), L. R. 4 A. & E. 265. *Follid. Re St. Mark's, Marylebone Rd., St. Mark's (Vicar) v. St. Mark's (Parishioners)*, [1898] P. 114. *Refd. Adlam v. Colthurst* (1867), 37 L. J. Eccl. 3; *Fagg v. Lee* (1873), L. R. 4 A. & E. 135. *Generally, Mentd. Davey v. Hinde*, [1901] P. 95; *Marson v. Unmack*, [1923] P. 163.

##### C. Visitation.

**277. Right to fees—Procurations—In respect of impropriate rectory.]—SANDERSON v. CLAGGET**, No. 191, *ante*.

**278. ————Liability of incumbents & churchwardens.]—(1) Except in those archdeaconries where by arrangement with the Ecclesiastical Comrs. procurations in respect of the archidiaconal procurations are not required to be paid by the clergy, the incumbents of parishes cited to attend the annual visitation of the archdeacon within whose jurisdiction their benefices are situated, if not otherwise exempt, are legally bound to pay procurations to the archdeacon at the customary rate, notwithstanding that the archdeacon has not personally visited the parish in respect of which the procurations are claimed either personally or by deputy, & although the visitation is held in another parish or in the cathedral of the diocese & for a number of parishes collectively.**

The Archdeacon of E. claimed in a civil suit brought against the incumbent of a parish within his archdeaconry a procuration of ten shillings in respect of his annual visitation in that year held

for a number of parishes within the archdeaconry, including deft.'s parish, on May 8, 1911, in a parish of which deft. was not the incumbent, & in the cathedral of the diocese. Deft. was cited to attend the visitation, but did not appear at it or pay the sum claimed from him. At the hearing it appeared that no arrangement had been made with the Ecclesiastical Comrs. under which procurations in respect of the archdeacon's visitation would not be required to be paid, & that ten shillings was the amount at which the procurations in kind formerly payable to the archdeacon in respect of deft.'s parish had been commuted:—*Held*: (2) deft. was legally liable to pay to the promovent the customary procuracion of ten shillings due & payable to him as archdeacon in respect of his visitation in 1911, notwithstanding that the archdeacon had not visited deft.'s parish either personally or by deputy, but had held his visitation outside deft.'s parish & for a number of parishes at one & the same time; (3) Ecclesiastical Fees Act, 1867 (c. 135), & the Tables of Fees thereunder afforded no defence to the suit, as the fees under that Act, so far as they relate to visitations, are confined to fees payable by the churchwardens of parishes in cases where they have funds to pay them, & are not fees which affect, or are substituted for, procuracions payable by the incumbents of parishes.

(4) The ct. ordered that as long as deft. remained beneficed in the benefice of which he was incumbent at the date of the judgment in the suit, he should pay to the Archdeacon of E. for the time being the annual sum of ten shillings in respect of procuracions due & payable by him to the archdeacon in respect of the archidiaconal visitations from & inclusive of the year 1912 & onwards.—*EXETER (ARCHDEACON) v. GREEN*, [1913] P. 21; 20 T. L. R. 8.

**Fees payable to archdeacon's registrar.**—*See* No. 284, *post*.

#### D. Commissaries and Registrars.

**279. Official or commissary—Grant of office in reversion—Whether valid.**—*WALKER v. LAMB*, No. 259, *ante*.

**280. Registrar—Nature of office—Whether within Sale of Offices Act, 1551 (c. 16).**—A bond given by any of the officers mentioned in above Act for securing all the profits of the office to the person appointing, is void by that statute. So is a bond given by such an officer to surrender whenever the person appointing chose. The office of registrar of an archdeaconry is an office within that statute.—*LAYNG v. PAINE* (1745), Willes, 571; 125 E. R. 1326.

*Annotations*:—*Consd.* *Ley v. Lewis* (1801), 1 East, 391; *Fletcher v. Soudes* (1827), 1 Bl. N. S. 144.

**281. Grant of office for three lives—Whether valid.**—*WOODWARD v. FOX* (1691), 2 Vent. 267; 3 Lev. 289; 86 E. R. 432.

*Annotations*:—*Refd.* *Layng v. Paine* (1745), Willes, 571. *Mentd.* *Thornby v. Fleetwood* (1720), 1 Stra. 318; *R. v. Toole* (1867), 11 Cox, C. C. 75.

**282. Forfeiture of office—On sale.**—*WOODWARD v. FOX* (1691), 2 Vent. 267; 3 Lev. 289; 86 E. R. 432.

*Annotations*:—*Refd.* *Layng v. Paine* (1745), Willes, 571. *Mentd.* *Thornby v. Fleetwood* (1720), 1 Stra. 318; *R. v. Toole* (1867), 11 Cox, C. C. 75.

**283. Right of presentation to vacancy.**—*WOODWARD v. FOX* (1691), 2 Vent. 267; 3 Lev. 289; 86 E. R. 432.

*Annotations*:—*Refd.* *Layng v. Paine* (1745), Willes, 571. *Mentd.* *Thornby v. Fleetwood* (1720), 1 Stra. 318; *R. v. Toole* (1867), 11 Cox, C. C. 75.

**284. Right to visitation fees—From**

**churchwardens—By custom.**—From 1727 to 1801 visitation fees of the unvarying amount of 7s. 6d. for the Easter visitation, & 4s. 6d. for the Michaelmas visitation, were received by the registrars of an archidiaconal ct. from the churchwardens of a parish within the archdeaconry. From 1801 to 1857 fees of a varying amount, but always slightly in excess of 7s. 6d., & 4s. 6d. were received. A dispute having arisen in 1857, as to the fees payable to the registrars, & an action having been brought by the registrars, to recover fees of 7s. 6d. & 4s. 6d. for the Easter & Michaelmas visitations in 1857 & subsequent years:—*Held*: the uniform receipt for 71 years of the amounts of 7s. 6d. & 4s. 6d. was overwhelming evidence that the excess subsequently claimed was an usurpation on the part of the registrars, but that such modern usurpation did not affect their title to the original fees of 7s. 6d. & 4s. 6d. which had been received for 130 years, & that in favour of vested interests a legal origin of the right to those fees would be presumed unless the contrary were proved.—*SHEPARD v. PAYNE* (1864), 16 C. B. N. S. 132; 3 New Rep. 580; 33 L. J. C. P. 158; 10 L. T. 193; 28 J. P. 276; 10 Jur. N. S. 540; 12 W. R. 581; 143 E. R. 1075, Ex. Ch.

*Annotations*:—*Fold.* *Veley v. Pertwee* (1870), L. R. 5 Q. B. 573. *Mentd.* *Mills v. Colchester Corp.* (1867), L. R. 2 C. P. 470; *Bryant v. Foot* (1868), L. R. 3 Q. B. 497; *Lawrence v. Hiltch* (1868), L. R. 3 Q. B. 521; *Northumberland v. Houghton* (1870), 22 L. T. 491; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140.

**285. Nature of churchwardens' liability.**—The liability of churchwardens to pay the fee of the registrar to an archdeacon is not personal, but is contingent upon their possessing funds out of which the fees may be legally paid. Therefore, where churchwardens had no funds in their hands for the repairs of the church, or for any other expense incident to their office, except by voluntary subscriptions, & were without the means of obtaining funds:—*Held*: they were not liable to pay the fee of the registrar due upon a visitation of the archdeacon.—*VELEY v. PERTWEE* (1870), L. R. 5 Q. B. 573; 39 L. J. Q. B. 195; 22 L. T. 713; 34 J. P. 824; 18 W. R. 1025.

*Annotation*:—*Mentd.* *Klenck v. Farris* (1904), 68 J. P. 321.

**286. Claim to excessive fees—Whether right to customary fees lost.**—*SHEPARD v. PAYNE*, No. 284, *ante*.

#### SUB-SECT. 6.—PECULIARS.

**287. Classes.**—There are three sorts of peculiars. First when the archdeacon etc., have a peculiar within the diocese & subject to the jurisdiction of the ordinary: secondly, when one has a peculiar not subject to the ordinary but to the archbishop, & thirdly, when one has a peculiar subject neither to the ordinary nor to the archbishop (Holt, C.J.).—*JOHNSON v. LEY* (1696), Holt, K. B. 656; *Skin.* 589; 1 Com. 18; 5 Mod. Rep. 238; 90 E. R. 1262.

**288. Jurisdiction in.**—*JONES v. JONES* (1617), Hob. 185; 80 E. R. 332.

*Annotations*:—*Consd.* *Sheppard v. Bennett* (1869), L. R. 2 A. & E. 335. *Refd.* *Smith v. Wallet* (1699), 1 Id. Rayn. 587; *Lysons v. Barrow* (1836), 1 Hodg. 390.

**289. Ely Chapel.**—*BARTON v. WELLS* (1789), 1 Hag. Con. 21.

*Annotations*:—*Mentd.* *Kilson v. Drury* (1865), 29 J. P. 613; *Jenkins v. Cook* (1875), 1 P. D. 80; *Combe v. Edwards* (1878), 3 P. D. 103.

**290. Appeal from sentence in.**—The appeal from a peculiar is to the archbishop, & not to the

*Sect. 5.—Constitution of the Church into dioceses: Sub-sect. 6. Sect. 6: Sub-sects. 1 & 2, A. & B.]* bishop.—ANON. (1702), 11 Mod. Rep. 6; 88 E. R. 850.

*Royal peculiars.]—See Sect. 3, sub-sect. 4, ante.*

## SECT. 6.—DEANS AND CHAPTERS.

### SUB-SECT. 1.—IN GENERAL.

**291. Creation.—By translation of abbot & prior —Whether valid.]—**Hen. 8, translated the Abbot & Prior of Norwich by his letters patent, & created them by the name of dean & chapter, who surrendered their possessions to Edw. 6; Edw. 6 reincorporated them by the name of "The Dean & Chapter of the Cathedral Church of the Holy & undivided Trinity of Norwich, of the foundation of Edward the Sixth," & regranted their possessions to them, omitting the words "of the foundation of Edward the Sixth:"—*Held*: (1) the translation, if there were any defect in it, was made good by 35 Eliz. c. 3; (2) the misnomer in the regrant by Edw. 6, if material, was cured by the Statute of Confirmations, 1547 (c. 8); (3) the old corporation remained, notwithstanding the surrender.—NORWICH'S (DEAN & CHAPTER) CASE (1598), 3 Co. Rep. 73 a; 2 And. 165; 70 E. R. 793.

*Annotations:—As to (1) Refd. Trinity Chapel, Dublin (Dean) v. Dublin (Archbp.) (1723), 8 Mod. Rep. 183. As to (2) Refd. It. v. — (1610), Cro. Jac. 247. As to (3) Refd. Sutton's Hospital Case (1612), 10 Co. Rep. 1 a; It. v. London Corp. (1692), 12 Mod. Rep. 17. Generally. Mentd. Lynne Regis Corp. Case (1612), 10 Co. Rep. 120 a; Thompson v. Leach (1690), 2 Vent. 19; Mirehouse v. Rennell (1833), 1 Cl. & Fin. 527; Ford v. Harrington (1869), L. R. 5 C. P. 282; Boyd v. Phillips (1874), L. R. 4 A. & E. 297.*

**292. As corporation aggregate—Chapter apart from dean.]—**EMER'S CASE (1563), Moore, K. B. 51; 72 E. R. 434.

**293. ———.]—**By the common law a dean & chapter, being a corp. aggregate, might have made what estates they would of their possessions, as any person owner of a fee simple might do. But a bishop, or a dean of the possessions of his deanery, or other ecclesiastical person being a single corp., were not entrusted by the law singly, without the consent of the chapter, patron, or ordinary, as the case required, to alien their possessions. . . . The dean & chapter are one thing & the dean another in person & possession; yet the dean & chapter cannot present the dean to the church; but they may present one of the chapter; for it is no perfect corp. without the dean, as it is without the chapter. Therefore a gift or alienation to the chapter, the deanery being void, is not good (BRIDGMAN, C. J.).—LYN v. WYN (1665), O. Bridg. 122; 124 E. R. 502.

*Annotations:—Mentd. Doe d. Hill v. Pearson (1805), 2 Smith, K. B. 295; Irving v. Cuthbertson (1860), 6 Jur. N. S. 1211; Thames Conservators v. Hall (1868), L. R. 3 C. P. 415; Thorpe v. Adams (1871), L. R. 6 C. P. 125; Dodds v. Shepherd (1876), 1 Ex. D. 75; Garnett v. Bradley (1878), 26 W. R. 698; Re Smith's Estate, Clements v. Ward (1887), 35 Ch. D. 589.*

*See, also, Nos. 300, 313, post; CORPORATIONS, Vol. XIII., pp. 275, 372, Nos. 53, 1037.*

**294. Continuity of corporate existence—Surrender & reincorporation.]—**NORWICH'S (DEAN & CHAPTER) CASE, No. 291, *ante*.

**295. Whether spiritual or lay body—Christ Church, Oxford.]—**The ct. determined that the dean & chapter [of Christ Church, Oxford] was a spiritual & not a lay body.—FISHER'S CASE (1725), Bunb. 209; 145 E. R. 649.

**296. Title to property—Omission of part of**

**title of incorporation from grant.]—**NORWICH'S (DEAN & CHAPTER) CASE, No. 291, *ante*.

**297. Regulation—By statutes made by bishop—Statute contrary to policy of ecclesiastical establishment—Construction.]—**A statute made in 1663 by the Bishop, with the consent of the chapter, of Exeter, conferring upon every canon residentiary who should cease to be such by promotion to a higher degree & dignity in the Church of England (unless it be by voluntary resignation, etc.) the right of receiving to his own use the whole profits & advantages of the canonry for the following year, supposing such a statute to be valid, is at all events contrary to the policy of the ecclesiastical establishment, & to be construed strictly: therefore, where deft., who was dean & canon of that chapter, resigned the same in order to obtain promotion to another deanery, to which he was shortly afterwards promoted:—*Held*: he was not within the statute, not having ceased to be a member of the former church by promotion to the latter, but having ceased to be so before his promotion: besides, his resignation having been voluntary, he was expressly excluded by the terms of the exception; a promotion from one deanery to another seems not a promotion to a higher degree. The admission of pltf. as canon into *plenum jus*, although not made until a year after his first admission, related back to the time when his title to the profits accrued, so as to enable him to maintain an action for them.—GARNETT v. GORDON (1813), 1 M. & S. 205; 105 E. R. 77.

**298. Power to make bye-laws—As to archdeacon's oath.]—**R. v. TRINITY CHAPEL, DUBLIN (DEAN & CHAPTER), No. 268, *ante*.

**Control of minor canons & vicars-choral.]—**See Nos. 348, 349, *post*.

**299. Rights in relation to property—Grant of next avoidance—Whether successors bound.]—**A grant by a dean & chapter of the next avoidance will not bind their successors.—HEREFORD (DEAN & CHAPTER) v. HEREFORD (Bp.) & BALLARD (1595), Cro. Eliz. 440; 78 E. R. 681.

*Annotations:—Consd. Rennell v. Lincoln, Bp. (1827), 7 B. & C. 113. Refd. Case of Ecclesiastical Persons (1601), 5 Co. Rep. 14 a.*

**300. ——— Whether valid—Chapter without dean.]—**A chapter although it hath no dean, is within 13 Eliz., c. 10; which is a general law; therefore if such chapter grant a next avoidance, it is void *ab initio*; for otherwise, as there is no dean on whose death it might determine, it would be good for ever.—SOUTHWELL (CHAPTER) v. LINCOLN (Bp.) (1675), 1 Mod. Rep. 204; 2 Mod. Rep. 56; 86 E. R. 830, 938.

*Annotations:—Consd. Magdalen Hospital v. Knotts (1879), 4 App. Cas. 324. Refd. Roe d. Berkeley v. York, Archbp. (1805), 6 East, 86.*

**301. ——— Lease by—Effect of.]—**ANON. (undated), Plowd. Quarries, 28; 75 E. R. 898.

**302. ——— Granted for longer term than allowed—Remedies of lessee.]—**When a dean & chapter make a church-lease for a greater number of years than they can justify, & the dean & most of the prebendaries are changed, where a bill may be brought against the present dean & chapter, & likewise against the former dean & chapter, praying that the present dean & chapter may make the party such lease as they can by law, & that the former dean & chapter may refund such part of the fine in proportion as a fine upon a lease for 21 years would have borne to a fine upon a lease for forty years.—SAUNDERS & BRISTOL (DEAN & CHAPTER) (1740), Barn. Ch. 323; 27 E. R. 603, L. C.

— Dividends on fund in court—Compensation



for land compulsorily acquired.]—See COMPULSORY PURCHASE OF LAND, Vol. XI., p. 248, No. 1489.

**303. Relationship with bishop.**—The statute regulating appeals from archdeacons does not appear to me to regulate any appeals from deans & chapters; for a dean & chapter are of higher rank than an archdeacon. . . . The dean & chapter have in some instances a control over the bishop; while the archdeacon is only an officer of the bishop, & is sometimes called *oculus episcopi*, subordinate to him, & supervising for him (SIR JOHN NICOLL).—*PARHAM v. TEMPLAR* (1821), 3 Phillim. 223, 515.

*Annotations*.—*Reid. Phillpotts v. Boyd* (1875), L. R. 6 P. C. 435. *Mentd. Lyons v. Barrow* (1836), 2 Scott, 721; *Blitchings v. Cordingley* (1868), L. R. 3 A. & E. 113.

— **Visitatorial power of bishop.**—See Sect. 5, sub-sect. 2, E. (a), *ante*.

**304. Legal proceedings by & against.—Pleading.—Omission of part of corporate name.**—(1) In trespass for taking a load of wheat, if deft. justify for tithes under a feoffment from the dean & chapter of the rectory, it shall be intended there was glebe land appertaining thereto, whereof a feoffment might be made.

(2) In pleading an act done by a corp., as entering for a forfeiture, a deed to enter need not be shown. In pleading a lease by a dean & chapter the omission of part of their corporate name, is fatal.—*EDGAR & WEBB v. SORRELL* (1829), Cro. Car. 169; 79 E. R. 748.

**305. — Variance.**—An action for use & occupation may be maintained by a corporation aggregate.

In such an action by a dean & chapter, if the name of the present dean is mentioned at the beginning of the declaration, & it is afterwards laid that the occupation was, "by the permission of the dean & chapter," & it appears in evidence that deft. occupied only in the time & by the permission of a former dean, this is a fatal variance.—*ROCHESTER (DEAN & CHAPTER) v. PIERCE* (1808), 1 Camp. 460.

*Annotations*.—*Reid. Beverley v. Lincoln Gaslight & Coke Co.* (1837), 6 Ad. & El. 829. *Mentd. Hull v. Vaughan* (1818), 6 Price, 157; *Stafford Corp. v. Till* (1827), 4 Bing. 75; *Arnold v. Poole Corp.* (1842), 2 Dowl. N. S. 574; *Fishmongers' Co. v. Robertson* (1813), 5 Man. & G. 131; *Finlay v. Bristol & Exeter Ry.* (1852), 7 Exch. 409; *Love v. N. W. Ry.* (1852), 18 Q. B. 632; *Eccl. Comrs. v. Merril* (1869), L. R. 4 Exch. 102; *Re De Keyser's Royal Hotel, De Keyser's Royal Hotel v. It.*, [1919] 2 Ch. 197.

**306. Whether subject to statutes of limitation.**—The Dean & Chapter of W. made a grant of manor lands for three lives. In 1820, shortly after the death of the surviving life, they, by letter, requested the party holding the deed of grant to deliver it up to them. In 1822, the deed not having been delivered up, they wrote a second letter, referring to an interview held on the subject, & expressing surprise that no time had been fixed for handing over the document. Of this letter no notice was taken by the party holding the grant. In 1844, the dean & chapter filed a bill for the delivery up of the deed. Deft. by his answer set up Stat. Limitations as a bar to their claim:—*Held*: the non-compliance with the letter of 1822 constituted a conversion; p'ts. were barred by the statute.

If I am to consider the dean & chapter in the same position as any man under no disability, of full age, seised in fee simple of the land, & I think, I must so consider them, the question is, is there not, if the letters written in 1822 were not followed by compliance, such a refusal as acts as a conversion, & which puts the parties in a position adverse to each other? Very little establishes conversion. P'ts.' counsel have not established any especial

parliamentary privilege in the dean & chapter, exempting them from the operation of Stat. Limitations. I must, therefore, hold them to be barred by it (KNIGHT-BRUCE, V.C.).—*WELLS (DEAN & CHAPTER) v. DODDINGTON* (1845), 2 Coll. 73; 14 L. J. Ch. 304; 5 L. T. O. S. 170; 9 Jur. 768; 63 E. R. 642.

**Cathedral & precincts.—Whether extra parochial.**—See Nos. 317, 357, *post*.

**307. Rights of members to share in property.**—*WINNE v. BAMPTON*, No. 321, *post*.

## SUB-SECT. 2.—DEANS.

### A. In General.

**308. Whether affected by statute.—Statute naming "bishop or other spiritual person."**—*SWALLOW v. CITY OF LONDON* (1666), 1 Sid. 287; 82 E. R. 1110.

*Annotation*.—*Mentd. Re Clarke* (1842), 2 Q. B. 619.

**309. Vacation.—Whether by cession.—Acceptance of Irish bishopric.**—*EVANS & KIFFINS v. ASKWITH* (1627), W. Jo. 158; *Palm. 457*; *Noy*, 93; *Lat. 31*, 233; 82 E. R. 84; *sub nom. VAUGHAN v. ASCUR*, 2 Roll. Rep. 450; *sub nom. ANON.* 3 Salk. 71.

*Annotations*.—*Mentd. Colt & Glover v. Coventry & Lichfield, Bp.* (1617), Hob. 140; *Berry v. White* (1662), O. Bridg. 82; *Lienall v. Carre* (1669), 2 Kob. 672; *Throadnoodle v. Linum* (1674), Freem. K. B. 179; *It. v. London, Bp. & Birch* (1694), 1 Ld. Raym. 23; *It. v. Leighton* (1708), Fortes. Rep. 173; *Thomlinson v. Dighton* (1711), 1 Salk. 230; *Folk v. Ward* (1732), 2 Barn. K. B. 173; *It. v. Lisle* (1738), Andr. 163; *Grocers' Co. v. Canterbury, Archbp.* (1771), 2 Wm. Bl. 770; *Alston v. Atlay* (1837), 7 Ad. & El. 289; *Jewison v. Dyson* (1842), 6 State Tr. N. S. 1; *R. v. Canterbury, Archbp.* (1848), 11 Q. B. 483; *R. v. Eton College & Clark* (1857), 27 L. J. Q. B. 132; *R. v. Canterbury, Archbp.*, [1902] 2 K. B. 503.

**Dean of the Arches.**—See Part IV., Sect. 3, sub-sect. 1, *post*.

### B. Deans of Chapters.

**310. Nature of office.—Whether temporal or spiritual promotion.—Deanery created by Act of Parliament.**—The Deanery of Wells is a spiritual & not a temporal promotion, nor is it a donative, therefore leases made by the dean need not the confirmation of the King, nor even of the bishop, & the Act of Parliament that erected the new deanery on the surrender of the old one, & gave the nomination of the dean to the King, enacting also, that the new dean & his successors might grant, demise or depart with their possessions in the same manner as the ancient deans could, whose leases only required the confirmation of their chapter.

The lands & possessions of the prebend of C. were annexed by the Act to the deanery, but not the prebend itself:—*Qu.*: whether in that case the dean taking another prebend in the same cathedral may be deprived as having two promotions; & whether the deanery is thereby vacated *ipso facto*, or only voidable by sentence.—*WALBOND v. POLLARD* (1608), 3 Dyer, 273; 73 E. R. 610.

*Annotations*.—*Mentd. Grendon v. Lincoln, Bp.* (1576), 2 Plowd. 493; *Bagn's Case* (1615), 11 Co. Rep. 93 b; *It. v. Patrick* (1667), 2 Kob. 65, 164; *Fletcher v. Bondes* (1827), 1 Bl. N. S. 141; *Ex v. Exeter, Bp.* (1850), 10 C. B. 102; *Exeter, Bp. v. Fust & Canterbury, Archbp.* (1850), 14 Jur. 876; *R. v. Fust* (1850), 14 J. P. 258; *Phillipotts v. Boyd* (1875), L. R. 6 P. C. 435.

**311. Appointment.—Old foundation.—Right of Crown to nominate.**—The Deanery of Exeter was founded & endowed by the bishop of that see in 1225; the dean to be elected freely by the chapter from among the prebendaries. For more than 300 years from the foundation the course pursued at the election of dean was for the bishop to issue his licence to the chapter to elect, for the chapter to



**Sect. 6.—Deans and chapters: Sub-sect. 2, B.; sub-sect. 3, A. & B.]**

elect & present to the bishop, & for the bishop to confirm. Elizabeth issued letters recommendatory on a vacancy occurring in 1559, & the person recommended by her was elected by the chapter, & all the formalities of previous elections were observed. Charles II. & succeeding monarchs down to 1839, granted the deanery as it became vacant by letters patent & as of full right, but the same formalities were always observed, the bishop issuing his license, the chapter electing, & then the bishop confirming. In 1839 the Crown issued letters patent granting the deanery, to which the chapter paid no attention. The Crown afterwards issued letters recommendatory in favour of the same person who was grantee under the letters patent, but the chapter elected another person. A rule for a *mandamus* to elect the person recommended by the Crown was discharged, on the grounds, that the Crown had not the right, which it appeared to claim, of recommending a person whom the chapter would be bound to elect, so that the election of any other would be void; & that, on the other hand, if the deanery were donative in the Crown, it would pass by letters patent, & the person elected by the chapter be a mere trespasser; that, if it were in the presentation of the Crown as patron, or the Crown had a right to nominate a person to the chapter to be by them presented to the bishop for institution, the proper remedy was *quare impedit*.—*R. v. Exeter (Chapter)* (1840), 12 Ad. & El. 512; 113 E. R. 906; *sub nom.* *R. v. Exeter Cathedral (Church President & Chapter)*, 4 Jur. 674; *sub nom.* *R. v. St. Peter's, Exeter (Chapter)*, 4 Per. & Dav. 252; 9 L. J. Q. B. 308.

*Annotations:—Mentd.* *R. v. Orton Trustees* (1849), 14 Q. B. 139; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Harper v. Hedgoc*, [1923] 2 K. B. 314.

**312. As corporation sole.—Apart from chapter.]**  
—*LYN v. WYN*, No. 293, *ante*.

**313. As member of the chapter.—Document sealed with chapter seal in absence of dean.]**  
—*RICHARDSON v. THOMAS* (1753), 2 Burn's Eccl. Law, 9th ed. 113.

*Annotation:—Mentd.* *R. v. Barre* (1849), 13 L. T. O. S. 528.

**314. Power of leasing.—Whether confirmation by Crown necessary.]**—*WALROND v. POLLARD*, No. 310, *ante*.

**315. Rectory annexed to deanery.—Effect of Ecclesiastical Commissioners Act, 1840 (c. 113).—Whether rectory vested in commissioners.]**—A private Act united & annexed the rectory of T. (not in the cathedral city of Lichfield) to the deanery of Lichfield, & the dean was to be instituted thereto on application to the bishop, without presentation, & be possessed thereof in right of his deanery. Ecclesiastical Commissioners Act, 1840 (c. 113), provided that all the estate of the holder of any deanery or canonry & his successors should be vested in the Ecclesiastical Comrs. for the purposes of the act. Ecclesiastical Commissioners Act, 1850 (c. 94), s. 19, provided that no dean should hold with his deanery any benefice unless in the cathedral city:—*Held*: the rectory of T. did not pass to the Ecclesiastical Comrs., & the dean of Lichfield was not disabled by the last named Act from holding it.—*R. v. Champneys* (1871), L. R. 6 C. P. 384; 40 L. J. C. P. 95; 24 L. T. 181; 36 J. P. 56; 19 W. R. 386.

**NOTE:—**The above decision dealing with the Rectory of Tatenhill formerly annexed to the Deanery of Lichfield was the subject of a special Act of Parliament: see *Ecclesiastical Commissioners Act*, 1873 (c. 64).

**316. — Rectory lying outside cathedral city.—Effect of Ecclesiastical Commissioners Act, 1850 (c. 94), s. 19.—Whether dean incapacitated from holding rectory.]**—*R. v. CHAMPNEYS*, No. 315, *ante*.

**317. Sub-dean.—Whether independent of cathedral authority.]**—(1) If the foundation of the cathedral & the grant of the adjoining land date before the year 1189 & the institution of civil parishes, it will be presumed that neither the site of the cathedral nor of the precincts are within the limits of any parish.

(2) An office held by a person called a sub-dean in a cathedral, but independently of the dean, & not subject to the cathedral authority, is an anomaly unknown to the law.

In the cathedral church of A., from a very early period, there has been an officer called the sub-dean, who is not a member of the chapter, & is not inducted into a stall. Except on very rare occasions, the sub-dean has been also vicar of the parish in which the cathedral is locally situated. For many centuries, & until the year 1852, the north transept of the cathedral was used as a church by the parishioners of the same parish, & the churchyard adjoining the cathedral as their place of burial. No church rate was ever levied upon the parish for the repairs of the north transept, but the whole expense of the maintenance of the north transept & the churchyard was defrayed by the dean & chapter, & the services regulated & controlled by them also. The inhabitants of the precincts of the close maintained their own poor, & held an annual vestry in the south transept of the cathedral to lay a rate for that purpose, nor were they inhabitants of the parish, so that they could be presented to the ordinary if they did not receive the sacrament in the parish church at Easter. The vicar & sub-dean kept the registers both of the parish & of the precincts of the close. Before the year 1813 the names of the inhabitants of the parish & of the close were entered promiscuously in the register books of baptisms, marriages & burials. After 1813 the marriages of inhabitants of the parish & the close were still entered in the same book, but the baptisms & burials were entered in separate books for the parish & for the close. The vicar & sub-dean performed all the ordinary ministerial duties for, & received the usual fees from, the inhabitants of the parish & of the close, & for many years some of the inhabitants of the precincts of the close paid Easter offerings to the vicar & sub-dean:—*Held*: (3) the right conceded to the parish by using the north transept for divine service & the churchyard for burials, was only a limited privilege, & the incumbent of the parish had only such rights as vicar as were incidental to the privileges conceded, & were limited accordingly; (4) such rights were extinguished in 1852, when a new church was substituted for the north transept, & in 1854, when the cathedral churchyard was closed for burials by an Ord. in Council; (5) the sub-dean, as distinguished from the vicar, had separate rights & duties, namely, the discharge of spiritual functions within the close, & the ministerial fees arising from the duties so discharged; (6) the appointment of sub-dean did not legally incapacitate the dean, when he thought fit, from personally discharging the spiritual duties in respect of the inhabitants of the close.—*BRAITHWAITE v. HOOK* (1802), 7 L. T. 254; 20 J. P. 660; 8 Jur. N. S. 1180.

*Annotations:—Generally, Mentd.* *St. Sepulchre (Vicar) v. St. Sepulchre (Churchwardens)* (1879), 5 P. D. 64; *Davey v. Hinde*, [1901] P. 95.

**318.** — Acting as vicar of surrounding parish — Functions distinguished.]—*BRAITHWAITE v. HOOK*, No. 317, *ante*.

**319.** — Effect on spiritual duties of dean—In regard to inhabitants of close.]—*BRAITHWAITE v. HOOK*, No. 317, *ante*.

#### SUB-SECT. 3.—CANONS AND PREBENDARIES.

##### A. In General.

**Whether corporation sole.**]—*See CORPORATIONS*, Vol. XIII., pp. 275, 276, Nos. 53, 54.

**320. Rights—To share of revenue.**]—A prebendary is not entitled to share of the revenues of the church before it is divided, unless some part thereof be allotted to his prebend in particular.—*YOUNG v. LYNCH* (1753), *Say*. 84; 96 E. R. 811.

*Annotations*:—*Reid*. R. v. Durham, Bp. (1758), 2 Keny. 296; *Mirehouse v. Rennell* (1833), 7 Bli. N. S. 241.

**321.** — Fine on lease granted after election—Agreement for lease before election.]—Though a dean & chapter are reasonable in the fines they demand, if an accident delays the lease which has not happened from their fault or from the tenant's, yet if it is not completed till after a new member comes in, he shall have his proportion.—*WINNE v. BAMPTON* (1747), 3 Atk. 473; 20 E. R. 1072, L. C.

*Annotation*:—*Mentl*. *Willmot v. Coventry Corp.* (1835), 1 Y. & C. Ex. 518.

**322.** — Inspection of charters, etc., concerning prebend.]—A prebendary may inspect charters, etc., of the chapter in a suit concerning his prebend at seasonable times.—*YOUNG v. LYNCH* (1747), 1 Wm. Bl. 27; 96 E. R. 14.

**323. Residence—Whether prebend benefice within Stat. 43 Geo. 3, c. 84.**]—43 Geo. 3, c. 84, which prohibits under a penalty a spiritual person from absenting himself from his benefice for more than a certain time in any one year, means year from the time when the action is brought for a penalty. In such action it is not necessary to allege in the declaration that the benefice has the cure of souls; & its being alleged that he absented himself for a period exceeding eight months together (to wit), on Oct. 10, 1810, for the space of nine months then next following is sufficiently certain of the time of absence, for it shall be intended to be for more than eight months immediately consecutive to Oct. 10, the jury having found a verdict for a penalty corresponding with that period of absence. The annual value means average annual value. A prebend is a benefice within the statute.—*CATHCART v. HARDY* (1814), 2 M. & S. 534; 105 E. R. 480.

*See, generally*, Part V., Sect. 8, sub-sect. 3, *post*.

**324.** — Whether necessary—St. Paul's Cathedral.]—*Eccles. Comrs. Act*, 1840 (c. 113), does not render it necessary that a member of the chapter of the cathedral church of St. Paul, should be residentiary; therefore, the non-residentiary prebendaries of that cathedral are entitled to be summoned to attend & vote at a meeting of the chapter on the occasion of an election of a proctor to represent the chapter in convocation.—*RANDOLPH v. MILMAN* (1868), L. R. 4 C. P. 107; 38 L. J. C. P. 81; 32 J. P. 820; 17 W. R. 262, Ex. Ch.

*Annotation*:—*Reid*. R. v. York, Archbp. (1888), 36 W. R. 718.

**325.** — Right to vote—Non-residentiary canon of St. Paul's.]—*RANDOLPH v. MILMAN*, No. 324, *ante*.

**326. Voting—By proxy—Whether proxy revoked by personal vote.**]—A proxy made by a canon to act for him in his absence, in all corporate business, is not revoked by the canon making the proxy having, in an intermediate period, appeared & acted for himself.—*EYRE v. LOVELL* (1782), 3 Doug. K. B. 66; 99 E. R. 541.

**327. Chancellor of chapter—Power of leasing.**]—*BISCO v. HOLTE*, No. 217, *ante*.

##### B. Election, Appointment and Installation.

**328. Election—By majority of votes—Dean voting in minority.**]—*WEBBER'S CASE* (1773), *Lofft*, 254; 98 E. R. 637.

**329.** — Before vacancy—Whether valid.]—*OWEN v. STAINHOW* (1682), T. Jo. 199; 84 E. R. 1215.

**330. Right of appointment—By bishop—On refusal of chapter to elect.**]—*CHICHESTER (Bp.) v. HARWARD & WEBBER*, No. 186, *ante*.

**331.** — Hereford.]—By *Eccles. Comrs. Act*, 1840 (c. 113), s. 25, in the cathedral church of York, as soon as a vacancy shall occur in the deanery, & in the cathedral churches of Chichester, Exeter, Hereford, Salisbury, & Wells respectively, as soon as every person who was a member of the respective chapters of such churches at the passing of this Act shall cease to be such member, all the canonries shall be in the direct patronage of the Archbishop of York & of the bishops of the respective sees, who shall upon the vacancy of any canonry collate thereto a spiritual person, who shall thereupon be entitled to installation as a canon of such church.

In the cathedral church of Hereford the capitular body consisted at the time of the passing of the Act of a dean & five residentiary canons, who were called the "close chapter," & twenty-two non-residentiary canons, making up the "general chapter." One of the officers in the body was the praetor, who by customary right on a vacancy succeeded to one of the residentiary canonries, & a new praetor was appointed out of the non-residentiary canons by the close chapter. The non-residentiary canons were appointed by the bishop. At York the dean alone appointed the residentiary canons from out of the non-residentiaries. Since the passing of the Act a praetor had been appointed at Hereford; & the last of those persons who were members of the close chapter at the passing of the statute having afterwards died, the bishop claimed under the statute to appoint direct to the vacant canonry residentiary. The praetor claimed to succeed to the vacancy on the ground that several who were members of the general chapter at the passing of the Act were still members;—*Held*: "chapter" meant the "close chapter"; for that it was the intention of the statute to preserve the vested rights of patronage alone, without any regard to the rights of the body out of which the selection was to be made; & the residentiary canonries therefore were now in the direct patronage of the bishop.—*R. v. HEREFORD (DEAN)* (1870), L. R. 5 Q. B. 196; 10 B. & S. 996; 39 L. J. Q. B. 97; 22 L. T. 295; 34 J. P. 437; 18 W. R. 606.

**332. Installation—Whether mandamus will issue to compel.**]—*Mandamus* [granted] to admit a prebendary to his stall & voice.—*R. v. NORWICH (DEAN & CHAPTER)* (1719), 1 Stra. 159; 93 E. R. 447; *sub nom.* *SHERLOCK v. NORWICH (DEAN & CHAPTER)*, *Fortes. Rep.* 222.

*Annotation*:—*Reid*. R. v. Dublin (Dean & Chapter) (1722), 1 Stra. 536.

**333.** — — — ]—*CLARKE v. SARUM (Bp.)*

**Sect. 6.—Deans and chapters: Sub-sect. 3, B. & C.; sub-sects. 4 & 5.]**

(1737), 2 Stra. 1082; 93 E. R. 1046; *sub nom.* R. v. SALISBURY (Bp.), Andr. 20.

*Annotations:—*Dbid. Powell v. Milbanke (1772), 1 Term Rep. 399, n. *Consol. R. v. Orton Trustees* (1849), 14 Q. B. 139.

*See, generally, CROWN PRACTICE, Vol. XVI., pp. 314, 315.*

**334. — Whether necessary—Prebend annexed to archdeaconry.]—**An Archdeacon of Rochester, when instituted & inducted into that office, is *ipso facto* inducted into the prebend annexed to it by royal grant, & may claim to be sworn in as prebendary, without being installed.—R. v. ROCHESTER (DEAN & CHAPTER) (1832), 3 B. & Ad. 95; 110 E. R. 36.  
*Annotation:—*Reid. A.-G. v. Durham (1882), 46 L. T. 16.

#### C. The Prebend or Endowment.

**335. To whom it may be granted.]—**A layman may be presented to a prebendary.—BLAND v. MADDOX (1587), Cro. Eliz. 79; 78 E. R. 339.  
*Annotation:—*Reid. Mirehouse v. Rennell (1833), 7 Bll. N. S. 241.

*See, now, Act of Uniformity, 1662 (c. 4).*

**336. Rectory annexed to—Right of presentation.]—**GIE v. RIDER (1662), 1 Sid. 75; 82 E. R. 978.

**337. — Whether appropriation within 21 Hen. 8 (c. 13), s. 31.]—**HAZEN-NOSE COLLEGE v. SALISBURY (Bp.), No. 2428, *post*.

**338. Annexation to archdeaconry—Whether severable—Effect of separate grant.]—**Henry VIII. by his letters patent erected & refounded the cathedral church of Rochester, & appointed therein a chapter, consisting of a dean & six prebendaries, as well as other functionaries, & officers not of the chapter, & directed that the dean should appoint the inferior officers; reserving to the King, his heirs & successors, the right of nominating the dean & six prebendaries, & their successors, as vacancies occurred. Charles I. by his letters patent granted to A., Archdeacon of Rochester, & his successors the first canonry or prebend which after the date of the letters patent should become vacant by death, resignation, etc., & that the said prebend or canonry should be united & annexed to the archdeacon & his successors. In 1639 A. was admitted to the prebend; he & his successors, being archdeacons, had from that time till 1827 held that prebend, when B., the last archdeacon, died. Each of them was collated & inducted to the archdeaconry, & instituted & inducted to the prebend, separately & distinctly. When the last archdeacon died, W. was bishop, & by him C. was collated & admitted to the archdeaconry, & also instituted to the prebend, but he had not been inducted into either at the time of the bishop's death in Feb. 1827. On June 12, 1827, the see continuing vacant, another clergyman, D., was presented by the Lord Chancellor to the prebend by letters patent under the Great Seal, & he was inducted thereto on June 16, 1827. On June 27, the see being still vacant, George IV. granted the archdeaconry to C., habendum for life, with all profits, pre-eminences, etc. thereto belonging; & on July 14 following, C. was duly inducted into the archdeaconry:—*Held*: (1) the prebend being an ecclesiastical benefice, & not a mere office, the Crown might alienate it; (2) Charles I. might lawfully annex it to the archdeaconry, the archdeacon being a corporation sole, & also a spiritual person capable of discharging all the duties & exercising all the functions belonging to a prebend,

& the letters patent were sufficient for the purpose of annexing it, though the annexation was only of that prebend which should first become vacant; (3) C. was entitled to the prebend, & not D.; because an annexation once made cannot be severed, & because C. became prebend in fact, as well as in law, by his institution & induction into the archdeaconry, & the prior institution & induction of D. to the prebend was wholly void.—KING v. BAYLAY (1831), 1 B. & Ad. 761; 9 L. J. O. S. K. B. 181; 109 E. R. 969.

*Annotations:—*As to (3) *Expld. & Apld. R. v. Rochester* (Dean & Chapter) (1832), 3 B. & Ad. 95. *Reid. A.-G. v. Durham* (1882), 46 L. T. 16.

**339. — Effect of induction as archdeacon.]—**R. v. ROCHESTER (DEAN & CHAPTER), No. 334, *ante*.

**340. Right of presentation in right of prebend—Death of prebendary before presentation—On whom right devolves.]—**MIREHOUSE v. RENNEL, No. 70, *ante*.

**341. Profits—During vacancy—Recovery by new appointee.]—**28 Hen. VIII., c. 11, s. 3, gives the "tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, & all other whatsoever revenues, casualties, or profits, certain & uncertain, belonging to any" dignity, prebend, or benefice therein mentioned, which shall accrue between the occurrence of a vacancy & a new appointment, to the appointee. 5 & 6 Will. IV., c. 30, directs the profits of dignities or benefices, without cure of souls, becoming vacant during the existence of a certain ecclesiastical commission, to be paid to the treasurer of Queen Anne's Bounty, who is to keep an account of the receipts & expenses, & retain the balance until he shall be otherwise ordered "by competent authority." By a subsequent statute the Crown is declared entitled to appoint, notwithstanding the existence of the commission in question, three persons to certain prebends therein named. One of these appointees, having duly demanded from the Treasurer of Queen Anne's Bounty the profits received by him during the vacancy, brought an action for money had & received, to recover them. A special verdict (on a verdict found in his favour), declared these to be "the net profits of the prebend":—*Held*: a judgment for plff. given on this verdict could not be sustained, because it did not distinguish the sources from which these profits might arise, nor show whether they were derived from the *corpus* of the prebend to which he was individually entitled, or from sums due to him in respect of his share of the funds of the corporation aggregate, of which, as prebend, he was a member.—REPTON v. HODGSON (1850), 3 H. L. Cas. 72; 10 E. R. 28, H. L.; *affy.* S. C. *sub nom.* HODGSON v. REPTON (1845), 7 Q. B. 96, Ex. Ch.  
*Annotation:—*Reid. Gleaves v. Parfitt (1860), 6 Jur. N. S. 805.

**342. — Power of mortgage.]—**A canon of W. granted the canonry & the profits, etc., to plffs., to secure a sum of money. So far as it appeared on an interlocutory application, the estates were vested in the corp., & the canon was entitled to an aliquot share of the profits. There was no cure of souls, & the only duties were residence within the castle, & attendance in the chapel 21 days a year:—*Held*: upon this state of circumstances, the security was valid, & a receiver of the profits was appointed.—GRENFELL v. WINDSOR (DEAN & CANONS) (1840), 2 Beav. 544; 48 E. R. 1292.

*Annotations:—*Reid. M'Bean v. Deane (1885), 1 T. L. R. 634. *Mentd. Re Mirams*, [1891] 1 Q. B. 594.

**343. — —.]—**Deft., who was one of the canons of the Queen's free chapel of St. George

at Windsor demised by way of mtge. for 99 years, if he should so long live & continue a canon, to the lessor of pltf. "All canonry of R. A. Musgrave, of the Queen's free chapel of St. George at Windsor, & all glebe & other lands, messuages, tenements, & hereditaments belonging thereto; & all & every the rights, rents, profits, etc., to the canonry belonging." On ejectment brought on the demise of the mtgee., it appeared in evidence that there was no property attached to any individual canonry, but that the whole property belonged to the dean & chapter, & that the surplus rents, after payment of certain expenses thereout, were divided equally among the dean & the other members of the chapter; that all the canons had houses assigned to them for their residence, but that no particular house was appropriated to any one canonry; that whenever a vacancy occurred the canons had a right of choice of the vacant house according to their seniority, & that the house which was left after the other canons had made their selection, was assigned to the new canon. Deft. had retained possession of the same house which was assigned to him upon his installation:—*Held*: (1) ejectment would not lie either for the canonry of deft., or for the house assigned to him for his residence as canon; (2) deft. was not estopped, by the mtge. deed, from showing that the house in question did not belong to the canonry.—*DOE d. BUTCHER v. MUSGRAVE* (1840), 1 Man. & G. 625; 1 Scott, N. R. 451; 9 L. J. C. P. 318; 4 Jur. 631; 133 E. R. 483.

**344. Right to residence.—Whether as corporation sole or member of corporation aggregate.—Windsor.**—*DOE d. BUTCHER v. MUSGRAVE*, No. 343, *ante*.

**345. ——— Exeter.**—The canons of Exeter take their houses by succession, hold them in right of their prebends for life, & repair them at their own expense. The chapter, as a body, cannot interfere with their enjoyment of their houses:—*Held*: though each canon was a member of the corpn. aggregate of the chapter, yet he held his house in severalty as a corpn. sole.—*FORD v. HARRINGTON* (1869), L. R. 5 C. P. 282; 1 Hop. & Colt. 331; 39 L. J. C. P. 107; 21 L. T. 609; 34 J. P. 120; 18 W. R. 289.

*Annotation*.—*Mentd. Harris v. Phillips*, [1891] 1 Q. B. 267.

**Liability for dilapidations.**—*See* No. 3657, *post*.

#### SUB-SECT. 4.—MINOR CANONS AND VICARS CHORAL.

**346. Nature of office.—Whether "corporation sole."**—A vicar choral of the cathedral church of Wells is a "corporation sole," & his personal representative is liable to an action at the suit of his successor in the vicarage, for dilapidations of the house held by him as such vicar choral. *Semble*: even if he were not strictly a "corporation sole," he still has such a sole estate in the house as to create the liability.—*GLEAVES v. PARFITT* (1860), 7 C. B. N. S. 838; 29 L. J. C. P. 216; 6 Jur. N. S. 805; 141 E. R. 1045.

*Annotations*.—*Refd. Bridgewater v. Durant* (1861), 11 C. B. N. S. 7; *Ford v. Harrington* (1869), L. R. 5 C. P. 282.

**347. Appointment.—Scottish episcopal minister.—Whether valid.—Compliance with formalities.**—*INNES v. BEDDOE*, *INNES v. DUNCOMBE* (1897), 13 T. L. R. 466.

**348. Suspension.—On account of absence.**—*BOUGHTON v. YORK* (DEAN & CHAPTER) (1715), cited in 2 Q. B. at pp. 10, 28; 3 P. D. at p. 111; 3 Q. B. D. at p. 771.

*Annotations*.—*Consd. Combe v. Edwards* (1878), 3 P. D. 103; *Martin v. Mackonochie* (1879), 49 L. J. Q. B. 9. *Refd. R. v. Hereford* (Dean & Chapter) (1897), 13 T. L. R. 374.

**349. Customary duties.—Jurisdiction of temporal courts as to.**—*R. v. HEREFORD* (DEAN & CHAPTER) (1897), 13 T. L. R. 374, C. A.

**350. Right to residence & appurtenances.—Chichester.**—Where a prescriptive ecclesiastical corpn. of vicars choral of the cathedral of Chichester had, besides other estates in common, four vicarial houses with their appurtenances, which had always been appropriated to the several use & residence of the four vicars; & by ancient custom, upon every vacancy the vicars, according to seniority, made their option of taking in severalty any one of such vicarial houses with the appurtenances, of which option an entry was made in the corpn. act book & signed by the vicars:—*Held*: a new vicar having made an option, which was entered in the act book & signed by all, to take one of the vicarial houses, with certain appurtenances, then in the possession of S., which were not all the appurtenances formerly annexed to & enjoyed with the same house by his predecessors therein, could not maintain an ejectment for the other appurtenances, such as part of the ancient garden which had been leased off by the corpn. before his appointment. For supposing him entitled to make an option of the entire premises, & to have it entered in the act book, as against the corpn.; yet no such option having been made & entered in the act book according to the custom, he had no separate legal title to the premises in question, on which he could maintain an ejectment.—*GOODTITLE d. MILLER v. WILSON* (1809), 11 East, 334; 103 E. R. 1033.

*Annotation*.—*Consd. Doe d. Butcher v. Musgrave* (1840), 1 Man. & G. 625.

**351. Right to share in fine on renewal of lease.—St. Paul's.—Recovery.**—A vicar choral of St. Paul's Cathedral is not entitled, during his year of probation, to share in a fine paid on the renewal of a lease by the dean & chapter & vicars choral, of an estate which is one of the sources of the emoluments enjoyed by such vicars choral. Had he been entitled, money had & received would, it seems, have been the proper form of action to recover it, either against all the other vicars choral, or against the pittansary, the person entrusted with the collection & distribution of the funds.—*SHOUBRIDGE v. CLARK* (1852), 12 C. B. 335; 19 L. T. O. S. 203; 138 E. R. 934.

**352. Liability for dilapidations.—Devolution on death.**—*GLEAVES v. PARFITT*, No. 346, *ante*.

#### SUB-SECT. 5.—CHAPTER RECORDS.

**353. As evidence.—On question of title.**—An estates book of the Dean & Chapter of St. Paul's, over one hundred years old, was admitted in evidence on a question of title but commented on in respect of alterations made therein in another handwriting from that of the book.—*IVY'S (LADY) TRAIL*, *MOSSAM v. IVY* (1684), 10 State Tr. 555.

*Annotation*.—*Refd. Darby v. Ouseley* (1856), 2 Jur. N. S. 497.

**354. ——— Of reputation.**—A book kept in the chapter house of the Dean & Chapter of Sarum, purporting to contain copies of leases granted by the dean & chapter, is, as a public book, evidence of those leases for the purpose of reputation, without proof of possession under the leases.—*COOMBS v. COETHEE & WHEELER* (1829), Mood. & M. 398, N. P.

# SECT. 7.—CONSTITUTION OF THE CHURCH INTO PARISHES.

## SUB-SECT. 1.—THE PARISH.

### A. In General.

**355. What constitutes—Within Church Building Act, 1818 (c. 45), s. 59.]—**(1) The township of B. was a populous district situated within the parish of W., had constables of its own, & maintained its own poor. It had, from time immemorial, chapelwardens & a chapel of its own. Divine service was performed, & the sacraments of the church administered, in the chapel, the repairs of which were paid for by the township. It had had its own burial ground from the year 1727; but, until then, it had had none but that of W.: &, down to 1740, but not later, the township made payments to the clergy of W. church in respect of burials at B. There was evidence of payments made from 1727 to 1740, to the clergy of W. for churchings at B. Chapel; & of marriages having been celebrated there by license & banns from 1695 to 1754, but not afterwards till 1843, when the chapel was licensed under the Registration Act, 1836 (c. 85). There was also evidence of payments made, from time to time by B. to the churchwardens of W., on account of W. church, beginning in 1689 & ending in 1752: which payments were sometimes entered in account as "levies":—*Held*: these facts did not show B. to be a parish, within the above Act.

(2) The chapel of B. being insufficient for the accommodation of its inhabitants, they, in vestry, resolved that a grant offered to them by the Society for Promoting the Enlargement, etc., of Churches & Chapels should be accepted, & that the chapel should be enlarged according to the society's plans, "any deficiency in the expense to be made up by the sale" of certain private pews, " & by rates under the Act of Parliament." They also resolved to petition the Comrs. for Building New Churches to erect a new church in the township; & the petition was presented, stating the inability of the inhabitants to build a church, & that the enlargement, now agreed upon, would require a rate of 1s. in the pound for five years, which they had pledged for that purpose. The chapelwardens then borrowed of an individual £600, on the security of the existing & future rates, for the purpose of the enlargement. On *mandamus* to repay the £600; return, that the sum was not borrowed with the consent of the vestry within the meaning of the above Act:—*Held*: the writ could not be enforced, the resolutions of vestry not being a consent to the borrowing of money within the above Act.—*R. v. WILLIAM* (1850), 16 Q. B. 1; 117 E. R. 775; *sub nom. R. v. BILSTON* (CHAPEL WARDENS), 20 L. J. M. C. 63; 16 L. T. O. S. 280; 15 Jur. 506.

— **Whether chapelry part of parish.]—See No. 377, *post*.**

**356. Parish church—Privileged to have bells.]—**A parish church is privileged to have bells.—*SOLTAU v. DE HELD* (1851), 2 Sim. N. S. 133; 21 L. J. Ch. 153; 16 Jur. 326; 61 E. R. 291.

*Annotations:—Mentd.* *R. v. Lister & Byles* (1856), Dears. & B. 209; *Crump v. Lambert* (1867), L. R. 3 Eq. 409; *Walker v. Browster* (1867), L. R. 5 Eq. 25; *A.-G. v. Cambridge Consumers Gas Co.* (1868), 4 Ch. App. 71; *Gort v. Clark* (1868), 16 W. R. 569; *Inchbald v. Robinson*, *Inchbald v. Barrington* (1868), 20 L. T. 109; *Harrison v. Good* (1871), 24 L. T. 263; *Roskell v. Whitworth* (1871), 19 W. R. 894; *Gaunt v. Pyney* (1872), 8 Ch. App. 8; *Wintor v. Baker* (1887), 3 T. L. R. 569.

### B. Boundaries.

**357. Extra-parochial places—Ancient cathedrals.]—**The sites & areas of ancient cathedrals,

colleges & Inns of Court are extra-parochial.—*R. v. PETERBOROUGH JJ.* (1783), Cald. Mag. Cas. 238.

**358. ——— Presumption from age.]—***BRAITHWAITE v. HOOK*, No. 317, *ante*.

**359. ——— Colleges.]—R. v. PETERBOROUGH JJ.**, No. 357, *ante*.

**360. ——— Inns of Court.]—R. v. PETERBOROUGH JJ.**, No. 357, *ante*.

**361. ——— Presumption from long acquiescence in exclusion from parish.]—**The occupiers of houses in Serjeant's Inn, Fleet Street, are not liable to pay poor's rates to the parish of St. Dunstan in the West.

When a parish has for several hundred years acquiesced in the notion, that a particular place is not within it, a very strong case should be made out, before a jury can be called upon to find that such place is within the parish (BEST, C.J.).—*KING v. BUTTERWORTH* (1826), 2 C. & P. 301, N. P.

**Delimitation of—By statutory authority.]—See BOUNDARIES**, Vol. VII., pp. 266–268, Nos. 15, 16, 20–24.

— **By judicial authority.]—See BOUNDARIES**, Vol. VII., pp. 270–272, Nos. 38, 48, 49.

**Evidence of.]—See BOUNDARIES**, Vol. VII., pp. 266, 313, Nos. 12, 332.

— **Admissibility — Reputation.] — See BOUNDARIES**, Vol. VII., pp. 314, 315, Nos. 335, 338, 349, 351.

— **Public documents, etc.] — See BOUNDARIES**, Vol. VII., pp. 316, 318, Nos. 364, 367, 379, 386, 389.

— **Private documents.] — See BOUNDARIES**, Vol. VII., pp. 319, 320, Nos. 399, 404, 409.

**Perambulations.]—See BOUNDARIES**, Vol. VII., p. 321, Nos. 413–415, 417, 418.

**Boundary plates—Presumption arising from.]—See BOUNDARIES**, Vol. VII., p. 280, No. 118.

**Duty to maintain.]—See BOUNDARIES**, Vol. VII., p. 281, No. 119.

### C. Notices.

**362. Publication—Sufficiency—At principal door of church.]—**(1) In the township of T. where was an ancient chapel, a new church was built & consecrated in 1832, since which period divine service had been regularly performed on Sundays in the new church, though parish meetings continued to be held in the chapel, where christenings & burials were also occasionally performed:—*Held*: (1) the new church, being the church *de facto* of the place, it was a sufficient publication of a poor rate if the notice required by Parish Notices Act, 1837 (c. 45) were affixed at or near the door thereof, & not at that of the chapel; (2) it was a sufficient publication if the notice were affixed to the principal door only of the church.

(3) In the same place a room was hired for a schoolhouse, in which divine service was regularly celebrated on Sundays according to the rites of the Church of England:—*Held*: it was not necessary to affix any notice on the door of the school.—*ORMEROD v. CHADWICK* (1847), 16 M. & W. 367; 2 New Mag. Cas. 55; 2 New Sess. Cas. 697; 16 L. J. M. C. 143; 8 L. T. O. S. 343; 11 J. P. 138; 153 E. R. 1321.

*Annotations:—As to* (2) *Fold, R. v. Salop JJ.* (1864), 5 New Rep. 172. *Generally, Mentd.* *R. v. Shipperbottom* (1847), 2 New Sess. Cas. 641; *Hambottom v. Duckbottom* (1847), 1 Exch. 506; *L. v. Preston* (1848), 12 Q. B. 816; *R. v. Mills* (1851), 17 L. T. O. S. 164; *R. v. Stretfield & Dixon* (1863), 32 L. J. M. C. 236.

**363. ——— Parish divided into several districts—Each with own chapel—Notice of poor rate.]—**Where a parish has several districts, each having its

own chapel, & separately maintaining its own poor, notice on the chapel door of that district alone for which the poor rate is made is sufficient publication within Parish Notices Act, 1837 (c. 45), s. 2.—*R. v. WORCESTERSHIRE JJ.* (1840), *Arn. & H.* 80; 4 *Per. & Dav.* 440; 10 *L. J. M. C.* 12; 5 *J. P.* 177.

**364.** — Township with ancient chapel & new church.]—*ORMEROD v. CHADWICK*, No. 362, *ante*.

**365.** — Highway parish part of larger poor law parish—No parish church in highway parish.]—*H.*, in Warwickshire, is a parish within Highway Act, 1835 (c. 50), but for poor law & ecclesiastical purposes is not a parish but is included in the parish of *K.* There was no consecrated church or chapel of the Church of England in *H.*, but only a schoolroom licensed for divine service & a Wesleyan chapel. The parish church of *K.* was three miles from *H.* A highway rate for *H.* having been duly allowed by justices was published by a notice affixed to the doors of the schoolroom & of the Wesleyan Chapel in *H.*, & not by a notice on the parish church of *K.*:—*Held*: that such notice was a sufficient publication of the rate within sect. 27 of the above Act.—*R. v. WOLFERSTAN*, [1803] 2 *Q. B.* 451; 62 *L. J. M. C.* 148; 69 *L. T.* 429; 58 *J. P.* 133; 42 *W. R.* 176; 37 *Sol. Jo.* 718; 5 *R.* 561.

*Annotation*:—*Reid. Beeson v. Derby Overseers* (1903), 89 *L. T.* 47.

**366.** — At schoolroom hired & used for church service—Whether necessary.]—*ORMEROD v. CHADWICK*, No. 362, *ante*.

#### *D. Distinct and Separate Parishes.*

**367. Creation—Under Church Building Acts, 1818 (c. 45), & 1819 (c. 134)—Enrolment of boundaries.]**—In the year 1823, a piece of ground in the parish of *M.*, Leicester, was purchased by subscription of the inhabitants, & conveyed to the Comrs. for Building New Churches, who erected a chapel on part of it & inclosed the remainder for a burial ground. In 1827, the chapel & burial ground were consecrated. In 1828 an Ord. in Council was made & published, whereby, after reciting sect. 16 of Church Building Act, 1818 (c. 45), which empowers the comrs. to divide populous parishes into two or more distinct & separate parishes; also reciting sect. 21 of that Act, which empowers the comrs. to divide populous parishes into ecclesiastical districts; also reciting that the comrs. had made a representation to the Crown respecting the increase of population & insufficient Church accommodation in the parish; also reciting that it appeared to the comrs. expedient that an ecclesiastical district should be assigned to the new chapel under Church Building Act, 1819 (c. 134); & that the consent of the bishop had been obtained: His Majesty ordered that the proposed division should be made & effected according to the provisions of the Acts. The boundaries of the district were duly enrolled under Church Building Act, 1819 (c. 134), s. 22. No Ord. in Council was made respecting the performance of the offices of the Church in the said chapel, or the appropriation of the fees payable in respect thereof, nor did the comrs. make any order as to whether the fees for burials, etc. were to be reserved to the incumbent of the parish, or assigned to the curate of the chapel, or whether burials, etc. should be performed in such chapel. In the year 1848, the corp'n. of Leicester established a cemetery within the borough, under a local Act, by which the burial service over deceased persons removed

for interment in the cemetery was to be performed by, & the fees paid to the incumbent who might have been required to perform the service, & would have been entitled to the fees, if the interment had taken place in his parish or ecclesiastical district:—*Held*: the Ord. in Council was made under Church Building Act, 1818 (c. 45), s. 21, & not under Church Building Act, 1819 (c. 134), s. 16; & that, upon enrolment of the boundaries, the chapelry became a separate district parish for all ecclesiastical purposes; & after the death of the then incumbent of the original parish, the curate of the district parish was entitled to the fees for burial, both in his parish & in respect of deceased persons removed therefrom for interment in the cemetery.—*EDGEILL v. BURNABY* (1853), 8 *Exch.* 788; 23 *L. J. Ex.* 65; 21 *L. T. O. S.* 144; 17 *J. P.* 520; 155 *E. R.* 1571.

*Annotation*:—*Reid. Roberts v. Aulton* (1857), 2 *H. & N.* 432.

**368.** — —.]—*TUCKNESS v. ALEXANDER*, No. 3752, *post*.

**369.** — —.]—In 1851, the church of *T.* was built & consecrated, & in 1852 a district was assigned to it by Ord. in Council, as a chapel of ease under Church Building Act, 1818 (c. 45), & Church Building Act, 1819 (c. 134), s. 16, out of the ancient parish of *W.* At that time deceased inhabitants were all buried in the parish churchyard. By the Act of Consecration & Ord. in Council authority was given to perform baptisms, marriages, & burials in the new church, & the fees were to be received by the incumbent of the district:—*Held*: the district of *T.* became a distinct & new parish in 1856 under New Parishes Act, 1856 (c. 104), s. 14, & was a "new parish" within Burial Act, 1857 (c. 81), s. 5.—*ORONSHAW v. WIGAN BURIAL BOARD* (1873), *L. R.* 8 *Q. B.* 217; 42 *L. J. Q. B.* 137; 28 *L. T.* 283, *Ex. Ch.* *Annotations*:—*Fold. Harris v. Lambeth Burial Board* (1883), 47 *J. P.* 561. *Reid. Hall v. Barlow, Re St. Mary, Islington, Burial Fees* (1891), *Trist.* 149.

**370. Evidence—Separate churches—Lands intermixed.]**—Two parishes, the lands of which were intermixed, had each a separate church, with one patron & one incumbent, who celebrated divine service in each church once each Sunday morning or evening alternately, & christened the children in either irrespective of the residence of the parents. There was also one parish clerk, one communion plate, & one burial ground. There had always been overseers, churchwardens, & surveyors of highways appointed for each parish separately, but the same poor rate in amount had always been assessed in both parishes, & when collected, the amount was thrown into one fund, & applied to the poor of both parishes indiscriminately:—*Held*: the preponderance of evidence was in favour of these being distinct & separate parishes, & therefore, a joint appointment of overseers for the united parishes was invalid.—*R. v. TOMBLESON* (1863), 1 *New Rep.* 521; 27 *J. P.* 150.

**371. Effect of division of existing parish—On right to choose churchwardens—Private Act.]**—As a rule, existing customs or rights are not to be taken away by mere general words in an Act of Parliament. But without words especially abrogating them, they may be abrogated by plain directions to do something which is wholly inconsistent with them. And this may be the case though the Act is a private Act of Parliament, & though the particular custom may have been confirmed, years before, by a verdict in a ct. of law.

A parish consisted of four townships or hamlets, *D.*, *W.*, *M.*, & *B.* *D.* contained the parish church,

*Sect. 7.—Constitution of the Church into parishes; Sub-sect. 1, D., E., F. & G.]*

& gave the name to the whole parish. One of the churchwardens of D. was appointed by the rector, the other was elected by the parishioners. The two persons who, in the township or hamlet of M., performed the various duties of churchwardens & overseers, were elected by the inhabitants of M., which hamlet raised & administered its rates quite independently of D., & the churchwardens of D. proper never interfered; & this custom of election in M. by the inhabitants, had been confirmed by a verdict in a ct. of law many years ago. A private Act of Parliament was passed creating D. & W. into one parish, M. into another, & B. into a third. The Act contained a provision that when the three parishes had been constituted, the churchwardens of each should be chosen as those of D. had been chosen & appointed:—*Held*: though there were no particular words in the Act expressly putting an end to the custom of the inhabitants of the hamlet of M. electing the churchwardens, there were words clearly directing something else to be done entirely inconsistent with that custom, which, therefore, on M.'s being constituted a parish, ceased, & the rector of the new parish of M. became entitled, as the rector of D. had always been, to appoint one of the churchwardens, while the other was elected by the parishioners at large, for that the Act had made D. the model on which the newly created parishes were formed, & were to be governed.—*GREEN v. R.* (1870), 1 App. Cas. 513; 35 L. T. 495; 41 J. P. 196, H. L.; *revisq.* S. C. *sub nom.* R. v. *GREEN* (1874), 31 L. T. 513, Ex. Ch.

*E. Consolidated Chapelries.*

**372. Formation—By Order in Council—Whether enrolment in Chancery of name, boundaries, etc., necessary.]**—The formation of a district or chapelry on the requisition of the Ecclesiastical Comrs., by an Ord. in Council, under Church Building Act, 1845 (c. 70), s. 9, is valid, without any enrolment in Chancery of the name, boundaries, etc., as required by Church Building Act, 1819 (c. 134), s. 6.—*R. v. SOUTH WEALD OVERSEERS* (1864), 5 B. & S. 391; 4 New Rep. 323; 33 L. J. M. C. 103; 10 L. T. 498; 28 J. P. 708; 10 Jur. N. S. 1009; 12 W. R. 873; 122 E. R. 876.

**373. — Effect of—Assimilation to district chapelry.]**—(1) Consolidated chapelries & district chapelries, though differing in origin, are, when once formed, precisely similar in character.

(2) Consolidated chapelries are within New Parishes Act, 1856 (c. 104), s. 14.

(3) Where an ecclesiastical district has been formed out of several parishes, the incumbent of the chapelry in the new district will not be entitled to the fees of marriages, etc. within sect. 12 of above Act until after the next avoidance, or the relinquishment of fees by the incumbents of all the parishes out of which the chapelry has been formed. The incumbent of two parishes from which portions were taken in order to form a consolidated chapelry, appeared to have made no formal resignation of fees accruing in respect of such portions of the chapelry, but stated that when they gave up the right to the parish they considered that they had given up everything:—*Held*: there was sufficient evidence of a relinquishment of such fees within the sect.

(4) A deft. is not bound to appeal from an interlocutory decree, though he might so have raised the whole question at issue.—*JONES v. GOUGH* (1865), 3 Moo. P. C. C. N. S. 1; 12 L. T. 31; 29

J. P. 196; 11 Jur. N. S. 251; 13 W. R. 509; 18 E. R. 1; *sub nom.* *GOUGH v. JONES*, 5 New Rep. 381, P. C.; *affg.* S. C. *sub nom.* *GOUGH & CARTWRIGHT v. JONES* (1863), 9 L. T. 610; *previous proceedings, sub nom.* *GOUGH & CARTWRIGHT v. JONES* (1862), 7 L. T. 566.

*Annotation*:—As to (2) *Reid*. *Cronshaw v. Wigan Burial Board* (1873), L. R. 8 Q. B. 217.

**374. — Whether within New Parishes Act, 1856 (c. 104), s. 16.]**—*JONES v. GOUGH*, No. 373, *ante*.

*See, generally*, Sub-sect. 1, G., *post*.

**375. — Right of inhabitants to choose churchwardens in original parish.]**—Contiguous portions of parishes of B. & S. formed into a consolidated chapelry for all ecclesiastical purposes, & assigned to the consecrated church of St. J.:—*Held*: those ratepayers residing within that part of the parish of B. lying within the consolidated chapelry, had a right to vote in the election of churchwardens for the ancient parish of B.—*NEWMAN v. KING* (1870), 34 J. P. 358.

*See, generally*, Sub-sect. 6, D., *post*.

**Right of incumbent to fees.]**—*See* Part VII., Sect. 10, sub-sect. 1, *post*.

*F. District Chapelries.*

**376. Whether messuage within—Admissibility of evidence.]**—Upon an issue whether a certain messuage is situated within a chapelry, a person who occupies rateable property within the chapelry is a competent witness to prove that it is.—*MARSDEN v. STANSFIELD* (1828), 7 B. & C. 815; 1 Man. & Ry. K. B. 609; 1 Man. & Ry. M. C. 358; 6 L. J. O. S. K. B. 159; 108 E. R. 927.

*Annotations*:—*Mentd.* *Doe d. Hobbs v. Cockell* (1836), 4 Ad. & El. 478; *Wormald v. Mackintosh* (1840), 5 My. & Cr. 5; *R. v. Adderbury East* (1843), Dav. & Mer. 324; *R. v. Martin* (1848), 6 State Tr. N. S. 925.

**377. Whether part of parish—Evidence.]**—A chapelry may form part of a parish although the inhabitants of the chapelry have never been assessed for church rates or repairs, or taken any part in the election of churchwardens of the parish church, & although owing to the magnitude of the parish the chapelry has always appointed separate overseers & levied separate poor rates under Poor Relief Act, 1662 (c. 12). The fact that the vicar of the parish receives the vicarial tithe of the chapelry & that residents in the chapelry are in the habit of being married at the parish church is almost conclusive evidence that the chapelry is part of the parish.—*Re* *SANDBACH SCHOOL & ALMSHOUSE FOUNDATION, A.-G. v. CREWE* (EARL), [1901] 2 Ch. 317; 70 L. J. Ch. 604; 84 L. T. 815; 40 W. R. 647.

**378. — Annexation of endowment.]**—*HUGHES v. DENTON*, No. 3444, *post*.

**379. Creation—Authority of Ecclesiastical Commissioners.]**—*TUCKNESS v. ALEXANDER*, No. 3752, *post*.

**380. Constitution as new parish—Effect of—On identity.]**—*HUGHES v. DENTON*, No. 3444, *post*.

**381. — By Order in Council under Church Building Act, 1839 (c. 49)—Original parish regulated by local Act—Whether valid.]**—The rule of construction, that a general Act of Parliament does not repeal or affect a prior special Act of Parliament without express words of reference, applies to the Church Building Acts.

(1) Where a local Act regulated the ecclesiastical arrangements of the parish of St. Pancras:—*Held*: not to be affected by above Act.

(2) An Ord. in Council, purporting, under sect. 3 of the latter, with the consent of the



bishop alone, upon the representation of the Ecclesiastical Comrs., to order the assignment of a district to a parochial chapel built under the former Act:—*Held: ultra vires.*

(3) The insertion in a general Act of Parliament of a saving clause, providing, that the Act shall not apply to a special case which had previously been regulated by a special Act of Parliament not otherwise referred to, will not prevent the application of the rule of construction mentioned above.

(4) The incumbent of a district parish created such by a private Act of Parliament, will not be allowed to restrain the incumbent of the mother church from publishing banns & celebrating marriages between persons resident in the district parish, nor from receiving ecclesiastical dues.—*FITZGERALD v. CHAMPNEYS* (1861), 2 John. & II. 31; 30 L. J. Ch. 777; 5 L. T. 233; 7 Jur. N. S. 1009; 9 W. R. 850; 70 E. R. 958.

*Annotations:—As to (4) Held. Tuckness v. Alexander* (1863), 2 Drow. & Sm. 614. *Generally, Held. Stewart v. West Derby Burial Board* (1886), 34 Ch. D. 314. *Mentel. Thorpe v. Adams* (1871), L. R. 6 C. P. 125; *Garnett v. Bradley* (1878), 3 App. Cas. 944; *Re Smith's Estate, Clements v. Ward* (1887), 35 Ch. D. 589; *Baird v. Tunbridge Wells Corp.*, [1894] 2 Q. B. 807; *Hornsey District Council v. Smith*, [1897] 1 Ch. 843; *R. v. Local Government Board, Ex p. South Stoneham Union*, [1908] 2 K. B. 368; *Jenkins v. G. C. Ry.*, [1912] 1 K. B. 1.

**382. — Effect on prior trust deed.—Construction of Order in Council.**—By a deed of 1840 a certain chapel was vested in trustees, upon trust to permit same to be used as a chapel of ease, dependent upon the parish church, & to permit the vicar for the time being or his curates to officiate as ministers thereof, & to allow the vicar & churchwardens to let the pews, & to permit the churchwardens to receive the pew rents & other emoluments for the benefit of the vicar, after paying the necessary expenses; & the vicar & churchwardens were authorised to appoint the clerk, pew openers & other officers of the chapel. By an Ord. in Council, dated Oct. 1860, the chapel was constituted a district chapelry, & it was ordered that marriages, baptisms, etc., should be solemnised & performed in the chapel, & that the fees should belong to the minister of such chapel for the time being, subject to a proviso that so long as the existing vicar remained vicar the fees should be paid to him, but the Ord. did not mention or affect to deal with the pew rents:—*Held: (1)* the effect of the Ord. in Council was to withdraw the chapel from all the purposes included in the trust deed; *(2)* to constitute the district chapelry a benefice; & *(3)* to deprive the vicar & churchwardens of the parish church of all right to receive the pew rents, or to nominate the officers of the church. *Qu.:* whether after the creation of the district chapelry the pews of the chapel could lawfully be let & the pew rents received for the benefit of the minister of the chapel.—*FITZGERALD v. FITZPATRICK* (1864), 4 New Rep. 87; 33 L. J. Ch. 670; 10 L. T. 477; 28 J. P. 645; 10 Jur. N. S. 913; 12 W. R. 771.

*Annotation:—As to (1) Held. Chichester & Eubrook Estate Trustees v. Woodward, Sandgate Faculty Case* (1888), Trist. 180.

*See, also, No. 373, ante.*

**383. Formation under Church Building Acts, 1819, 1839, & 1856—Distinguished from parish formed under Church Building Act, 1818—Parish clerk's right to fees.**—A district chapelry, created by an Ord. in Council, under Church Building Acts, 1819 (c. 134), & 1839 (c. 49), & 19 & 20 Vict., c. 55, is not equivalent to a district parish created under Church Building Act, 1818 (c. 45), & the parish clerk of such a district chapelry is not

entitled as of right to the district chapelry as to possession—How original parish, whose churchwardens to the creation of the district vestry clerk was a case, the bishop may, under 19 s. 14, award compensation to the [the vestry lieu of fees.—*HAMPSTEAD PARISH* may bring an *CASE, Re LANGMEAD* (1876), Trist. 54. *WIMBOROUGH, Right of incumbent to fees.*—*See Sect. 10, sub-sect. 1, post.*

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#### G. New Parishes.

**384. Creation.]—CRONSHAW v. WIGAN BURIAL BOARD, No. 369, ante.**

**385. —.]—**The ancient parish of St. Mary comprised, *inter alia*, the district parish of St. Mark, attached to the district church of which was a churchyard wherein the remains of the inhabitants of St. Mark were interred. In 1852 a burial board was formed for the whole of the parish of St. Mary, & in 1853 the churchyard of the district parish of St. Mark was closed by order of the Secretary of State, & the remains of the inhabitants of St. Mark's were thenceforth interred in the burial ground provided by the burial board of St. Mary. Such burial ground was consecrated in 1854, & from that time became the burial ground of St. Mary. In 1875 a church called St. James was built & consecrated in the district parish of St. Mark, & a district, part of the district parish of St. Mark, assigned to it by Ord. in Council. By the sentence of consecration & Ord. in Council authority was given to solemnise & perform burials, etc., at the church of St. James, the fees to arise therefrom to be paid & belong to the minister of such church for the time being. The incumbent of St. James' having brought an action claiming to perform the burial service in defts.' burial ground over the bodies of the inhabitants of St. James' buried therein, & to receive the fees for such services:—*Held:* the district of St. James was a "new parish" within Burial Act, 1857 (c. 81), s. 5.—*HARRIS v. LAMBERTH BURIAL BOARD* (1883), 47 J. P. 501, D. C.

**386. Distinguished from district constituted under Church Building Act, 1831 (c. 38).]**—By sect. 16 of above Act, two churchwardens are to be appointed for every church or chapel built under the provisions of that Act; one by the incumbent, & the other by the renters of pews. Marriage Act, 1836 (c. 85), s. 20, empowers the bishop of a diocese, by license under his hand & seal, to authorise the solemnisation of marriages in a district chapel, for persons residing within the district. By sect. 32 the bishop may, with the consent of the Archbishop of the province, revoke this license. New Parishes Act, 1843 (c. 37), s. 15, enacts that when any church or chapel shall be built in any district, & consecrated as the church or chapel of such district, the district shall, from & after such consecration, be & be deemed to be a new parish for ecclesiastical purposes. &, by sect. 17, in every such case of a district so becoming a new parish, two churchwardens are to be chosen for it; one by the perpetual curate of the new parish & the other by the resident inhabitants having a similar qualification to that which would entitle inhabitants to vote at the election of churchwardens for the principal parish. New Parishes Act, 1856 (c. 104), s. 11, empowers the Ecclesiastical Comrs., upon the application of the incumbent of a district church or chapel, with the written consent of the bishop of the diocese, to make an order under their seal, authorising the publication of banns

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*Sub-sect. 1, G. & H.; sub-sect. 2, A.]*

of matrimony & the solemnisation therein of marriages, baptisms, churchings, & burials; all the fees for the performance of which offices are to be payable, & to be paid to the incumbent. & by sect. 14, wheresoever or as soon as banns of matrimony & the solemnisation of marriages, churchings, & baptisms, are authorised to be published or performed in any consecrated district church or chapel, such district not being at the time of the passing of that Act a separate & distinct parish for ecclesiastical purposes, & the incumbent of which is, by such authority, entitled for his own benefit to the entire fees for the performance of such offices, without any reservations thereout, such district shall become & be a separate & distinct parish for ecclesiastical purposes, such as is contemplated by New Parishes Act, 1843 (c. 37), s. 15; the church of the district shall be the church of such parish; & all the provisions of New Parishes Act, 1843 (c. 37), relative to new parishes, upon their becoming such, & to the matters & things consequent thereon, shall extend & apply to the said parish & church as fully & effectually as if it had become a new parish under the provisions of that Act. The church of C. was built, & had a district assigned to it, under Church Building Act, 1831 (c. 38). In the year 1840 the bishop of the diocese granted, under Marriage Act, 1836 (c. 85), s. 20, his license for the publication of banns & the solemnisation of marriages in the church, & for taking the same fees in respect thereof as were taken in the mother church by the minister & incumbent thereof for the time being; to which the fees for churchings, baptisms, & burials were afterwards added. From the consecration of the church down to the issuing of the writ of *mandamus* in the present case, two churchwardens were chosen for the church in the manner directed by Church Building Act, 1831 (c. 38), s. 10; one by the incumbent, & the other by the pew renters. Upon demurrer to the return to a *mandamus* to the incumbent of the district to convene a meeting of the inhabitants to elect a churchwarden, the return alleging that the incumbent & the pew renters had the privilege of electing the churchwardens, & that sect. 15 of New Parishes Act, 1843 (c. 37), & sect. 14 of New Parishes Act, 1856 (c. 104), were inapplicable:—*Held*: the return was good. The authority contemplated by New Parishes Act, 1856 (c. 104), s. 14, was not a revocable license by the bishop, but an authority under an order of the Comrs. under sect. 11 of that Act; therefore the district was not brought within the operation of sect. 14 of the Act. *Seem*: New Parishes Act, 1843 (c. 37), s. 15, is inapplicable to the case of a district constituted, not under that Act, but under Church Building Act, 1831 (c. 38), with a license by the bishop under Marriage Act, 1836 (c. 85).

This authority, if it had been granted by the order of the Comrs., would be of a permanent & irrevocable character; but it has not been granted, & we are of opinion that the revocable authority or license of the bishop is not enough to bring this district within sect. 14 of New Parishes Act, 1856 (c. 104) (*per CUR.*).—*R. v. PERRY* (1861), 3 E. & B. 640; 30 L. J. Q. B. 141; 3 L. T. 885; 25 J. P. 229; 7 Jur. N. S. 655; 9 W. R. 383; 121 E. R. 583.

**PART III. SECT. 7, SUB-SECT. 1.—H.**  
**G. Parish registers—Amendment—**  
*Jurisdiction of court to order.*—Where application was made for an order

authorising the amendment of the entry as to appt.'s baptism in a church register of baptisms by making certain additions thereto:—*Held*: as such

register was not a public record, the ct. could not authorise the amendment.—*Ex p. REEVE* (1912), C. P. D. 194.—**S. AF.**

**387. Whether "place having a known & defined boundary"—Local Government Act, 1858 (c. 98), sect. 12—Parts of two townships each maintaining own poor & highways.**—A district formed for ecclesiastical purposes under New Parishes Act, 1843 (c. 37), consisting of parts of two townships, each of which townships separately maintains its own poor & its own highways, was "a place having a known & defined boundary" within sect. 12 of above Act, & was not a less place included within a greater within the meaning of sect. 14. Preliminary proceedings under sects. 14 & 16 were therefore unnecessary, & the district might at once adopt the Act, at a meeting of owners & ratepayers, convened by the churchwardens; & an order of the Secretary of State confirming such adoption was valid.—*It. v. NORTHOWRAM & CLAYTON (RATEPAYERS)* (1865), L. R. 1 Q. B. 110; 7 B. & S. 110; 35 L. J. Q. B. 90; 30 J. P. 181.

*Annotations*:—*Mentd.* *R. v. Hardy* (1868), L. R. 4 Q. B. 117; *It. v. Local Government Board* (1873), L. R. 8 Q. B. 227.

**Rights of inhabitants—Burial.**—*See BURIAL*, Vol. VII., p. 527, No. 74.

**H. Parish Records and Documents.**

**388. Parish registers—Right of inspection.**—*ANON.* (1733), 2 Barn. K. B. 209; 94 E. R. 493.

**389. —Duty of incumbent to make copies.**—*ANON.* (1733), 2 Barn. K. B. 209; 94 E. R. 493. *See, now*, Births & Deaths Registration Act, 1836 (c. 86), s. 35.

**390. —Entries in—On whom duty lies.**—An entry in the register book by the minister of the parish of the baptism of a child, which had taken place before he became minister or had any connection with the parish, & of which he received information from the parish clerk, is not admissible in evidence, nor is the private memorandum of the fact made by the clerk who was present at the baptism.

Registers should be made up promptly, & by the person whose duty it is to make them up. The register of baptism, in this case, purports to bear date Feb. 6, 1776, but it was not made up till June, 1777, & then it was made up—not by the person who was minister of the parish at the time of the baptism, or by a person who appeared at that time to have any connection with the parish—but by one who afterwards became the minister of the parish. It must be taken, therefore, that he made this entry after the death of the minister of the parish who was present at the baptism. . . . I think, therefore, the register itself clearly ought not to have been received in evidence (*BAYLEY, J.*).—*DOE d. WARREN v. BRAY* (1828), 8 B. & C. 813; 3 Man. & Ry. K. B. 428; 2 Man. & Ry. M. C. 66; 7 L. J. O. S. K. B. 101; 108 E. R. 1245.

*Annotation*:—*Refd.* *Lyell v. Kennedy* (1887), 56 L. T. 647.

**391. —Time for making.**—*DOE d. WARREN v. BRAY*, No. 390, *ante*.

*See Parochial Registers Act, 1812 (c. 146), s. 3.*

**392. —Custody.**—Where a rectory is in fact void, although one has acted as rector & appointed an officiating chaplain, this ct. will not grant a *mandamus*, at the instance of one of the churchwardens, to compel him to give up the register book of the parish to the churchwardens, as there is no other remedy. When a benefice is full, the incumbent is the proper

custodian of the parish books; *semble*: if void, the churchwardens.—*Ex p. HOLLOWAY* (1855), 24 L. T. O. S. 255; 19 J. P. Jo. 99; *sub nom. R. v. CUMLEY, Ex p. HOLLOWAY*, 3 W. R. 247.

— **Forgery of & damage to.**—*See CRIMINAL LAW*, Vol. XV.

**Terriers—As evidence.**—*See EVIDENCE*.

— **Of boundaries.**—*See BOUNDARIES*, Vol. VII., p. 318, Nos. 379, 380.

**Vestry books.**—*See* Nos. 619, 620, *post*.

**Parish books & papers—Discovery of.**—*See CORPORATIONS*, Vol. XIII., p. 424, Nos. 1455–1457.

— **Papers in charge of vestry clerk.**—*See* No. 621, *post*.

— **As evidence of boundaries.**—*See BOUNDARIES*, Vol. VII., p. 318, No. 381.

#### SUB-SECT. 2.—THE INCUMBENT.

##### A. In General.

**393. Estate in benefice—Rectory.**—*HUNTLEY v. RUSSELL*, No. 3719, *post*.

**394. Duties—Whether bound to preach.**—*TAYLOR v. GAY* (1009), 1 Sid. 409; 82 E. R. 1185.

— **At archdeacon's visitation.**—*See* Sect. 5, sub-sect. 5, C., *ante*.

— **Necessity for licence.**—*See* Part V., Sect. 2, sub-sect. 4, A., *post*.

— **In relation to vestries.**—*See* Sub-sect. 4, *post*.

— **Cure of souls.**—*See* Part V., Sect. 8, sub-sect. 2, *post*.

— **Residence.**—*See* Part V., Sect. 8, sub-sect. 3, *post*.

**395. Rights—Subordinated to spiritual duties.**—*Claim*: that pltf. was vicar of a parish; that a chapel was erected within it & endowed & consecrated for the administration of the sacraments & the performance of all other divine offices according to the rites of the Church of England; that pltf. as such vicar was entitled to nominate & present, & had nominated & presented a clerk to the chapel, but another clerk had been licensed, instituted, & admitted by deft. bishop on the nomination & presentation of certain other defts., who thereby hindered pltf. in the exercise of his right; & he claimed to have his right established & declared. Defence of the last mentioned defts.: That certain freeholders had erected the chapel & conveyed to the Ecclesiastical Comrs., & applied to them under Church Building Act, 1851 (c. 97), to declare the right of nomination to be in defts. who had endowed the chapel, & that before making such declaration a copy of the application was according to the Act, sent by the Comrs. to pltf., he being both patron & incumbent of the parish; that if he had ceased to be patron he stood by & knowingly allowed those defts. to endow the chapel & procure the same to be consecrated in the belief entertained by them as he well knew that he was patron, & that the sending of such copy to him was in fact a sending of a copy both to the patron & incumbent, as required by the Act, & pltf. was therefore estopped from denying that he was patron; & that the right of nomination had been declared to be in those defts., who afterwards nominated. On demurrer to the allegation of estoppel:—*Held*: (1) it was bad, because the rights of the vicar were not merely private but were accompanied by spiritual & other duties in which his parishioners were interested, & he could not therefore waive or divest himself of those rights & duties by the conduct imputed to him; (2) the

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claim was bad, inasmuch as it did not allege that the chapel was a chapel of ease, or otherwise show any right in the vicar to nominate and present a clerk to it.

(3) Defts. claiming relief over against the Ecclesiastical Comrs. served upon them a notice under R. S. C., Ord. 16, r. 18. They entered an appearance under r. 20, & an order was afterwards made at chambers, under r. 21, that they should be at liberty to appear & defend this action so far as related to the question whether all things required to be done by them, in order to enable them as against pltf. to make a valid declaration of the right of nomination & to vest that right in defts., were done by them, & that they should be bound by the finding upon that question. The pltf. then obtained an order on the Ecclesiastical Commissioners for discovery of documents:—*Held*: the third parties having appeared in the action to litigate with pltf., he was entitled to discovery from them, & the order for it was right.

The vicar of a parish as such, has only the right to present to a public consecrated chapel within his parish, when such chapel is a chapel of ease, though he has the right to forbid any person to officiate within his parish without his consent, unless he has been deprived of such right by some statute or some arrangement binding on the bishop of his diocese, the patron of the mother church, & the patron thereof.—*MACALLISTER v. ROCHESTER* (Bp.) (1880), 5 C. P. D. 194; 49 L. J. Q. B. 114, 443; 42 L. T. 22, 481; 28 W. R. 584, D. C.

*Annotations*:—*As to* (3) *Distd.* *Molloy v. Kilby* (1880), 15 Ch. D. 162. *Fold.* *Eden v. Wardale Iron & Coal Co.* (1887), 34 Ch. D. 223. *Refd.* *Miller v. Roberts* (1882), 21 Ch. D. 198.

**396. — Consistent with those of parishioners.**

—The incumbent has only such rights as are consistent & co-equal with the rights of the parishioners (*LORD COLERIDGE, C.J.*).

No one can lawfully read a service over a corpse in a churchyard, & for this purpose the consecrated portion of a cemetery is the same thing as a churchyard, unless he is the incumbent or some clergyman duly authorised by him . . . speaking generally, no clergyman can perform sacred rites in the parish of another clergyman without the consent of the incumbent; to do so would be an ecclesiastical offence (*LORD COLERIDGE, C.J.*).

Consecration is effected by the decree of a competent ecclesiastical ct., that is to say, the act or sentence of consecration, signed by the bishops, setting aside the ground or building in *sanctus usus* (*LORD COLERIDGE, C.J.*).—*WOOD v. HEADINGLEY-CUM-BURLEY BURIAL BOARD*, [1892] 1 Q. B. 713; 66 L. T. 90; 56 J. P. 326; 40 W. R. 390; 8 T. L. R. 217; 36 Sol. Jo. 201, D. C.

*Annotations*:—*Mentd.* *Williams v. Britton Ferry Burial Board*, [1903] 2 K. B. 565; *Sutton v. Bowden*, [1913] 1 Ch. 518.

**397. — Relief from rates—Under Ecclesiastical Tithe Rentcharge (Rates) Act, 1920 (c. 22), s. 1 (2)—How total income arising from benefice calculated.**—In the above sub-sect. the words "total income arising from the benefice" mean the total income arising from the benefice to the incumbent thereof for the time being as owner of the tithe rentcharge; & therefore, the incumbent of a benefice, in arriving at the total income arising therefrom to be shown in a statutory declaration made by him under the sub-sect., is entitled to deduct from the total gross revenue of the benefice sums paid by him to the incumbents of other parishes pursuant to Ords. in Council charging the tithes & hereditaments of the benefice with the

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payment thereof, & a sum paid to his own predecessor pursuant to a declaration of vacancy directing payment thereof out of the revenue of the benefice.—*R. v. LATCHINGDON OVERSEERS, Ex p. HEARN*, [1922] 2 K. B. 14; 91 L. J. K. B. 429; 126 L. T. 504; 86 J. P. 43; 20 L. G. R. 114, D. C.

Incumbent of two benefices.]—

*See* No. 2437, *post*.

*Fees.*—*See* Part VII., Sect. 10, sub-sect. 1, *post*.

As chairman of vestry meeting.]—*See* Sub-sect. 4, C. (c) ii., *post*.

Nomination of churchwarden.]—*See* Nos. 670–679, *post*.

Whether corporation sole.]—*See, generally*, CORPORATIONS, Vol. XII., p. 276, Nos. 58–60, 61.

398. — *Perpetual curate.*—Where a perpetual curacy is augmented from Queen Anne's bounty fund the incumbent becomes, by statute, a corp. capable of taking in perpetuity. The incumbent of a perpetual curacy not so augmented took in exchange, to him & his successors for ever, land of more than 40s. annual value:—*Held*: a subsequent incumbent was entitled to a county vote in respect of this land as equitable freeholder.—*WALLIS v. BIRKS* (1870), L. R. 5 C. P. 222; 1 Hop. & Colt. 365; 39 L. J. C. P. 106; 22 L. T. 268; 34 J. P. 343; 18 W. R. 734.

*See, generally*, Part V., Sect. 3, sub-sect. 4, *post*.

399. *Standard of conduct.*—*WILLIAMS v. HALL*, *WILLIAMS v. FURLAY*, No. 1402, *post*.

Parish surrounding cathedral.—Sub-dean of cathedral vicar of parish.]—*See* No. 317, *ante*.

*B. Rights and Liabilities in regard to Property.*

(a) *The Church.*

i. *In General.*

400. *Nature of estate.*—*R. v. MARCH* (1663), 1 Sid. 101; 82 E. R. 995; *sub nom. R. v. LARKING*, 1 Keb. 438.

*Annotation.*—*Refd.* *Burton v. Henson & Kerbey* (1842), 11 L. J. Ex. 348.

401. — *Possession with churchwardens.*—All persons ought to understand that the sacred edifice of the church is under the protection of the ecclesiastical laws as they are administered in these cts.; that the possession of the church is in the minister & the churchwardens; & that no person has a right to enter it when it is not open for divine service, except with their permission, & under their authority. That pews already erected cannot be pulled down without the consent of the minister & churchwardens, unless after cause shown by a faculty or licence from the ordinary (*SIR JOHN NICHOLL*).—*JARRATT v. STEELE* (1820), 3 Phillim. 167; 161 E. R. 1290.

*Annotations.*—*Apprvd.* *Griffin v. Dighton* (1864), 5 B. & S. 93. *Exptd.* *Hitchings v. Cordingley* (1868), L. R. 3 A. & E. 113. *Refd.* *Copo v. Barber* (1872), 41 L. J. M. C. 137; *St. Michael, Bessishaw* (Rector, etc.), c. Parishioners of same, [1893] P. 233; *Lee v. Hawtrej*, [1898] P. 63.

*See, generally*, Sub-sect. 6, *post*.

402. — *Subject to purposes to which dedicated.*—*GREENSLADE v. DARBY*, No. 476, *post*.

403. *The site.*—A grant by a rector to an individual of the exclusive right of burial for himself, his family, & friends, in a vault under the church, is a grant of an easement arising out of land & cannot be made *by parol*. No action will lie for the disturbance of such a right against a rector; if it would, case & not trespass would be the proper form. (1) *Semble*: a rector has no power to make such a grant, even by deed.

The freehold of the church is in the rector; but the rector holds the freehold subject to the jurisdiction of the ordinary, & for general & public purposes, not for his own; for the benefit of the parishioners at large, not for his own sole benefit & emolument. The object is, that he shall be enabled to furnish all his parishioners from time to time with reasonable & convenient space for the purposes of burial, & if he had the power to grant to one individual an exclusive right of burial to an individual, not a parishioner, & his family such as pltf. now claims, that object might be defeated because the greater portion of the church might become appropriated to wealthy individuals who could afford to pay largely to the rector for such a privilege, to the actual exclusion of the poorer parishioners. (2) *Semble*: such a right cannot be granted at all, except by means of a faculty, to a parishioner, & annexed to a mansion within the parish. In the case of a pew, a faculty is necessary for such a grant; (3) *Semble*: it is equally necessary in the case of a tomb or vault.

In both cases the governing principle ought to be, to regulate the accommodation according to the rights & wants of the parishioners; & a faculty can do no more than limit, in the one case the right of sitting, & in the other the right of burial, to inhabitants of the parish. Generally in the case of a pew, the faculty is confined to persons inhabiting a particular house within the parish, & if not, it is annexed to a parishioner, in the character of parishioner, supposing it may be so, still when the party removes from the parish, the exclusive privilege ceases, & the rights of other persons coming into the parish attach.—*BRYAN v. WHISTLER* (1828), 8 B. & C. 288; 2 Man. & Ry. K. B. 318; 6 L. J. O. S. K. B. 302; 108 E. R. 1050.

*Annotations.*—*As to* (1) & (2) *Refd.* *Taplin v. Florence* (1851), 10 C. B. 744; *Ashby v. Harris* (1868), L. R. 3 C. P. 523; *Kerrison v. Smith* (1897), 66 L. J. Q. B. 762; *North Manchester Overseers v. Winstanley*, [1908] 1 K. B. 835. *Generally, Mentd.* *Wood v. Leadbitter* (1845), 13 M. & W. 838.

404. —.—*REDHEAD v. WAIT*, No. 1053, *post*.

405. —.—*GREENSLADE v. DARBY*, No. 476, *post*.

406. — *Conveyance accepted by Ecclesiastical Commissioners.*—By Church Building Act, 1845 (c. 70), s. 13, the freehold of the site of every church of which the Comrs. therein mentioned shall accept a conveyance under Church Building Acts, as to any church not yet consecrated, when the same shall be consecrated, shall vest in the incumbent.

Land having been conveyed under above Acts to the Ecclesiastical Comrs. as a site for a church, a church was afterwards erected on a part of the land, & the church & part only of the land were consecrated:—*Held*: upon such consecration, the whole of the land so conveyed to the Comrs. vested in the incumbent.—*PLUMSTEAD DISTRICT BOARD OF WORKS v. ECCLESIASTICAL COMRS. FOR ENGLAND*, [1891] 2 Q. B. 361; 61 L. T. 830; 55 J. P. 791; 39 W. R. 700, D. C.

407. *The fabric.*—The property in all that is attached to & forms a portion of the fabric of a parish church is only well laid in an indictment as that of the person or persons who is or are in law the parson.—*R. v. MADELEY* (1843), 1 L. T. O. S. 504.

408. — *Where benefice a vicarage.*—In an indictment under 7 & 8 Geo. 4, c. 29, s. 44, for stealing lead from the roof of a parish church where the benefice is a vicarage the lead is properly laid to be the property of the vicar.—*R. v. MILES* (1846), 6 L. T. O. S. 485; 1 Cox, C. C. 351.

**409. Custody of key.]—**REDHEAD v. WAIT, No. 1053, *post*.

**410. — Subject to right of access to church.]—**(1) The minister has, in the first instance, the right to the possession of the key of the church, & the churchwardens have only the custody of the church under him: if he refuses access to the church on fitting occasions, he will be set right on application to higher authorities.

(2) Where the office of the judge is promoted, the whole transaction should be fairly stated in the arts., in order (3) that the judge may consider whether he ought to allow his office to be promoted, & (4) that deft. may be enabled, without injustice to himself, to give an affirmative issue.—*LEE v. MATTHEWS* (1830), 3 Hag. Ecc. 169; 162 E. R. 1119.

*Annotations:—As to* (1) *Apld.* *Hitchings v. Cordingley* (1868), L. R. 3 A. & E. 113. *Refd.* *Griffin v. Dighton* (1863), 33 L. J. Q. B. 29; *Evans v. Dodson* (1874), Trist. 26. *As to* (3) *Consd.* *R. v. Oxford Bp.* (1879), 4 Q. B. D. 523.

**411. Liability for repairs.—Under Metropolitan Building Act, 1855 (c. 122)—Whether “owner.”—**The incumbent of a district church in the Metropolis, although the freehold of such church is vested in him under Church Building Acts, is not the “owner” of the church within the above Act, so as to be personally liable for the expenses incurred by the Metropolitan Board of Works in respect of such church as a dangerous structure.—*R. v. LEE* (1878), 4 Q. B. D. 75; 48 L. J. M. C. 22; 39 L. T. 605; 43 J. P. 302; *sub nom.* *R. v. PARRIDGE & LEE*, 27 W. R. 151, D. C.

*Annotation:—Mentd.* *Regent’s Canal & Dock Co. v. L. C. C.* (1909), 73 J. P. 276.

**412. Right to pew rents.—Whether interest in land.]—**Where the right to receive for his own benefit the pew rents of a church is vested in the vicar by virtue of his office, even though such right arise merely by implication from the terms of the licence of the bishop when appointing the vicar, the pew rents may, in such circumstances, constitute an equitable freehold interest in land within Registration Act, 1429, c. 7.

*Qu.*: whether the mere actual receipt of pew rents by the vicar for his own use would of itself be sufficient to constitute an interest in land.—*VICKERS v. SELWYN* (1903), 89 L. T. 747; 68 J. P. 9; 52 W. R. 153; 48 Sol. Jo. 52; 1 Smith, Reg. Cas. 325, D. C.

*Annotation:—Refd.* *Wolfe v. Surrey County Council Clerk*, *Reeve v. Surrey County Council Clerk*, [1905] 1 K. B. 439.

**413. — Parish church erected under Church Building Acts—No special provisions in Order in Council or deed of consecration.]—**Legal possession of the freehold of a church by the vicar, coupled with the receipt of pew rents, is not sufficient to create an occupation within Representation of the People Act, 1832 (c. 45), s. 24; to create such an occupation, there must be actual, as well as legal, possession. *Semble*: the fact that, in the case of a new parish church erected under Church Building Acts, neither the Ord. in Council creating the new parish nor the deed of consecration of the church, contains the special provisions relating to pew rents embodied in Church Building Acts, does not render the collection & receipt of pew rents by, or on behalf of, the vicar, illegal.—*WOLFE v. SURREY COUNTY COUNCIL CLERK*, *REEVE v. SURREY COUNTY COUNCIL CLERK*, [1905] 1 K. B. 439; 74 L. J. K. B. 101; 92 L. T. 114; 69 J. P. 22; 53 W. R. 264; 21 T. L. R. 153; 3 L. G. R. 407; 1 Smith, Reg. Cas. 378, D. C.

*Annotation:—Distd.* *North Manchester Overseers v. Winstanley*, [1908] 1 K. B. 835.

*As to pews generally, see* Part VII., Sect. 3, sub-sect. 9, *post*.

## ii. The Chancel.

**414. The site—Nature of estate in.]—**ANON. (1616), 1 Brownl. 45; 123 E. R. 655.

*Annotation:—Consd.* *Griffin v. Dighton & Davies* (1863), 33 L. J. Q. B. 29. The notion that the chancel is part of the rector’s globe, though entertained by Lord Coke, is now exploded (*Cockburn, C. J.*).

**415. — — — — —.]—**The freehold of a church, including chancel & churchyard, is in the rector, but the right to the corporal possession is in the spiritual incumbent after induction; & therefore a lay rector has not, as against the vicar, any right to the possession or control of the chancel.

In contemplation of law, the freehold of the church, & therefore that of the chancel, which forms part of the church, as well as the freehold of the churchyard, is in the rector, whether spiritual or lay; but this naked & abstract right carries with it, in our judgment, no right of possession; the latter being in the incumbent, who is responsible to the Ordinary for the celebration of public worship (*COCKBURN, C. J.*).—*GRIFFIN v. DIGHTON* (1863), 5 B. & S. 93; 2 New Rep. 270; 33 L. J. Q. B. 29; 8 L. T. 500; 27 J. P. 359; 10 Jur. N. S. 69; 11 W. R. 804; 122 E. R. 767; *affd.* (1864), 5 B. & S. 93, 108, Ex. Ch.

*Annotations:—Refd.* *Fowke v. Burlington*, [1914] 2 Ch. 308. *Mentd.* *Hitchings v. Cordingley* (1868), L. R. 3 A. & E. 113; *St. Michael, Bassishaw (Rector, etc.) v. Parishioners of Same*, [1893] P. 233; *Morley v. Leacroft*, [1906] P. 92.

**416. — — — — — As spiritual rector—Subject to use of parishioners.]—**(1) The lay rector is not entitled as of right to make a vault or affix tablets in the chancel without leave of the Ordinary, nor is he entitled to a faculty for such purposes without laying before the Ordinary such particulars as will afford the vicar & parishioners an opportunity of judging of it, & satisfy the Ordinary that such vaults or tablets will not interrupt the parishioners in the use & enjoyment of the chancel: nor has the vicar an absolute veto, though he may show cause against the grant of a faculty.

*Semble*: the consent of the lay rector must precede the leave of the Ordinary for the construction of a vault or the erection of tablets in the chancel.

(2) Though the freehold of the chancel be in the rector, lay or spiritual, the use of it belongs to the parishioners & the Ordinary, as protector of their rights, must see that neither their present nor future accommodation be unduly prejudiced.

(3) No fee to the vicar for consent to interments in the chancel is due of common right; & any special custom to such effect must limit the amount, & be strictly proved.—*RICH v. BUSHNELL* (1827), 4 Hag. Ecc. 164.

*Annotations:—As to* (1) *Refd.* *Moody v. Randolph* (1874), 38 J. P. 324. *As to* (2) *Consd.* *Griffin v. Dighton* (1863), 2 New Rep. 270. *Apld.* *Nickalls v. Briscoe*, [1892] P. 269. *As to* (3) *Consd.* *Noville v. Bridger* (1874), 30 L. T. 690. *Generally, Mentd.* *Kingwill v. Rugg* (1867), 16 L. T. 540; *Kellett v. St. John’s, Burscough Bridge* (1916), 32 T. L. R. 571.

**417. Right to construct vault—Where rector only.]—**COUSSMAKER v. LONDON (Br.) (1731), 2 Wood, 350.

**418. Liability for repairs.]—**At common law, the parishioners of every parish are bound to repair the church; but by the canon law, the parson is obliged to do it; & in London the parishioners by particular custom repair both church & chancel; though the freehold is in the parson. Ifre those of a chapelry may prescribe to be exempt from repairing the mother church, where it buries & christens within itself, & has never contributed to it; but in this case it appears that the chapel was only a latter erection in case & favour of them of the chapelry, they having buried at the mother

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*Sub-sect. 2, B. (a) ii., iii. & iv., (b), (c) & (d).]*

church till the time of Hen. 8, & then undertook to contribute to the repairs of the same (HOLT, C. J.). —*BALL v. CROSS* (1688), 1 Salk. 164; Holt, K. B. 138; 90 E. R. 975.

*Annotation:—Consd. Craven v. Sanderson* (1838), 7 Ad. & El. 880.

419. —[.]—*WILLIAMS v. BOND* (1690), 2 Vent. 238; 86 E. R. 415.

*Annotation:—Refd. Morley v. Leacroft*, [1896] P. 92.

420. —[.]—(1) If a suit is instituted in the spiritual ct. for a rate, part of which is bad, the ct. will grant a prohibition for the whole.

(2) The parishioners, not the churchwardens, ought to assess the rate to repair the church.

(3) The parish ought to repair the nave of the church.

(4) The parson ought to repair the chancel.

*Qu.*: whether parishioners are bound to contribute to the charge of the ornaments of the chancel.

(5) Where a man libels in the spiritual ct. for an entire thing of a part of which the ct. has no cognisance, there shall be a prohibition for the whole, but where he libels for two distinct things, of one of which only the ct. has no cognisance, a prohibition *quoad*.—*PENSE v. PROUSE* (1695), 1 Ld. Raym. 59; 91 E. R. 934; *sub nom.* HAWKINS v. ROUS, Carth. 360; Holt, K. B. 139; *sub nom.* ANON., Comb. 344; *sub nom.* PRICE v. ROUSE, 12 Mod. Rep. 83; *sub nom.* PIERCE v. PROUSE, 1 Salk. 165.

*Annotations:—As to (2) Consd. Gosling v. Veley* (1853), 4 H. L. Cas. 679. *As to (3) Refd. Veley v. Burder* (1841), 12 Ad. & El. 265. *As to (4) Refd. Morley v. Leacroft*, [1896] P. 92.

421. —[.]—(1) The liability of an incumbent to repair the parsonage house & the chancel, is a liability at common law, & has not been enlarged by any statute.

(2) The principle upon which that liability is to be ascertained in amount is, that the premises are to be put into such a state of repair as an outgoing lay tenant ought to leave his buildings, where he is under covenant to leave them in good & sufficient repair.

(3) But he is not bound to supply or maintain anything in the nature of ornament. Painting, white-washing, & papering, are for this purpose considered as ornament; except where the painting be necessary to preserve exposed timber from decay.—*WISE v. METCALFE* (1830), 10 B. & C. 299; 5 Man. & Ry. K. B. 235; 8 L. J. O. S. K. B. 126; 109 E. R. 461.

*Annotations:—As to (1) Apud. Downes v. Craig* (1841), 9 M. & W. 166. *Refd. Bird v. Ralph* (1835), 2 Ad. & El. 773; *Mason v. Lambert* (1848), 12 Q. B. 795. *As to (2) Refd. Huntley v. Russell* (1819), 13 Q. B. 572; *Pell v. Addison* (1860), 2 F. & F. 291. *Generally, Refd. Martin v. Roe* (1857), 7 E. & B. 237. *Mentd. Raymond v. Fitch* (1835), 4 L. J. Ex. 45; *Jenkins v. Betham* (1855), 15 C. B. 168.

422. —[.]—Where parishioners liable for decoration.]—If there be a special custom in a parish, that the adorning of the inside of the chancel of the church shall be done at the charge of the owners & occupiers of ancient houses, yet they are not bound by such a custom both to ornament & to repair the chancel; for the parson is bound to repair of common right, & the custom does not release him: nor can the owners &

occupiers of mills or racks be rated towards such ornaments; for where a temporal inheritance is to be charged by a particular custom, the custom must be strictly pursued.—*HAWKIN'S CASE* (1698), 5 Mod. Rep. 389; 87 E. R. 723.

*See, now, Ecclesiastical Dilapidations Measure*, 1923 (No. 6), s. 52.

423. *Right to chief seat.*—(1) A possessory title to a pew is sufficient against a mere intruder. The ct. will decide upon the admissibility of a plea according only to the facts stated therein.

(2) The rector is entitled to the chief seat in the chancel, unless it be prescribed for by another.—*SPRY v. FLOOD* (1840), 2 Curt. 353; 4 J. P. 3.

*Annotation:—As to (2) Refd. Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

424. *Right to burial fee.*—*RICH v. BUSHNELL*, No. 416, *ante*.

425. *Control over acts of lay rector—As to making vault—Or fixing tablets.*—*RICH v. BUSHNELL*, No. 416, *ante*.

426. *Removal of ornaments.*—(1) The Ordinary has jurisdiction to authorise by faculty the affixing of military colours as church ornaments to the walls of the chancel of a parish church where it appears that a former rector of the church has approved of their being placed in the chancel.

(2) The rector of a parish church has no legal right without the sanction of a faculty to remove out of the chancel church ornaments such as military colours, placed there without a faculty in a permanent position with the concurrence of a former rector & former churchwardens.

(3) *Semble*: churchwardens of a parish church to which military colours, no longer required for use, have been presented, have vested in them the legal property in the colours for the purpose of safe custody in all cases where the colours are not affixed to the freehold.—*VINCENT v. EYTON*, [1897] P. 1.

*Annotation:—Generally, Refd. Re St. Margaret's, Westminster*, [1905] P. 286.

iii. *The Bells.*

427. *Right to control ringing.*—*Semble*: the churchwardens have no right, against the remonstrances of the minister of the parish, to break into the belfry of the parish church & ring the bells, though there may be some very special occasions in which they would be justified in doing so.—*HARRISON v. FORBES & SISSON* (1860), 25 J. P. 179; 6 Jur. N. S. 1353.

428. —[.]—*REDHEAD v. WAIT*, No. 1053, *ante*.

429. —[.]—*DAUNT v. CROCKER*, No. 1408, *post*.

iv. *The Organ.*

430. *Refusal to allow exercise of vendor's lien—Liability in trover.*—(1) A. agreed to build an organ for B. & to fix it in the parish church of C. for £708 to be paid by certain yearly instalments. The agreement provided that in the event of the organ being completed & erected as aforesaid, & £708 or any part thereof not being paid at the time or times thereinbefore mentioned, then it was thereby declared & agreed that the whole sum or balance, with the interest then due thereon, should become due & payable to W., & might be

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 B. (a) iii.

*h. For parish & town.—Not for dissenters.*—On the re-erection of the Peebles Church, the heritors of the parish & the magistrates of the town agreed that a steeple to be annexed to the church should be raised at the

cost of the town, the bells to be employed for the parish as well as for the town.—*Held*: the bells should be rung for the purposes of the church & for the purposes of the town, but not for the purposes of dissenting congregations.—*PEEBLES MINISTER & KIRK SESSION*

(1875), L. R. 2 Sc. & Div. 460.—*SCOT.*

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 B. (a) i.

*k. Not liable to seizure & sale.*—*BINKS v. TRINITY CHURCH (RECTOR & CHURCHWARDENS)* (1881), 25 L. C. L. J. 259.—*CAN.*



sued for & recovered accordingly; & in the meantime, & until the balance & interest should be paid, W. should have a lien on the organ; & in default of any or either of such payments at the time thereinbefore mentioned, W. might either dispose of or remove the organ as he might think proper:—*Held*: the property in the organ remained in A. until the instalments were paid.

The instalments being unpaid, A. demanded the organ of the vicar of C. & the churchwardens. The vicar kept the church door locked, & refused to allow the organ to be removed, claiming a lien upon it. The churchwardens did nothing:—*Held*: (2) the vicar was liable in trover, & not the churchwardens. *Semble*: (3) the absence of a faculty for the removal of the organ was no answer to plff.'s claim.—*WALKER v. (LYDE (1861), 10 C. B. N. S. 381; 142 E. R. 500.*

(b) *The Churchyard or Parish Cemetery.*

**431. The churchyard—Estate in.]**—(1) Articles having been admitted against churchwardens for making a new footpath across a churchyard, etc., an allegation in reply, pleading facts showing that the churchwardens acted *bonâ fide* & for the benefit of the parishioners, was rejected, as not setting up a legal defence.

(2) As to the churchyard, by the common law the rector has the freehold therein, qualified undoubtedly by the rights of the parishioners, but subject thereto he may bring an action for trespass if his right be unjustly invaded (*DR. LUSHINGTON*).

(3) The churchwardens by virtue of their office are bound to see that the footpaths are kept in proper order & the fences in repair (*DR. LUSHINGTON*).

(4) Individuals may by prescription have a right of way; & parishioners have the same right for the purpose of attending divine worship, vestries, & other fit occasions. The public may also have a right of way which is not to be infringed upon (*DR. LUSHINGTON*).

(5) Neither the rector nor the churchwardens can make a new path without a faculty from the Consistory Ct. In strictness that is by law required. The consent of the rector is necessary by reason of his common law right. The churchyard being consecrated ground, this ct. has cognisance of the matter, & it is the duty of the ct. to protect it against any unauthorised or illegal invasion whatever (*DR. LUSHINGTON*).—*WALTER v. MOUNTAGUE & LAMPRELL (1836), 1 Curt. 253; 163 E. R. 85.*

*Annotations*:—*As to (2) Refd.* *St. Stephen, Walbrook (Rector & Churchwardens) & Grocers Co. v. Sun Fire Office Trustees (1883), Trist. 103.* *As to (3) Refd.* *St. Stephen, Walbrook (Rector & Churchwardens) & Grocers Co. v. Sun Fire Office Trustees (1883), Trist. 103.* *As to (5) Apud.* *Batten v. Gedyne (1889), 41 Ch. D. 507; St. John the Baptist, (Cardiff) (Vicar) v. St. John the Baptist, (Cardiff) (Parishioners), [1898] P. 155.* *Refd.* *St. Mary Abbots, Kensington (Vicar & Churchwardens) v. St. Mary Abbots, Kensington (Inhabitants & Parishioners) (1873), Trist. 17; Re St. George-in-the-East (1876), 1 P. D. 311; St. Stephen, Walbrook (Rector & Churchwardens) & Grocers Co. v. Sun Fire Office Trustees (1883), Trist. 103; St. Nicholas, Leicester (Vicar) v. Langton, [1899] P. 19; Re Bideford Parish, Ex p. Bideford (Rector, etc.), [1900] P. 311. *Generally, Mentd.* *Davey v. Hinde, [1901] P. 95.**

**432. — Rights in regard to—To cut timber—For repair of church.]**—*BELLAMIE v. —, No. 3710, post.*

**433. — — — — — For repair of parsonage or chancel.]**—A rector may cut down timber for the

repairs of the parsonage house, or chancel, but not for any common purpose.

He is also entitled to votes for repairing barns & outhouses belonging to the parsonage (*LORD HARDWICKE, (C.).—STRACHY v. FRANCIS (1741), 2 Atk. 217; 26 E. R. 534.*

*Annotations*:—*Dbtd.* *Greenlade v. Darby (1868), L. R. 3 Q. B. 421.* *Refd.* *Marlborough v. St. John (1852), 5 De G. & Sm. 174.*

**434. — — — Control over—Footpaths.]**—*WALTER v. MOUNTAGUE & LAMPRELL, No. 431, ante.*

**435. — — — — — Inscriptions.]**—(1) Inscriptions proposed to be placed on the tombstones in a parish churchyard are in the first instance subject to the control of the incumbent of the parish, but any decision come to by him may be reviewed by the Ordinary on proper application being made to the ecclesiastical ct. of the diocese.

(2) The solrs. in ecclesiastical suits are, as officers of the ct., personally responsible for & bound to pay into the registry the ct. fees incurred by them on behalf of their respective clients; but the solr. having so paid the fees is entitled, if his client is successful in the suit, to obtain an order on the unsuccessful party to recoup him for the payments made by him.—*PEARSON v. STEAD, STEAD v. PEARSON, [1903] P. 66; 18 T. L. R. 331.*

**436. — — — Liabilities in respect of—Repair of fences.]**—The court refused to grant a rule *nisi* for a new trial after a verdict for deft. [an incumbent], upon an indictment for non-repair of a churchyard fence which was moved, on the ground of the verdict being against evidence.

It is very clear that you may indict deft. again if the fences have continued out of repair since the last indictment (*LORD ELLENBOROUGH, (C.J.).—R. v. REYNELL (1805), 6 East, 315; 2 Smith, K. B. 406; 102 E. R. 1307.*

*Annotations*:—*Mentd.* *R. v. Mann (1815), 4 M. & S. 337; R. v. Botfield (1854), 18 J. P. Jo. 741.*

**437. Parish cemetery.—Nature of occupation.]**—The rector of a parish has a beneficial occupation of a parish cemetery, & is liable to be rated on the profit accruing to him from burial & other fees, such profit being incidental to his occupation, not to his office.—*WINSTANLEY v. NORTH MANCHESTER OVERSEERS, [1910] A. C. 7; 79 L. J. K. B. 95; 101 L. T. 616; 74 J. P. 49; 26 T. L. R. 90; 54 Sol. Jo. 80; 8 L. G. R. 75, 11. L.; affg. S. C. sub nom. NORTH MANCHESTER OVERSEERS v. WINSTANLEY, [1908] 1 K. B. 835.*

*Annotations*:—*Mentd.* *West Kent Main Sewerage Board v. Dartford Union Assmt. Com. (1911), 104 L. T. 357; Lord Advocate v. Walker Trustees, [1912] A. C. 95; Liverpool Corp'n v. Chorley Union Assmt. Com. & Withnell Overseers, [1913] A. C. 197; Re New Parish of Haigh with Aspull, [1919] P. 143; Poplar Assmt. Com. v. Roberts, [1922] 2 A. C. 93; Harper v. Hedges, [1923] 2 K. B. 314.*

**Burial fees.]**—*See Part VII., Sect. 10, sub-sect. 1, D., post.*

(c) *The Parsonage.*

*See Part VII., Sect. 6, sub-sect. 2, post.*

(d) *Church Funds.*

**438. Control of—Alms collected in chapel in parish.]**—(1) A chapel being shortly before 1735 built by private subscription, & the subscribers agreeing, out of the pew rents, to pay the rector of the parish a yearly stipend for performing divine service, a licence was obtained from the bishop to the rector & his successors, who, from time to time, performed therein parochial duties, but there

PART III. SECT. 7, SUB-SECT. 2.—  
B. (d).

1. *Right to participate—Not affected by salary paid to curate.]*—The

income arising from an endowment fund in connection with the Church of England was payable to a certain class of clergyman whose incomes were not in excess of

salary paid to a curate associated with pltf. in the work of his parish could not be accounted part of pltf.'s income for the purpose of excluding him from participation in the income arising from



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was no proof of consecration, nor of any composition, between the patron, incumbent, & ordinary; such chapel is merely proprietary, & the minister, nominated by the rector of the parish & licensed by the bishop, cannot perform parochial duties therein, nor distribute the alms collected at the Lord's supper.

(2) Proprietary chapels are anomalies unknown to the constitution, & to the ecclesiastical establishments of the Church of England, & can possess no parochial rights.

(3) The performance of baptisms, marriages, & burials, in a chapel existing from time immemorial, might possibly be presumptive evidence of consecration, & of a composition: *ulter* as to a chapel, the origin of which is ascertained.

(4) Alms, collected in chapels as well as in parish churches during the reading of the offertory, are by the direction of the rubric at the disposal of the incumbent of the parish & the churchwardens thereof, & not of the minister or proprietors of the chapel.—*MOYSEY v. HILLCOAT* (1828), 2 Hag. Eccl. 30; 162 E. R. 775.

**Annotations:—***As to (1) Held.* Down & Connor & Dromore, Lord Bp. v. Miller, Same v. Potter (1861), 5 L. T. 30. *As to (2) Held.* Williams v. Brown (1835), 1 Curt. 53. *As to (3) Folia.* A. G. v. St. Cross Hospital (1856), 8 De G. M. & G. 38. *As to (4) Folia.* Dowdall v. Hewitt (1864), 10 L. T. 823. *Apid.* Liddell v. Hainsford (1868), 38 L. J. Eccl. 15. *Generally, Mentd.* Trower v. Hurst (1847), 5 Notes of Cases 160, 382; Richards v. Fincher (1874), L. R. 4 A. & E. 255.

**439. — Alms collected in chapel in district not constituted separate parish.]—**An unconsecrated chapel was locally situated within the district of a chapel of ease with a district chapelry belonging thereto:—*Held:* the incumbents & churchwardens of the chapel of ease, notwithstanding that the incumbent had sole & exclusive cure of souls within the district chapelry, were not entitled to claim the sacramental alms collected at such unconsecrated chapel.—*LIDDELL v. RAINSFORD* (1868), 38 L. J. Eccl. 15; 33 J. P. 407.

**Annotation:—***Held.* Richards v. Fincher (1873), L. R. 4 A. & E. 107.

**440. — Fund collected in church for specific charity—Charity carried on by incumbent.]—***It. v. O'NEILL, Ex p. OLIVER* (1807), 31 J. P. Jo. 742.

**Annotation:—***Consd.* Howell v. Holdroyd, [1897] P. 198.

**441. — Offertory at Holy Communion.]—**(1) Money given at the offertory in the communion office must still be disposed of, as directed by the rubric, to such pious & charitable uses as the minister & churchwardens shall think fit; or, in case of disagreement, as the ordinary shall appoint. (2) An announcement of the objects beforehand is not obligatory, but is not unlawful. Collections in church, during morning or evening prayer, may lawfully be made & announced, at the discretion of the incumbent. But the allocation of money so collected is now a matter for the joint decision of the incumbent & the parochial church council. (3) It is not an ecclesiastical offence in the case of the Holy Communion being combined with, or following, another service, to take two collections, one at the offertory, from the same gathering. (4) Churchwardens never had, & parochial church councils have not now, any voice in the disposal of money collected at extra-legal services or meetings held under the authority of the incumbent elsewhere than in church, unless such money has been allocated to "church

purposes" within Parochial Church Councils (Powers) Measures, 1921, [No. 1], s. 4 (1), (ii.) (a). Money collected at such services or meetings, unless so allocated, must be applied to the objects (if any) announced by the incumbent: *Semble:* (5) in a criminal suit in the Arches Ct. the arts. exhibited should state *seriatim* the particular laws alleged to have been infringed. Such arts. should also be signed by counsel, the ancient practice of the ct., which required the signature of an advocate, being now satisfied by the signature of a barrister.—*MARSON v. UNMACK*, [1923] P. 163; 30 T. L. R. 555.

**442. — Collections at extra legal services & meetings.]—***MARSON v. UNMACK*, No. 441, *ante*.

**By parochial church council.]—***See, now,* Parochial Church Councils (Powers) Measure, 1921 [No. 1], sects. 4 (1), 7; No. 441, *ante*.

**443. Gift for substantial repairs of church—Discretion in application.]—**(1) A church rate carried by a majority of one, was, *inter alia*, questioned on the alleged ground that the vicar & occupiers of the church lands were not entitled to vote, as they were not liable to pay church rate:—*Held:* the vicar & occupiers of church lands were entitled to vote, & the opponent to the rate had failed in his objections & the rate would be pronounced for with costs.

(2) It had been decided to undertake certain repairs to a church, & the vicar was given by an anonymous donor a sum of money towards the "substantial repairs":—*Held:* the parishioners had no right to direct the particular application of such money; the money was deposited with the vicar for a special purpose & was clearly intended to be applied at the vicar's discretion, & that discretion might be exercised by him in replacing stone mullions, etc., which were decayed.

(3) For an omission to rate persons liable to be rated to the church rate to render that unequal, it must be shown that in consequence thereof, an unjust burden, that can be appreciated, has been thrown on the complainant.

(4) A parishioner ought to have an opportunity of comparing the church rate with the poor rate book, when the former does not contain a specification of the properties, in order to satisfy himself that he is fairly charged with reference to other persons assessed (*SIR HERBERT JENNER FUST*).—*HANSON & KNOTT v. CAMPKIN* (1851), 2 Rob. Eccl. 370.

**C. Control of Ministrations in Parish.**

**Duty to provide.]—***See* Part VI., Sect. 1, sub-sect. 2, *post*.

**Right to nominate curate to chapel of ease.]—***See* Part V., Sect. 4, sub-sect. 1, B., *post*.

**444. Stranger officiating—Whether permission of incumbent necessary—Preaching.]—***TURTON v. REIGNOLDS* (1700), 12 Mod. Rep. 433; Holt, K. B. 527; 88 E. R. 1431; *sub nom.* ANON., 12 Mod. Rep. 420.

**Annotation:—***Held.* Down & Connor & Dromore, Lord Bp. v. Miller, Same v. Potter (1861), 5 L. T. 30.

**445. — Where stranger licenced by ordinary.]—***PORTLAND (DUKE) v. BINGHAM*, No. 1301, *post*.

**446. — — — — —.]—**(1) A bishop cannot consecrate a chapel, or authorise a person to preach in it, without the consent of the incumbent of the parish. (2) The office of the judge allowed to be promoted, not upon the merits of a case, but

the fund, he being otherwise entitled thereto.—*RITCHIE v. NOVA SCOTIA DIOCESAN SYNOD* (1889), 21 N. S. R. 309; 17 S. C. R. 705.—*CAN.*

**PART III. SECT. 7, SUB-SECT. 2.—C. m. Rector—Instituted but not inducted—Right to preside at meetings.]—**Where a priest of the Church of

England, in holy orders, has been nominated under 32 Vict. c. 6, to fill the office of rector of a parish, & has been duly presented to the bishop &

from the nature of the suit.—*CARR v. MARSH* (1814), 2 Phillim. 198.

*Annotations* :—*As to* (1) *Feld*. *Freeland v. Neale* (1848), 6 Notes of Cases 252. *Reid*. *Barnes v. Shore* (1846), 8 Q. B. 640; *Down & Connor & Dromore, Lord Bp. v. Miller, Same v. Potter* (1861), 5 L. T. 30. *As to* (2) *Reid*. *Williams v. Brown* (1835), 1 Curt. 53; *R. v. Chichester, Bp.* (1859), 3 E. & E. 209; *R. v. Oxford, Bp.* (1879), 4 Q. B. D. 525.

447. ————.]—*WILLIAMS v. BROWN*, No. 1937, *post*.

448. ———— *Permission given by late incumbent.*]—The bishop of a diocese granted a licence to a clerk in holy orders to officiate as minister in an unconsecrated proprietary chapel in a parish within the diocese; the licence was granted with the consent of the incumbent of the parish. Afterwards the bishop died, & the incumbent of the parish died, & the succeeding incumbent forbade the clerk to minister in the parish. The clerk insisted on his right to officiate in the said chapel, & the succeeding incumbent promoted criminal proceedings against the clerk under Church Discipline Act, 1840 (c. 86), & prayed that he should be monished to abstain from officiating in the chapel:—*Held*: (1) the licence was invalid as against the promotor, & did not, under the circumstances, authorise deft. to officiate in the chapel; (2) that the clerk could not be considered as a curate, & was not entitled to the benefit of Pluralities Act, 1838 (c. 106), s. 95.—*RICHARDS v. FINCHER* (1874), 1 L. R. 4 A. & E. 255; 43 L. J. Eccl. 21; 39 J. P. 116.

449. ———— *Burial.*]—*WOOD v. HEADINGLEY-CUM-BURLEY BURIAL BOARD*, No. 396, *ante*.

——— *Permission given by incumbent—Licence given by bishop—Effect of death of incumbent.*]—*See* No. 448, *ante*.

——— *Without permission of incumbent—As offence.*]—*See* Nos. 1389, 1494, *post*.

450. *Election of lecturer—Whether consent of incumbent necessary—Apart from custom to elect without consent.*]—The ct. will not grant a *mandamus* to a bishop to licence a lecturer, without the consent of the rector, where such lecturer is supported by voluntary contributions, unless an immemorial custom to elect without such consent be shown.—*R. v. LONDON (Bp.)* (1786), 1 Term Rep. 331; 99 E. R. 1123.

*Annotations* :—*Reid*. *R. v. Exeter, Bp.* (1802), 2 East, 462; *R. v. Oxford, Bp.* (1806), 3 Smith, K. B. 341; *R. v. London, Bp.* (1811), 13 East, 419.

451. ————.]—*Mandamus* to the rector to certify to the bishop the election of a lecturer refused; there being no immemorial custom for the lecturer to use the pulpit without the rector's consent, & the lecturer being paid out of the poor rates.—*R. v. FIELD* (1791), 4 Term Rep. 125; 100 E. R. 930.

*Annotations* :—*Feld*. *R. v. Exeter, Bp.* (1802), 2 East, 462. *Reid*. *R. v. London, Bp.* (1811), 13 East, 419.

452. ————.]—Where no immemorial custom appeared to appoint a lecturer in a parish church, & on the contrary it appeared that the lectureship was founded in 1658, when the episcopal constitution was suspended, & consequently there could not be the joint assent of the bishop, the rector, & the vicar to the endowment, a *mandamus* to the bishop to licence a lecturer without the assent of the vicar was denied; though it appeared that the lectureship was originally endowed by the rector with an annual stipend payable out of the impropriate rectory, & that several lecturers had from time to time been accepted by the bishop

& vicar for the time being.—*R. v. EXETER (Bp.)* (1802), 2 East, 462; 102 E. R. 445.

*Annotation* :—*Reid*. *R. v. London, Bp.* (1811), 13 East, 419.

453. ————.]—No person can be a lecturer [in a parish church] although elected by the parishioners without the rector's consent, unless there be an immemorial custom to elect without his consent.—*CLINTON v. HATCHARD* (1822), 1 Add. 96.

454. *Use of pulpit by lecturer—Election of lecturer governed by statute.*]—*R. v. KING* (1859), 23 J. P. Jo. 420; *sub nom. Re KING*, 33 L. T. O. S. 222.

455. *Erection of chapel—Whether consent of incumbent necessary.*]—*PORTLAND (DUKE) v. BINGHAM*, No. 1301, *post*.

456. ————.]—Under the general law the erection of a new public chapel, properly so called, requires the joint consent of patron, incumbent, & ordinary, & generally, a compensation to future incumbents. The whole cure of souls, & all the emoluments of a parish, belong under the original endowment, to the incumbent & his successors, & not in the existing incumbent by institution & induction.—*BLISS v. WOODS* (1831), 3 Hag. Ecc. 486.

*Annotations* :—*Reid*. *Williams v. Brown* (1835), 1 Curt. 53; *Down & Connor & Dromore, Lord Bp. v. Miller, Same v. Potter* (1861), 5 L. T. 30; *MacAllister v. Rochester, Bp.* (1880), 5 C. P. D. 194.

457. *Consecration of chapel—Whether consent of incumbent necessary.*]—*CARR v. MARSH*, No. 446, *ante*.

*Proprietary chapel—Application for licence for marriages—Without concurrence of incumbent of parish.*]—*See* No. 151, *ante*.

*See, also*, No. 438, *ante*.

——— *Officiating in workhouse chapel—Whether consent of incumbent necessary.*]—*See* No. 4064, *post*.

458. *Right to perform—Marriage of inhabitants of district parish.*]—*FITZGERALD v. CHAMPNEYS*, No. 381, *ante*.

#### SUB-SECT. 3.—LAY RECTORS.

459. *Nature of appropriation.*]—*PORTLAND (DUKE) v. BINGHAM*, No. 1301, *post*.

460. *Whether having cure of souls.*]—*PORTLAND (DUKE) v. BINGHAM*, No. 1301, *post*.

461. *Right to nominate vicar—Covenant to "find."*]—*MALLET v. TRIGHT*, No. 1938, *post*.

462. *Duty to maintain priest—Where no vicarage endowed.*]—Impropriator of the small tithes bound to maintain a priest, where there is no vicarage endowed, & in such case the King may assign to the curate such proportion of the small tithes as he thinks fit. Otherwise where there is an endowment, though never so small.—*BONSEY v. LEE* (1684), 1 Vern. 247; 23 E. R. 445.

463. ———— *Where vicarage endowed—Though endowment small.*]—*BONSEY v. LEE*, No. 462, *ante*.

464. *Nature of estate in chancel or church.*]—*RICH v. BUSHNELL*, No. 416, *ante*.

465. ————.]—(1) The ecclesiastical ct. having full jurisdiction to entertain an action & grant relief in respect of the interference with a churchward—such as a pathway within a parish churchyard—forming an approach for the parishioners to their parish church, the High Ct. will not exercise jurisdiction in respect of such an interference at the suit of a parishioner.

instituted, & a mandate has issued to induct him, & he has actually entered on the duties of rector of such parish,

he is the legal rector, though he may not have been inducted, & is entitled by law to preside at the meeting for

election of churchwardens & vestrymen.—*Re TAYLOR, Ex p. CHANDLER* (1873), 1 Pug. 354.—*CAN.*

**Sect. 7.—Constitution of the Church into parishes : Sub-sects. 3 & 4, A., B. & C. (a).]**

The incumbent & churchwardens of a parish church removed, but without having obtained a faculty, or the consent of the justices under Church Building Act, 1819 (c. 134), s. 39, certain ancient steps leading down from the churchyard to the adjoining high road. These steps had been included in the churchyard, being recessed within the churchyard wall, & they had formed one of the approaches to a path in the churchyard leading to the church door. An action was thereupon brought by four parishioners against the incumbent & churchwardens for a mandatory injunction to compel the restoration of the steps. One of these plffs. was also the lay rector of the parish, but in fact sued only as a parishioner :—*Held* : the ct. would not exercise jurisdiction by granting a mandatory injunction, on the grounds : (a) that the steps constituted a churchway, the right to use which was solely in the parishioners, & not a footway common to the public, & the ct. would not exercise jurisdiction in respect of the interference with a churchway within the churchyard at the suit of a parishioner, a jurisdiction which was vested in the ecclesiastical ct. ; & (b) that, even if a mandatory injunction were granted, it might be rendered nugatory by a faculty confirming the acts of the incumbent & churchwardens.

(2) The lay rector of a parish, in respect of his freehold property in the parish church & churchyard, can maintain an action in the High Ct. against a trespasser.

(3) A person not resident in a parish but owning property within it, in respect of which he pays parish rates, is a "parishioner" & entitled to sue as such.—*BATTEN v. GEDYE* (1880), 41 Ch. D. 507 ; 58 L. J. Ch. 549 ; 60 L. T. 802 ; 53 J. P. 501 ; 37 W. R. 540 ; 5 T. L. R. 415.

*Annotation* :—*Refd.* *Kensit v. St. Ethelburga, Bishopsgate Within*, [1900] P. 80.

**466. Rights as to chancel—Right to chief seat.]**

—*HALL v. ELLIS* (1809), Noy. 133 ; 74 E. R. 1096.

*Annotation* :—*Refd.* *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

**467. ——— Extends to lessee.]**—*HALL v. ELLIS* (1809), Noy. 133 ; 74 E. R. 1096.

*Annotation* :—*Mentd.* *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

**468. ——— Whether confined to single seat.]**

—*STILEMAN-GIBBARD v. WILKINSON*, No. 3290, *post*.

**469. ——— Whether right to grant a part.]**—A grant of part of the chancel of a church by a lay impropriator to A., his heirs & assigns, is not valid in law ; & therefore such grantee, or those claiming under him, cannot maintain trespass for pulling down his or their pews, there erected.—*CLIFFORD v. WICKS* (1818), 1 B. & Ald. 498 ; 106 E. R. 183.

*Annotations* :—*Refd.* *Griffin v. Dighton* (1864), 5 B. & S. 93 ; *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

**470. ——— As to vaults—& fixing tablets.]**

—*RICH v. BUSHNELL*, No. 410, *ante*.

**471. Liability to repair chancel.]**—*HALL v. ELLIS* (1809), Noy. 133 ; 74 E. R. 1096.

*Annotation* :—*Refd.* *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

**472. ———.]**—*DAVIES' CASE* (1820), 2 Roll. Rep. 211 ; 81 E. R. 757.

*Annotation* :—*Refd.* *Morley v. Leacroft*, [1896] P. 92.

*See, note, Ecclesiastical Dilapidations Measure, 1923 (No. 6), s. 52.*

**473. ——— Jurisdiction of ecclesiastical courts in respect of.]**—The arts. in a criminal suit promoted by the churchwardens of a parish against the lay rector of a parish church, charged that the chancel of the church was in a very dilapidated

condition, & that resp., though legally bound to repair it, had for four years refused & neglected to do so. On resp. giving an affirmative issue the arts. & submitting to judgment, the ordinal pronounced that resp. had offended against the ecclesiastical law, & admonished him to do the repairs required.—*MORLEY v. LEACROFT*, [1896] P. 92.

**474. ———.]**—The ecclesiastical cts. have no jurisdiction to entertain a criminal suit against a lay rector who has neglected to perform his duty of repairing the chancel of the church of which he is the rector, unless the chancel was out of repair at the time of the institution of the suit.—*NEVILL v. KIRBY*, [1898] P. 100.

**475. Liability to repair body of church.]**—*DAVIES' CASE* (1820), 2 Roll. Rep. 211 ; 81 E. R. 757.

*Annotation* :—*Refd.* *Morley v. Leacroft*, [1896] P. 92.

**476. Rights in churchyard—As against incumbent.]**—(1) An impropriate rectory, after its surrender to the Crown on the dissolution of monasteries, was granted by Queen Elizabeth to lay impropriators. Up to 1826 the impropriators appointed a curate with a yearly stipend of £31 10s. ; in that year the curacy was augmented out of Queen Anne's Bounty, & the then lay impropriator charged the rectory, glebe land, tithes, etc., with the yearly rentcharge of £31 10s., payable to the curate for the time being : the curacy then became a perpetual benefice by force of Queen Anne's Bounty Act, 1714 (c. 10). Pltf. was duly nominated, licensed & instituted to the benefice in 1852. From the time of the grant of Elizabeth the lay impropriators had had exclusive possession of all the tithes & glebe lands ; & during living memory these lands had been let to tenants together with the right of depasturing the churchyard with sheep, & the tenants had exercised this right without interruption till 1806, when pltf. gave deft., the present tenant, notice not to trespass, & then brought an action. On a case stating the above facts, the ct. having power to draw inferences of fact :—*Held* : the action was not maintainable : for that though pltf. had possession of the churchyard for spiritual purposes, it was not such a possession as excluded the lay impropriator, or his tenants, in whom the soil & herbage were still vested.

The freehold was vested in the rector & he was entitled to the land, including the grass, herbage & everything else, as fully as the original owner had been ; but as the land had been set apart by consecration for the church & churchyard, the right which the rector as the owner of the freehold had in the profits was proportionately diminished, because he could not desecrate it, or use it for any purpose which was inconsistent with the object of its consecration (*BLACKBURN, J.*).

(2) Historical origin of vicarages discussed by *BLACKBURN, J.*—*GREENSLADE v. DARBY* (1868), L. R. 3 Q. B. 421 ; 9 B. & S. 428 ; 37 L. J. Q. B. 137 ; 18 L. T. 463 ; 32 J. P. 437 ; 16 W. R. 898.

*Annotations* :—*As to* (1) *Connd. Winstanley v. North Manchester Overseers*, [1910] A. C. 7. *Refd.* *Wallis v. Birks* (1870), L. R. 5 C. P. 222 ; *Fowke v. Berington*, [1914] 2 Ch. 308.

*See, also, No. 478, post.*

**477. ——— As against trespasser.]**—*BATTEN v. GEDYE*, No. 405, *ante*.

**478. Action against incumbent—Claiming freehold of chancel & churchyard—What interrogatories allowed.]**—In an action by the lay rector of a parish claiming the freehold in the chancel & churchyard against the vicar of the parish & his churchwardens, interrogatories were disallowed

which went to inquire into the evidence of plff.'s title.—*GARLAND v. ORAM* (1890), 55 J. P. 374; 7 T. L. R. 80, D. C.

#### SUB-SECT. 4.—THE VESTRY.

##### A. Constitution.

**479. Qualification of vestryman—Tenement owner—Assessed to poor rate instead of occupier.**—The effect of Vestries Acts, 1818 (c. 69), & 1819 (c. 85), although there are no privative words, is to make rating to the poor rate the exclusive qualification for voting in all parish vestries.

Where, therefore, Small Tenements Act, 1850 (c. 99), has been adopted in a parish, the occupiers of small tenements, not being rated to the poor rate, although still liable to the church rate, are not entitled to vote at a vestry held for the purpose of making a church rate.

Vestries Act, 1818 (c. 69), s. 3, gave to persons assessed to the last poor rate one vote for every £25 value, "so, nevertheless, that no inhabitant shall be entitled to give more than six votes"; by Small Tenements Act, 1850 (c. 99), s. 6, the owner of a small tenement, rated under the Act "shall have the same right to vote in vestry as if he were an occupier duly rated in respect of the same tenement":—*Held*: the owner of more than six small tenements, rated under the latter Act, was entitled to no more than six votes by force of the proviso in the former Act.—*RICHARDSON v. GLADWIN* (1858), E. B. & E. 138; 27 L. J. M. C. 192; 31 L. T. O. S. 97; 22 J. P. 688; 4 Jur. N. S. 377; 6 W. R. 473; 120 E. R. 460. *Annotation*:—*Consd.* *Lambe & Clarke v. Gileves* (1862), 26 J. P. 327.

**480. — Occupier—Where tenement owner rated to poor rate.**—*RICHARDSON v. GLADWIN*, No. 479, *ante*.

**481. — Residence — Temporary absence with intention to return.**—Temporary absence with an intention & right to return does not prevent a qualification for vestryman being obtained by residence during twelve months.—*STANFORD v. WILLIAMS* (1899), 80 L. T. 490; 15 T. L. R. 316; 43 Sol. Jo. 419, D. C. *Annotation*:—*Reid.* *R. v. Townson, Ex p. Broderip* (1908), 72 J. P. 368.

**482. — Value of rated property—Part of property sublet.**—Where a person is rated as the occupier of premises of the requisite value for qualifying for the office of vestryman, he is not disqualified from election to & acting in such office, merely because his personal occupation is reduced below the qualifying value by reason of his having sublet portions of the premises.—*HILTON v. HAYNES* (1894), 11 T. L. R. 8; 39 Sol. Jo. 12; 15 R. 41.

##### B. Functions.

*See, now*, Local Government Act, 1894 (c. 73), ss. 6 (1), 19 (4); London Government Act, 1899 (c. 14), s. 23 (1); Parochial Church Councils (Powers) Measure, 1921 (No. 1).

**483. Former duties.**—The vestry being the body mentioned in Burial Act, 1857 (c. 81), s. 4, is beyond all doubt a body which enjoyed powers & owed duties divisible into two classes, namely those which do, & those which do not, relate to the affairs of the church (*BUCKLEY, L.J.*)—*WEST-*

*MINSTER CORPN. v. ST. GEORGE, HANOVER SQUARE* (RECTOR & CHURCHWARDENS), [1909] 1 Ch. 592; 78 L. J. Ch. 581; 100 L. T. 546; 73 J. P. 259; 25 T. L. R. 393; 53 Sol. Jo. 357; 7 L. G. R. 774, C. A.; *reversd.* on other grounds, *sub nom.* *ST. GEORGE, HANOVER SQUARE* (RECTOR & CHURCHWARDENS) *v.* *WESTMINSTER CORPN.*, [1910] A. C. 225, H. L.

*Annotation*:—*Mentd.* *Re Hyde Park Place Charity* (1911), 80 L. J. Ch. 593.

**Duties transferred to borough & district councils.**—*See* LOCAL GOVERNMENT; METROPOLIS.

**484. Powers—Alteration of church ornaments.**—

*SHERFIELD'S CASE* (1632), 3 State Tr. 519.

*Annotation*:—*Reid.* *Faulkner v. Litchfield* (1815), 3 Notes of Cases, 511.

**485. — Election of churchwarden—On release of existing churchwarden.**—I know of no authority to the effect that because a vestry first fixes upon one person & subsequently sees some good & reasonable cause . . . to excuse him, it may not rescind that election & proceed to a new election. Nor do I know of any authority that because the vestry has, even for some bad reason, excused the individual first fixed upon, a proper person, subsequently chosen at the same meeting, is not duly elected nor liable to serve (*SIR JOHN NICHOLL*).—*BIRNIE v. WELLER & ELLIOTT* (1831), 3 Hag. Ecc. 474; 162 E. R. 1231.

**486. — Rescission of election.**—*BIRNIE v. WELLER & ELLIOTT*, No. 485, *ante*.

**487. — As to church rates—Sole authority to grant.**—Where churchwardens duly summoned a meeting of parishioners in vestry, for the purpose of making a rate for the repairs of the parish church, & for the expenses incidental to the execution of their office for the remainder of the year of their office, & the parishioners assembled accordingly, but refused to make or grant a rate; & the churchwardens thereupon made one of their own authority:—*Held*: (1) such rate, so made, was illegal, the churchwardens had no such authority; (2) the parishioners in vestry were the only parties legally authorised to grant or withhold a church rate.—*VELEY v. BURDER* (1841), 12 Ad. & El. 265; Arn. & H. 194; 10 L. J. Ex. 532; 5 J. P. 401; 5 Jur. 1013; 113 E. R. 813, Ex. Ch.; *affy.* *S. C. sub nom.* *BURDER v. VELEY* (1840), 12 Ad. & El. 233; *previous proceedings, sub nom.* *VELEY & JOSLIN v. BURDER* (1837), 1 Curt. 372.

*Annotations*:—*As to* (1) *Distd.* *Veley & Joslin v. Gooding* (1813), 3 Curt. 253; *Gooding v. Veley* (1853), 4 H. L. Cas. 679.

*Reid.* *Still* & *John v. Falfrey* (1841), 2 Curt. 902. *As to* (2) *Consd.* *Gooding v. Veley* (1841), 4 H. L. Cas. 679. *Generally, Reid.* *Seale v. Veley* (1841), 1 Notes of Cases, 170; *Varty & Mopsey v. Nunn* (1841), 2 Curt. 877; *R. v. Thomas* (1842), 3 Q. B. 589; *Francis v. Steward* (1844), 5 Q. B. 984; *Rose v. Watson* (1894), 63 L. J. M. C. 108.

*Mentd.* *Ex p. Story* (1852), 8 Exch. 195; *Westerton v. Liddell* (1857), Moore's Special Report; *White v. Steele* (1862), 12 C. B. N. S. 383; *London Corpn. v. Cox* (1867), L. R. 2 H. L. 239; *Mackonochie v. Penzance* (1881), 6 App. Cas. 424.

*See, generally*, Part VII., Sect. 14, *post*.

**Opposition to faculty—Whether ground for refusing.**—*See* Nos. 1763, 1761, 3091, 3096, *post*.

##### C. Meetings.

###### (a) Summoning Meetings.

**488. Who may summon—Whether civil court will take judicial notice.**—*Mandamus* to churchwardens to call a vestry to elect churchwardens refused.

#### PART III. SECT. 7, SUB-SECT. 4.—A.

**n. Qualification of vestryman—Pewholder—By purchase or lease.**—Under 3 Vict. c. 74, ss. 2, 3, 6, a vestry capable of electing churchwardens

must be composed of persons holding pews in the church by purchase or lease, or holding sittings therein by leave from the churchwardens. The churchwardens of a church where the

sittings were wholly free, were therefore held not liable on a contract made by their predecessors for building the church.—*ANDERSON v. WORTERS* (1882), 32 C. P. 659.—*CAN.*

**Sect. 7.—Constitution of the Church into parishes:**  
**Sub-sects. 3 & 4, A., B. & C. (a).]**

The incumbent & churchwardens of a parish church removed, but without having obtained a faculty, or the consent of the justices under Church Building Act, 1819 (c. 134), s. 39, certain ancient steps leading down from the churchyard to the adjoining high road. These steps had been included in the churchyard, being recessed within the churchyard wall, & they had formed one of the approaches to a path in the churchyard leading to the church door. An action was thereupon brought by four parishioners against the incumbent & churchwardens for a mandatory injunction to compel the restoration of the steps. One of these plffs. was also the lay rector of the parish, but in fact sued only as a parishioner:—*Held*: the ct. would not exercise jurisdiction by granting a mandatory injunction, on the grounds: (a) that the steps constituted a churchway, the right to use which was solely in the parishioners, & not a footway common to the public, & the ct. would not exercise jurisdiction in respect of the interference with a churchway within the churchyard at the suit of a parishioner, a jurisdiction which was vested in the ecclesiastical ct.; & (b) that, even if a mandatory injunction were granted, it might be rendered nugatory by a faculty confirming the acts of the incumbent & churchwardens.

(2) The lay rector of a parish, in respect of his freehold property in the parish church & churchyard, can maintain an action in the High Ct. against a trespasser.

(3) A person not resident in a parish but owning property within it, in respect of which he pays parish rates, is a "parishioner" & entitled to sue as such.—*BATTEN v. GEDYE* (1889), 41 Ch. D. 507; 58 L. J. Ch. 549; 60 L. T. 802; 53 J. P. 501; 37 W. R. 540; 5 T. L. R. 415.

*Annotation*:—*Reid*. *Kendall v. St. Ethelburga, Bishopsgate Within*, [1900] 1 P. 80.

**466. Rights as to chancel—Right to chief seat.**—*HALL v. ELLIS* (1899), Noy. 133; 74 E. R. 1096.

*Annotation*:—*Reid*. *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

**467. ——— Extends to lessee.**—*HALL v. ELLIS* (1899), Noy. 133; 74 E. R. 1096.

*Annotation*:—*Mentl*. *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

**468. ——— Whether confined to single seat.**—*STILEMAN-GIBBARD v. WILKINSON*, No. 3290, *post*.

**469. ——— Whether right to grant a part.**—A grant of part of the chancel of a church by a lay impropriator to A., his heirs & assigns, is not valid in law; & therefore such grantee, or those claiming under him, cannot maintain trespass for pulling down his or their pews, there erected.—*CLIFFORD v. WICKS* (1818), 1 B. & Ald. 498; 106 E. R. 183.

*Annotations*:—*Reid*. *Griffin v. Dighton* (1864), 5 B. & S. 93; *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

**470. ——— As to vaults—& fixing tablets.**—*RICH v. BUSHNELL*, No. 416, *ante*.

**471. Liability to repair chancel.**—*HALL v. ELLIS* (1899), Noy. 133; 74 E. R. 1096.

*Annotation*:—*Reid*. *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

**472. ———**—*DAVIES' CASE* (1620), 2 Roll. Rep. 211; 81 E. R. 757.

*Annotation*:—*Reid*. *Morley v. Leacroft*, [1896] P. 92.

*See, note*, Ecclesiastical Dilapidations Measure, 1923 (No. 6), s. 52.

**473. ——— Jurisdiction of ecclesiastical courts in respect of.**—The arts. in a criminal suit promoted by the churchwardens of a parish against the lay rector of a parish church, charged that the chancel of the church was in a very dilapidated

condition, & that resp., though legally bound to repair it, had for four years refused & neglected to do so. On resp. giving an affirmative issue to the arts. & submitting to judgment, the ordinary pronounced that resp. had offended against the ecclesiastical law, & admonished him to do the repairs required.—*MORLEY v. LEACROFT*, [1896] P. 92.

**474. ———**—*—*—*—*—The ecclesiastical cts. have no jurisdiction to entertain a criminal suit against a lay rector who has neglected to perform his duty of repairing the chancel of the church of which he is the rector, unless the chancel was out of repair at the time of the institution of the suit.—*NEVILLE v. KIRBY*, [1898] P. 160.

**475. Liability to repair body of church.**—*DAVIES' CASE* (1620), 2 Roll. Rep. 211; 81 E. R. 757.

*Annotation*:—*Reid*. *Morley v. Leacroft*, [1896] P. 92.

**476. Rights in churchyard—As against incumbent.**—(1) An impropriate rectory, after its surrender to the Crown on the dissolution of monasteries, was granted by Queen Elizabeth to lay impropriators. Up to 1826 the impropriators appointed a curate with a yearly stipend of £31 10s.; in that year the curacy was augmented out of Queen Anne's Bounty, & the then lay impropriator charged the rectory, glebe land, tithes, etc., with the yearly rentcharge of £31 10s., payable to the curate for the time being: the curacy then became a perpetual benefice by force of Queen Anne's Bounty Act, 1714 (c. 10). Pltf. was duly nominated, licensed & instituted to the benefice in 1852. From the time of the grant of Elizabeth the lay impropriators had had exclusive possession of all the tithes & glebe lands; & during living memory these lands had been let to tenants together with the right of depasturing the churchyard with sheep, & the tenants had exercised this right without interruption till 1866, when pltf. gave debt., the present tenant, notice not to trespass, & then brought an action. On a case stating the above facts, the ct. having power to draw inferences of fact:—*Held*: the action was not maintainable: for that though pltf. had possession of the churchyard for spiritual purposes, it was not such a possession as excluded the lay impropriator, or his tenants, in whom the soil & herbage were still vested.

The freehold was vested in the rector & he was entitled to the land, including the grass, herbage & everything else, as fully as the original owner had been; but as the land had been set apart by consecration for the church & churchyard, the right which the rector as the owner of the freehold had in the profits was proportionately diminished, because he could not desecrate it, or use it for any purpose which was inconsistent with the object of its consecration (*BLACKBURN, J.*).

(2) Historical origin of vicarages discussed by *BLACKBURN, J.*—*GREENSLADE v. DARBY* (1868), L. R. 3 Q. B. 421; 9 B. & S. 428; 37 L. J. Q. B. 137; 18 L. T. 463; 32 J. P. 437; 16 W. R. 898.

*Annotations*:—*As to* (1) *Consd.* *Winstanley v. North Manchester Overseers*, [1910] A. C. 7. *Reid*. *Wallis v. Birks* (1870), L. R. 5 C. P. 222; *Fowke v. Berington*, [1914] 2 Ch. 308.

*See, also*, No. 478, *post*.

**477. ——— As against trespasser.**—*BATTEN v. GEDYE*, No. 465, *ante*.

**478. Action against incumbent—Claiming freehold of chancel & churchyard—What interrogatories allowed.**—In an action by the lay rector of a parish claiming the freehold in the chancel & churchyard against the vicar of the parish & his churchwardens, interrogatories were disallowed

which went to inquire into the evidence of pltf.'s title.—*GARLAND v. ORAM* (1890), 55 J. P. 374; 7 T. L. R. 80, D. C.

#### SUB-SECT. 4.—THE VESTRY.

##### A. Constitution.

**479. Qualification of vestryman—Tenement owner—Assessed to poor rate instead of occupier.**—The effect of Vestries Acts, 1818 (c. 69), & 1819 (c. 85), although there are no privative words, is to make rating to the poor rate the exclusive qualification for voting in all parish vestries.

Where, therefore, Small Tenements Act, 1850 (c. 99), has been adopted in a parish, the occupiers of small tenements, not being rated to the poor rate, although still liable to the church rate, are not entitled to vote at a vestry held for the purpose of making a church rate.

Vestries Act, 1818 (c. 69), s. 3, gave to persons assessed to the last poor rate one vote for every £25 value, "so, nevertheless, that no inhabitant shall be entitled to give more than six votes"; by Small Tenements Act, 1850 (c. 99), s. 6, the owner of a small tenement, rated under the Act "shall have the same right to vote in vestry as if he were an occupier duly rated in respect of the same tenement":—*Held*: the owner of more than six small tenements, rated under the latter Act, was entitled to no more than six votes by force of the proviso in the former Act.—*RICHARDSON v. GLADWIN* (1858), E. B. & E. 138; 27 L. J. M. C. 192; 31 L. T. O. S. 97; 22 J. P. 688; 4 Jur. N. S. 377; 6 W. R. 473; 120 E. R. 460. *Annotation*:—*Consd.* *Lambe & Clarke v. Griefes* (1862), 26 J. P. 327.

**480. — Occupier—Where tenement owner rated to poor rate.**—*RICHARDSON v. GLADWIN*, No. 479, *ante*.

**481. — Residence—Temporary absence with intention to return.**—Temporary absence with an intention & right to return does not prevent a qualification for vestryman being obtained by residence during twelve months.—*STANFORD v. WILLIAMS* (1899), 80 L. T. 490; 15 T. L. R. 316; 43 Sol. Jo. 419, D. C.

*Annotation*:—*Reid*. *R. v. Townson, Ex p. Broderip* (1908), 72 J. P. 368.

**482. — Value of rated property—Part of property sublet.**—Where a person is rated as the occupier of premises of the requisite value for qualifying for the office of vestryman, he is not disqualified from election to & acting in such office, merely because his personal occupation is reduced below the qualifying value by reason of his having sublet portions of the premises.—*HILTON v. HAYNES* (1894), 11 T. L. R. 8; 39 Sol. Jo. 12; 15 R. 41.

##### B. Functions.

*See, now*, Local Government Act, 1894 (c. 73), ss. 6 (1), 19 (4); London Government Act, 1899 (c. 14), s. 23 (1); Parochial Church Councils (Powers) Measure, 1921 (No. 1).

**483. Former duties.**—The vestry being the body mentioned in Burial Act, 1857 (c. 81), s. 4, is beyond all doubt a body which enjoyed powers & owed duties divisible into two classes, namely those which do, & those which do not, relate to the affairs of the church (*BUCKLEY, L.J.*).—*WEST-*

*MINSTER CORPN. v. ST. GEORGE, HANOVER SQUARE* (RECTOR & CHURCHWARDENS), [1909] 1 Ch. 592; 78 L. J. Ch. 581; 100 L. T. 540; 73 J. P. 259; 25 T. L. R. 393; 53 Sol. Jo. 357; 7 L. G. R. 774, C. A.; *reversd.* on other grounds, *sub nom.* *ST. GEORGE, HANOVER SQUARE* (RECTOR & CHURCHWARDENS) *v. WESTMINSTER CORPN.*, [1910] A. C. 225, H. L.

*Annotation*:—*Mentd.* *Re Hyde Park Place Charity* (1911), 80 L. J. Ch. 593.

— **Duties transferred to borough & district councils.**—*See* LOCAL GOVERNMENT; METROPOLIS.

**484. Powers—Alteration of church ornaments.**—*SHERFIELD'S CASE* (1632), 3 State Tr. 510.

*Annotation*:—*Reid*. *Faulkner v. Litchfield* (1845), 3 Notes of Cases, 511.

**485. — Election of churchwarden—On release of existing churchwarden.**—I know of no authority to the effect that because a vestry first fixes upon one person & subsequently sees some good & reasonable cause . . . to excuse him, it may not rescind that election & proceed to a new election. Nor do I know of any authority that because the vestry has, even for some bad reason, excused the individual first fixed upon, a proper person, subsequently chosen at the same meeting, is not duly elected nor liable to serve (*SIR JOHN NICHOLL*).—*BIRNIE v. WELLER & ELLIOTT* (1831), 3 Hag. Ecc. 474; 102 E. R. 1231.

**486. — Rescission of election.**—*BIRNIE v. WELLER & ELLIOTT*, No. 485, *ante*.

**487. — As to church rates—Sole authority to grant.**—Where churchwardens duly summoned a meeting of parishioners in vestry, for the purpose of making a rate for the repairs of the parish church, & for the expenses incidental to the execution of their office for the remainder of the year of their office, & the parishioners assembled accordingly, but refused to make or grant a rate; & the churchwardens thereupon made one of their own authority:—*Held*: (1) such rate, so made, was illegal, the churchwardens had no such authority; (2) the parishioners in vestry were the only parties legally authorised to grant or withhold a church rate.—*VELEY v. BURDER* (1841), 12 Ad. & El. 265; Arn. & H. 194; 10 L. J. Ex. 532; 5 J. P. 401; 5 Jur. 1013; 113 E. R. 813, Ex. Ch.; *affg.* S. C. *sub nom.* *BURDER v. VELEY* (1840), 12 Ad. & El. 233; *previous proceedings, sub nom.* *VELEY & JOSLIN v. BURDER* (1837), 1 Curt. 372.

*Annotations*:—*As to* (1) *Dista.* *Veley & Joslin v. Gosling* (1843), 3 Curt. 253; *Gosling v. Veley* (1853), 4 H. L. Cas. 679. *Reid*. *Stull & Bunn v. Palfrey* (1841), 2 Curt. 902. *As to* (2) *Consd.* *Gosling v. Veley* (1853), 4 H. L. Cas. 679. *Generally, Reid.* *Seale v. Veley* (1841), 1 Notes of Cases, 679; *Varty & Mopsey v. Nunn* (1841), 2 Curt. 877; 170; *Varty* (1842), 3 Q. B. 589; *Francis v. Steward* (1844), 5 Q. B. 984; *Thos. v. Watson* (1894), 63 L. J. M. C. 108. *Mentd.* *Ex p. Story* (1852), 8 Exch. 195; *Westerton v. Liddell* (1857), Moore's Special Report; *White v. Steele* (1862), 12 C. B. N. S. 383; *London Corpn. v. Cox* (1867), L. R. 2 H. L. 239; *Macdonochie v. Penzance* (1881), 6 App. Cas. 424.

*See, generally*, Part VII., Sect. 14, *post*.

**Opposition to faculty—Whether ground for refusing.**—*See* Nos. 1763, 1761, 3091, 3096, *post*.

##### C. Meetings.

###### (a) Summoning Meetings.

**488. Who may summon—Whether civil court will take judicial notice.**—*Mandamus* to churchwardens to call a vestry to elect churchwardens refused.

#### PART III. SECT. 7, SUB-SECT. 4.—A.

**n. Qualification of vestryman—Prop holder—By purchase or lease.**—Under 3 Vict. c. 74, ss. 2, 3, 6, a vestry capable of electing churchwardens

must be composed of persons holding pews in the church by purchase or lease, or holding sittings therein by lease from the churchwardens. The churchwardens of a church where the

sittings were wholly free, were therefore held not liable on a contract made by their predecessors for building the church.—*ANDERSON v. WORTERS* (1882), 32 C. P. 659.—**CAN.**

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There was no instance of such a *mandamus*, & they [the ct.] could not take notice who had a right to call the vestry, & consequently did not know to whom it should be directed (*per* CUR.).—ANON. (1726), 2 Stra. 686; 93 E. R. 783.

*Annotation* :—*Reid*. R. v. Stoke Damerel (Minister & Churchwardens) (1836), 1 Nev. & P. K. B. 56.

**489. — Churchwardens with consent of incumbent.]**—A private parishioner has no right during the time of divine service, & of his own authority to publish such a notice . . . or any other notice in the church (SIR JOHN NICHOLL).

Vestries, for church matters, regularly are to be called by the churchwardens with the consent of the minister. Vestries Act, 1818 (c. 60), neither altered the general authority under which, nor the persons by whom vestries are to be called (SIR JOHN NICHOLL).—DAWE v. WILLIAMS (1824), 2 Add. 130; 102 E. R. 243.

*Annotations* :—*Consd.* Butt v. Fellowes (1843), 3 Curt. 680. *Reid*. R. v. Tottenham (Vicar & Churchwardens) (1879), 48 L. J. Q. B. 407. *Mentd.* Millar & Nimes v. Palmer & Kilby (1837), 1 Curt. 550; Sanders v. Head (1843), 3 Curt. 565.

**490. Whether mandamus to summon will issue**  
—To elect churchwardens.]—ANON. (1726), No. 488, *ante*.

**491. — — — — —]**—A *mandamus* may be granted, directed to the parishioners at large liable to be rated to the church rate, commanding them to meet in vestry, & elect churchwardens.—R. v. WIX (INHABITANTS) (1832), 2 B. & Ad. 197; 1 L. J. M. C. 36; 109 E. R. 1117.

*Annotations* :—*Distd.* *Ex p.* Le Gren (1844), 2 Dow. & L. 571. *Apld.* *Ex p.* Loveland Trustees (1851), 1 L. T. O. S. 147. *Reid*. R. v. Stoke Damerel (Minister & Churchwardens) (1836), 5 Ad. & El. 584; R. v. St. Saviour's, Southwark (1837), 1 Nev. & P. K. B. 496; R. v. St. Mary, Lambeth (1838), 2 Jur. 373. *Mentd.* R. v. Ramaden (1835), 3 Ad. & El. 456.

**492. — To do illegal act—Misapplication of charitable fund.]**—The ct. will not grant a *mandamus* to churchwardens to assemble the parishioners for the purpose of taking a poll upon a motion carried by a show of hands at a vestry meeting to do an illegal act, as to apply a portion of a fund held in trust for charitable purposes, to the erection of a monument to the memory of the donor of the fund.—R. v. ST. SAVIOUR'S (CHURCHWARDENS) (1834), 1 Ad. & El. 380; 3 Nev. & M. K. B. 878; 2 Nev. & M. M. C. 414; 110 E. R. 1252.

**493. — To assess church rate—For repairs of church.]**—Although a *mandamus* does not lie to the churchwardens to make a church rate, yet it lies to the churchwardens, etc., of two united parishes, under 10 Ann. c. 11, s. 24, to assemble a meeting, for the purpose of agreeing upon & ascertaining the moneys & rates to be assessed for the repair of the church of one of those parishes.—R. v. ST. MARGARET (CHURCHWARDENS) (1815), 4 M. & S. 250; 105 E. R. 827.

*Annotations* :—*Consd.* R. v. St. Margaret, Leicester (1838), 8 Ad. & El. 889; Veley & Joslin v. Gosling (1843), 7 Jur. 286.

**494. — — — — — For payment of debenture interest.]**—*Ex p.* LOVELAND'S TRUSTEES (1851), 17 L. T. O. S. 147; 15 J. P. Jo. 401.

**495. Power of summoning authority—To fix time of meeting.]**—The vicar & churchwardens of a parish declined to enter upon the notice paper of a vestry meeting a notice of motion by a parishioner that future meetings should be held in the evening :—*Held* : the summoning authority had power to fix the time of each vestry meeting, & there was no duty to allow notice of a motion which could

not have any effect.—R. v. TOTTENHAM (VICAR & CHURCHWARDENS) (1880), 49 L. J. Q. B. 870; *sub nom.* R. v. WILSON, ETC. (VICAR & CHURCHWARDENS OF TOTTENHAM), 43 L. T. 560; 45 J. P. 140, C. A.

**(b) Notice of Meeting.**

**496. By whom given—Whether private parishioner—During service in church.]**—DAWE v. WILLIAMS, No. 489, *ante*.

**497. — — — — — For making church rate.]**—*Semble* : notice of a vestry meeting, for making a church rate, may be given by a private parishioner.—BUTT v. FELLOWES (1843), 3 Curt. 680; 1 L. T. O. S. 479.

*Annotations* :—*Mentd.* Kemp & Page v. Attenborough (1857), 30 L. T. O. S. 211; R. v. Tottenham (Vicar & Churchwardens) (1880), 49 L. J. Q. B. 870.

**498. — Rector—For election of parish officers.]**—At a vestry meeting summoned by the churchwardens for the purpose of electing new churchwardens in a parish regulated by Vestries Act, 1818 (c. 60), the rector has a right to preside, & he may adjourn such meeting, though against the wish of the majority present, on his legal responsibility if in so doing he improperly disturbs the proceedings. A poll being demanded, he may of his own authority grant such poll. On the election of churchwardens at a vestry in such parish as above mentioned, a poll having been demanded, the rector granted the poll, & ordered it to be held immediately on the close of the other business, & continued for three successive days, at a time & a place in the parish deemed by him most convenient, & which he had appointed by previous notice, after the publication of a summons by the old churchwardens, in case a poll should be demanded : & he refused to put a motion which had been proposed for a different appointment, of which a majority of the old churchwardens had given previous notice. The other business lasting till seven in the evening, he directed that the poll should commence on the following morning at the time & place of which notice had been given; a majority of the meeting, as was alleged, dissenting. The poll was taken accordingly :—*Held* : rightly taken.

Vestries Act, 1818 (c. 60), s. 1, requires notice of the vestry to be given, but does not say who is to give it. We are of opinion that the rector is the fit person; he is at the head of the parish for this purpose; & in the present case he was to nominate one churchwarden at the vestry (DENMAN, C.J.).—R. v. D'OYLEY, R. v. HEDGER (1840), 12 Ad. & El. 130; 4 Per. & Dav. 52; 4 J. P. 523; 113 E. R. 763; *sub nom.* R. v. D'OYLEY, R. v. SURREY JJ. (EASTERN HALF HUNDRED OF BRIXTON), 4 Jur. 1056; *sub nom.* R. v. ST. MARY, LAMBETH (RECTOR & CHURCHWARDENS), 9 L. J. M. C. 113; *previous proceedings*, *sub nom.* R. v. LAMBETH (RECTOR) (1838), 8 Ad. & El. 356.

*Annotations* :—*Apld.* R. v. How (1863), 33 L. J. M. C. 53. *Reid*. R. v. Goole (Incumbent & Churchwardens) (1861), 4 L. T. 322; R. v. Wimbledon L. B. (1882), 8 Q. B. D. 459; R. v. Salisbury Bp. (1901), 70 L. J. K. B. 593. *Mentd.* *Elt* v. St. Mary's, Islington, Burial Board (1854), Kay. 449; R. v. St. Matthew, Bethnal Green, Vestry (1875), 32 L. T. 558; *Re* Chillington Iron Co. (1885), 29 Ch. D. 159.

**499. Time of publication—Whether during Sunday service.]**—On Apr. 6 notice was posted on the church door for a vestry meeting to appoint churchwardens on Apr. 10, which was Tuesday. On that day A. & B. were elected churchwardens. Doubts having arisen as to the sufficiency of the notice, it not having been published in church on the Sunday, another notice was duly given & read during service on the following Sunday that a



vestry meeting would be held to elect churchwardens on the ensuing Thursday, on which day A. & B. were again elected:—*Held*: A. & B. were duly elected churchwardens, as one or the other of the two elections was valid.—*Re* ST. FAITH (CHURCHWARDENS) (1856), 25 L. J. Q. B. 168; 26 L. T. O. S. 261; *sub nom.* R. v. ST. FAITH (INHABITANTS), 2 Jur. N. S. 212; 4 W. R. 267.

**500. Place of publication.**—Where more than one church in township.]—By Lighting & Watching Act, 1833 (c. 90), s. 33, the overseers are required to proceed in the same manner, for the purpose of collecting, raising, & levying the rate under that Act, as for levying money for the relief of the poor; & by Parish Notices Act, 1837 (c. 45), s. 2, all notices theretofore made in churches or chapels, are to be affixed on or near to the doors of all the churches & chapels within the parish.

A lighting & watching rate was made for the township of C., & a written notice of it was affixed to the door of the church of St. Michael, in the township, which was stated to be the only place where rates for the relief of the poor had theretofore been published. At the time of the publication of the rate, there were two other churches of the Established Church in the township of C., on the doors of which no notice of the rate was affixed:—*Held*: the publication of the rate was insufficient.—*R. v. WHITE* (1843), 4 Q. B. 141; 3 Gal. & Dav. 372; 12 L. J. M. C. 64; 7 J. P. 656; 7 Jur. 194; 114 E. R. 850.

**501. — Parish divided into separate parish & particular district.**—Publication at all churches except those in separate parish.]—Prior to the Burial Act, 1835 (c. 128), ss. 12, 13, the parish of T. included T. W., an ecclesiastical district formed under Church Building Act, 1818 (c. 45), & S., a hamlet containing a church, to which a district had been assigned under Church Building Act, 1831 (c. 38). Neither T. W. nor S. separately maintained their own poor, there being a common poor rate for the entire parish of T., but each had its separate burial ground. A vestry meeting of the inhabitants of the parish of T. was called, by notice affixed to the doors of all the churches in the parish, including that at S., but excluding those in T. W., to consider whether a burial ground should be provided for such part of the parish of T. as was not included in T. W., & if so, to appoint a burial board for such part of the parish. A burial board for T., excluding T. W., was appointed at this meeting:—*Held*: (1) the board was well appointed; (2) a poor rate made on that part of T. for which such board was appointed, for defraying the expenses of the board, was good; & that occupiers of property in S. were properly assessed to the rate; for though T. W. was entitled to a separate burial board, S. was not.—*VINER v. TONBRIDGE OVERSEERS* (1859), 2 E. & E. 9; 28 L. J. M. C. 251; 33 L. T. O. S. 202; 23 J. P. 773; 5 Jur. N. S. 1293; 7 W. R. 553; 121 E. R. 4.

*Annotations*:—*As to* (1) *Reid*. R. v. Walcot St. Swithin Overseers (1862), 2 B. & S. 571; R. v. Tonbridge Overseers (1884), 13 Q. B. D. 339.

**502. Length of notice.**—"Three clear days"—What constitutes.]—On Mar. 22 a notice was posted for a vestry meeting, to appoint parish officers on Mar. 25; the meeting being held, two surveyors of highways were appointed. On Apr. 11, at a special sessions for highways, it appeared to the justices that the appointment was invalid, as there had not been three clear days' notice of the vestry meeting which is requisite under Vestries Act, 1818 (c. 69), & they then appointed two other surveyors under High-

way Act, 1835 (c. 50), s. 11. The new surveyors, on Oct. 1, made a rate which some of the inhabitants refused to pay. On Nov. 20 they made another rate, & W., one of the inhabitants refused to pay. The justices refused to grant a distress warrant whereupon the surveyors obtained a rule nisi for a mandamus:—*Held*: the appointment at the vestry meeting was invalid on account of the insufficiency of the notice.—*R. v. BEST* (1847), 5 Dow. & L. 40; 2 New Seas. Cas. 655; 2 Saund. & C. 90; 16 L. J. M. C. 102; *sub nom.* R. v. SURREY JJ., 11 Jur. 489.

**503. Sufficiency.**—Whether notice of specific purpose necessary.]—Not necessary in all cases that notice should be given of the specific purpose for which a parish vestry is convened.—*CLUTTON v. CHERRY* (1816), 2 Phillim. 373.

*Annotations*:—*Reid*. Smith v. Deighton (1852), 8 Moo. P. C. C. 179; Rand & Grimwade v. Green (1860), 6 Jur. N. S. 303.

**504. — Intention to raise loan.**—At a vestry meeting, certain plans were produced for improving the parish church, & were referred to a committee. At a subsequent vestry their report, recommending an enlargement, was received & adopted, & a resolution passed for borrowing money on the parish rates to carry the plans into execution. The notice of holding the latter vestry, published in pursuance of Vestries Act, 1818 (c. 69), s. 1, stated the purpose of it to be to receive a report from the church committee, & to adopt such measures as may appear necessary for carrying that report into execution:—*Held*: this was a sufficient notice of the intention to propose borrowing money on the church rates for the purpose of executing the plans.—*BLUNT v. HARWOOD* (1838), 8 Ad. & El. 610; 1 Curt. 648; 3 Nev. & P. K. B. 577; 1 Will. Woll. & H. 515; 7 L. J. M. C. 107; 2 J. P. 424; 2 Jur. 617; 112 E. R. 909.

*Annotations*:—*Reid*. Burdor v. Voley (1840), 4 Por. & Dav. 452; Williams v. George (1843), 2 Notes of Cases 85; Mackonochie v. Penzance (1881), 6 App. Cas. 424. *Mentd.* Hawes & Vleat v. Pollatt (1840), 2 Curt. 473; 11 E. R. 403; Powell (1873), L. R. 8 Q. B. 403.

**505. — Omission of name of parish.**—Whether material.]—A notice of a vestry meeting affixed on the parish church door, & addressed "to the churchwardens, overseers, & principal inhabitants of this parish" is a valid notice though it does not name the parish, & although it is addressed to the principal inhabitants.—*RAND v. GREEN* (1800), 9 C. B. N. S. 470; 30 L. J. C. P. 80; 7 Jur. N. S. 120; 9 W. R. 54; 142 E. R. 185; *sub nom.* *Re* RAND v. GREEN, *Ex p.* GREEN, 3 L. T. 293; 24 J. P. 790; *subsequent proceedings*, 7 Jur. N. S. 128, n.

**506. — Notice addressed to principal inhabitants.**—*RAND v. GREEN*, No. 505, *ante*.

#### (c) Procedure at Meetings.

##### i. In General.

**507. Right to attend.**—Whether exclusion a cause of action.]—*Qu.*: whether a man who has a right to be present at a vestry can maintain an action against one who keeps him out of the room in which a vestry is holding.—*PHILLIBROWN v. RYLAND* (1725), 2 Ld. Raym. 1388; 8 Mod. Rep. 351; 1 Stra. 624; 92 E. R. 404.

**508. — Persons preventing attendance prosecuted to conviction.**—Right of parishioners to costs on certiorari.]—Rated inhabitants of a parish, who were prevented by rioters from entering the vestry room to attend a meeting called for the purpose of imposing a church rate, & who afterwards prosecuted the offenders, are parties grieved within the meaning of 5 & 6 Will. & Mar. (c. 11), s. 3, & therefore, entitled to costs on conviction

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of defts. after removal of the case by *certiorari*.—*R. v. THOMPSON* (1831), 2 B. & Ad. 287; 9 L. J. O. S. M. C. 81; 109 E. R. 1150.

*See, generally, CHOWN PRACTICE*, Vol. XVI., pp. 455 *et seq.*

**509. Quorum—Whether attendance of vicar necessary.]—***MAWLEY v. BARRETT*, No. 537, *post*.

**510. Control of election—Where no presiding officer.]—**Where there is no regular presiding sworn officer at an election, *e.g.* of churchwardens, one of whom by custom was chosen by parishioners paying scot & lot, & the other appointed by the rector, which latter in fact presided, the control of the election devolves at common law upon the electors themselves; but unless there be a custom to regulate the time for making such election, it is not competent to a majority of the electors assembled at the time of such election to narrow the period which the common law would allow; & therefore a resolution by them that it shall conclude at a given time must at least limit a time reasonable in itself with respect to numbers & distance, & be of sufficient notoriety. But whether a resolution by a majority of the vestry on the first day of the election to close the poll at 4 o'clock on the next day in a parish where the number of electors did not exceed 180, & where the affidavits stated a custom for 200 years not to keep the poll open for more than two days, & no instance within living memory of extending it beyond 4 o'clock on the second day, were sufficient to warrant the closing of the poll, at that time, while some of the voters were still coming in to poll, & others had no notice of the resolution; was a fit question to be tried upon a *mandamus*.—*R. v. WINCHESTER, BISHOP'S COMMISSARY COURT* (1800), 7 East, 573; 103 E. R. 222.

*Annotations:—Consd. Baker & Downing v. Wood* (1837), 1 Curt. 507. *Refd. Westerton v. Davidson* (1854), 1 Ecc. & Ad. 385; *R. v. Goole* (Incumbent & Churchwardens) (1861), 4 L. T. 322.

**511. Latitude of discussion allowed.]—**In a vestry meeting for civil purposes, as a full latitude of discussion must be allowed more coarse expressions do not constitute brawling.—*HOLLIS v. SCALES* (1829), 2 Hag. Ecc. 506; 162 E. R. 958.

**512. Formalities—Whether strict formality necessary.]—**(1) The observance of strict formality in putting motions & amendments thereon to vestry meetings is unnecessary; it is enough if conflicting propositions be so put to such a meeting, that those present understand what it is that they are called on to decide.

(2) At a meeting in vestry of the inhabitants of the parish of H. held under a local Act for the purpose of determining the application "to some public purpose, beneficial to the inhabitants," of moneys paid by two railway cos. in compensation of certain commonable rights of the inhabitants, a proposition was made that the money should be applied partly to a district church, & partly to almshouses. The proposition was met by an amendment to the effect that the money be applied to almshouses only. The chairman having inquired whether any one else wished to address the meeting, & no third proposition having been made, the amendment was put & carried. A poll was then demanded; & at the polling place the inhabitants were called on to vote for "the district church & almshouses," or for "the almshouses only." The result was in favour of the proposition for the district church & almshouses:—*Held*: the vestry must be taken to have agreed that the money should be applied in one of the two methods

proposed, & the poll was rightly so taken as to determine the question which of these two methods was preferred by the majority of the parishioners.

(3) Though a poll must not be so taken as to prevent a scrutiny, & therefore must not be taken by ballot, a voter has no right to insist on a scrutiny.—*R. v. HAMMERSMITH (VICAR & CHURCHWARDENS)* (1852), 3 B. & S. 504, n.; 19 L. T. O. S. 203; 122 E. R. 190; *sub nom. Re HAMMERSMITH VESTRY, Ex p. STEVENS*, 16 J. P. 632.

*Annotations:—As to* (2) *Consd. St. Michael, Oxford v. Luff* (1858), 7 W. R. 20. *Refd. R. v. Roberts* (1863), 3 B. & S. 495.

**513. Control by court—What court has jurisdiction.]—**The Ecclesiastical Ct. has jurisdiction, *ratione loci*, over the order & proceedings of vestry meetings, held in a church; & therefore, where a rector had libelled, in that *et.*, a parishioner, for preventing him from presiding as chairman at such a meeting, a prohibition was refused.

It is pleaded in the arts. & on their admissibility must be taken as true, that the minister's presiding at vestry meetings "is observed in & throughout the whole realm." The fact of such general usage for the minister so to preside is notorious, & has not been denied even in argument. Now such an usage, unless absurd or improper, I take to found a common law right (*SIR JOHN NICHOLL*).—*WILSON v. M'MATH* (1819), 3 B. & Ald. 211; 3 Phillim. 67; 106 E. R. 650.

*Annotations:—Consd. Sanders v. Head* (1843), 3 Curt. 565; *R. v. Salisbury Bp.*, [1901] 1 K. B. 573. *Refd. Ranson & Knott v. Campkin* (1851), 2 Rob. Ecc. 370; *Martin v. Mackonochie, Flammank v. Simpson* (1868), L. R. 2 A. & E. 116; *Holy Trinity, Stepney* (1902), 18 T. L. R. 789; *L. C. C. v. Dundas*, [1904] P. 1. *Mentd. St. Albans Bp. v. Fillingham*, [1906] P. 163.

**514. Evidence of proceedings.]—***R. v. ELY (ARCHDEACON)*, No. 729, *post*.

ii. *The Chairman.*

**515. Right of incumbent to preside.]—***WILSON v. M'MATH*, No. 513, *ante*.

**516. — Vestry for election of churchwardens.]—***R. v. D'OYLY, R. v. HEDGER*, No. 498, *ante*.

**517. Irregularity in nomination—Effect of.]—**Irregularities at the meeting at which the rate was made in the nomination of chairman & wrong announcement of the numbers on each side, acquiesced in, & no poll being demanded, will not vitiate the rate.—*CORNWALL v. WOODS* (1816), 4 Notes of Cases 555; 7 L. T. O. S. 189.

*Annotation:—Expld. St. Michael, Oxford v. Luff* (1858), 7 W. R. 20.

**518. Refusal to put resolution—Assumed election of another chairman.]—***R. v. STEPHENS (CHANCELLOR OF BANGOR)* (1870), *Prideaux's Churchwardens' Guide*, 10th ed., p. 201.

**519. — Amendment.]—**At a meeting of the vestry to elect churchwardens, D. was proposed to be re-elected, when parishioners moved an amendment that before electing a churchwarden a certain correspondence between the Charity Comrs. & the churchwardens as to some parish charity funds should be produced. The vicar refused to put the amendment, & declared D. duly elected:—*Held*: (1) the vicar was wrong in refusing to put the amendment; (2) he was wrong in not putting to the meeting whether D. should be elected.—*R. v. HAGBOURNE (VICAR)* (1886), 51 J. P. 276; 2 T. L. R. 809, D. C.

**520. — Resolution out of order—Qualification of candidate not contemplated by statute.]—***PEDLEY & LOVELL v. CHAPMAN* (1891), 7 T. L. R. 396.

**Power to adjourn meeting.]—***See* Sub-sect. 4, C. (d), *post*.

**Power to grant poll.**—See Sub-sect. 4, C. (c), *post*.

**Under Metropolis Management Acts.**—See METROPOLIS.

### iii. Resolutions and Voting.

**521. Right to vote—General rule.**—RICHARDSON v. GLADWIN, No. 479, *ante*.

**522. — In respect of church rate — Occupiers of small tenements not rated to poor rate.**—RICHARDSON v. GLADWIN, No. 479, *ante*.

**523. — In respect of what property — Property held jointly with another as executor.**—Where a person is assessed to the poor rate in respect of his own property, & is also exor. of a person whose exors. are assessed in respect of property of the deceased, he is entitled to vote at a vestry under Vestries Act, 1818 (c. 69), if the two assessments amount to £25.—R. v. KIRBY (1861), 1 B. & S. 647; 31 L. J. Q. B. 3; 5 L. T. 280; 26 J. P. 196; 10 W. R. 13; 121 E. R. 855. *Annotations*:—*Reid*, Lambe & Clarke v. GRIEVES (1862), 26 J. P. 327. *Ment*, R. v. BURROWS, [1892] 1 Q. B. 399.

**524. — Voter's rates paid by another.**—It is no legal ground for refusing a vote tendered at the poll that the voter's rates had been paid, not by himself but by other persons in order to enable him to vote; but in order to vitiate the rate on that ground, the rejected voter ought to have tendered his vote.—RICHARDS v. BIRLEY (1864), 2 Moo. P. C. C. N. S. 96; 10 L. T. 142; 28 J. P. 420; 15 E. R. 838, P. C.

**525. — Voter entitled to more than one vote — Limitation of number of votes.**—RICHARDSON v. GLADWIN, No. 479, *ante*.

**526. — — — — —**—Where Small Tenements Act, 1850 (c. 99), has been adopted in a parish, & parties are rated as owners under that Act, & also as occupiers in their own right, they are entitled on voting in vestry to add the amount of the ratable value of both capacities, & to give one vote for every £25 of annual rent, but so that they claim no more than six votes in all. But they are not entitled to vote separately for each class of property so as to exceed the number of votes which would be allowed by the above mode of computation.—LAMBE & CLARKE v. GRIEVES (1862), 26 J. P. 327; 8 Jur. N. S. 288.

**527. — — — — — Property held in own right & property held jointly as executor.**—R. v. KIRBY, No. 523, *ante*.

**528. — — — — — How calculated.**—LAMBE & CLARKE v. GRIEVES, No. 526, *ante*.

**529. — On election of people's churchwarden — Incumbent nominating other warden.**—An incumbent of a parish, who, upon the failure of himself & the parishioners to agree upon the choice of churchwardens, exercises his right of appointing one churchwarden, is not entitled either by the common law or under Vestries Act, 1818 (c. 69), s. 3, in his capacity as a ratepayer to vote at the election of the second churchwarden.

The 89th Canon of the Canons of 1603 is declaratory of the common law. In this canon the parishioners are mentioned in such a way as to show that, in case the vestry cannot agree, the minister is to choose his own churchwarden, & the parishioners, as opposed to & distinguished from

him, are to choose their churchwarden. The term "parishioners" in the Canon means, in fact, the minister's parishioners, & would not include the minister himself (A. L. SMITH, M.R.).—R. v. SALISBURY (BP.), [1901] 2 K. B. 2295; 70 L. J. K. B. 593; 65 J. P. 531; 49 W. R. 529; 17 T. L. R. 465; *sub nom.* R. v. SALISBURY (BP.), *Ex p.* VINE, 84 L. T. 553, C. A.

**530. Improper rejection of vote—Whether resolution vitiated—Result of election not affected.**—Where, upon the election of a churchwarden, the chairman of the vestry meeting had rejected votes which were alleged to be admissible, but it did not appear that the rejection had caused any difference in the result, the ct. refused to grant a *mandamus* ordering a fresh election. Though the persons, whose votes had been rejected, were parties to the application.—*Ex p.* MAWBY (1854), 3 E. & B. 718; 18 Jur. 906; 118 E. R. 1310; *sub nom.* *Ex p.* JOYCE, 23 L. J. M. C. 153; *sub nom.* R. v. BOURNE (VICAR, ETC.), 23 L. T. O. S. 143; *sub nom.* *Ex p.* WOODING, ETC., 18 J. P. 824; *sub nom.* *Ex p.* HARDING, 2 W. R. 473.

*Annotation*:—*Apld.* Shaw v. Thompson (1876), 3 Ch. D. 233.

**531. — — — — —**—RICHARDS v. BIRLEY, No. 524, *ante*.

**532. Numbers wrongly announced by chairman — Effect of.**—CORNWALL v. WOODS, No. 517, *ante*.

**533. Resolutions — Whether valid — Refusal by incumbent as chairman to put resolution—Assumed substitution of new chairman.**—R. v. STEPHENS (CHANCELLOR OF BANGOR), No. 518, *ante*.

**534. — — — — — Of majority — Whether binding on minority—Matter within jurisdiction of vestry.**—ST. JOHN'S, MARGATE (CHURCHWARDENS) v. ST. JOHN'S, MARGATE (PARISHIONERS, ETC.), No. 1749, *post*.

**535. — — — — — Departure of voters voting with majority—Negativising resolution carried by minority.**—A vestry having been convened, a survey & estimate of repairs [necessary for the parish church] & the expenses [thereof] was produced, & no objection made to either. A rate having been proposed & seconded, an amendment was moved & seconded, & on a show of hands, was carried. The majority of parishioners who had negatived the granting a rate having quitted the vestry, the churchwardens & the minority continued to remain in vestry, & re-proposed & carried the necessary rate:—*Held*: such rate was a legal & valid church rate.

The obligation of the parishioners to repair the churches is absolute; the performance of such obligation may be compelled; & the performance of it may be properly enforced by the ecclesiastical cts., subject to the control of the cts. of common law, when the ecclesiastical cts. exceed their jurisdiction, or attempt to enforce a rate which is illegal & invalid.—VELEY & JOSLIN v. GOSLING (1843), 3 Curt. 253; 2 Notes of Cases 278; 7 J. P. 418; 7 Jur. 286; 163 E. R. 720; *subsequent proceedings*, *sub nom.* GOSLING v. VELEY (1853), 4 H. L. Cas. 679, H. L.

*Annotations*:—*Reid*, R. v. Thomas (1842), 3 Q. B. 589; Francis v. Steward (1844), 5 Q. B. 984.

**536. — — — — — Whether binding on ordinary—**

### PART III. SECT. 7, SUB-SECT. 4.—C. (c) iii.

**a. Right to vote—Election of rector — Majority of qualified voters.**—Where, at a meeting held for the purpose of nominating a rector, only a portion of those who voted were admitted to be qualified, there being a doubt as to the rest:—*Held*: if

two-thirds of the qualified voters present voted for the candidate presented, the election is good, though others who voted may not be qualified.

—*Ex p.* BEEK (1873), 2 Pug. 66.—CAN.

**b. Resolutions — Appeal to bishop — Vestryman's right to interim injunction.**—By the constitution of an episcopal chapel, the decisions of the

vestry were declared reviewable by the bishop. At a meeting of the vestry resolutions affecting the character of a vestryman were passed, against which he appealed to the bishop; but, notwithstanding the appeal, the other vestrymen proceeded to carry the resolutions into effect. The applt. then applied, pending his

*the Church into parishes: ii., (d) & (e) i. & ii.]*  
 Sect. 7.—*Constitution of* *Ordinary's discretion.*—St.  
 Sub-sect. 4, C. (c) *TE* (CHURCHWARDENS) v. ST.

Matter subject to JOHN'S, MARGATE (PARISHIONERS, ETC.), No. 1749,  
 JOHN'S, MARGATE post.

537. — Whether binding on succeeding vestry.]—The acts of one vestry are not absolutely binding on a succeeding vestry; & they may be binding or rescinded by such succeeding vestry; consent the confirmation of the succeeding vestry is by not necessary to make the acts of a preceding one valid. The acts of a vestry may be valid, though the vicar was not present; he is not an integral part of the vestry.—MAWLEY v. BARBET (1798), 2 Esp. 687, N. P.

538. — Whether confirmation by succeeding vestry necessary.]—MAWLEY v. BARBET, No. 537, ante.

539. — Whether consent to borrowing within Church Building Act, 1818 (c. 45), s. 9.]—R. v. WILLIM, No. 355, ante.

—Amendment.]—See No. 519, ante.

540. "Division" of a vestry—How taken.]—A "division" of a vestry, "to be taken in the manner prescribed by Vestries Act, 1818 (c. 69)," may be taken by a poll of all the ratepayers, such poll being an adjournment of the vestry.

At such poll the original proposition & an amendment inconsistent with it, being the only one proposed, may be put to the vote, & affirmative & negative votes may be taken upon each, & in that way the sense of the votes may be ascertained.

Observations upon the best mode of taking the opinion of a meeting upon a resolution & amendment.—ELT v. ST. MARY'S, ISLINGTON BURIAL BOARD (1854), Kay, 449; 2 Eq. Rep. 1089; 18 J. P. 229; 69 E. R. 190.

Annotation:—Mentd. Hewitt v. White (1865), 14 W. R. 220.

#### (d) Adjournment of Meetings.

541. Right to adjourn—Whether in vestry or incumbent.]—The adjournment of a vestry meeting is, of common right, vested in the parishioners at large; not in the vicar.—STROUGHTON v. REYNOLDS (1736), Portes. Rep. 108; Lee temp. Hard. 274; 2 Str. 1045; 92 E. R. 804.

Annotations:—Consd. Wilson v. M'Math (1819), 3 B. & Ald. 244, n. Exptd. & Distd. R. v. Chester (Archdeacon) (1834), 1 Ad. & El. 342; Baker & Downing v. Wood (1837), 1 Curt. 507. Consd. R. v. D'Oyly (1840), 12 Ad. & El. 139. Reftd. R. v. Salisbury, Bp., [1901] 1 K. B. 573. Mentd. Breunor v. Hull (1866), L. R. 1 C. P. 748; Edney & Lunn v. Smallbones (1869), 21 L. T. 506.

542. — Whether in chairman.]—Where a meeting for the election of churchwardens takes place in the parish church, in pursuance of a notice that such meeting would be held at the parish church, & that in case a poll should be demanded the meeting would be immediately adjourned to the town hall, the chairman may, upon a poll being demanded, adjourn the meeting, although a majority of the voters present object to such adjournment. The right of adjourning the business in progress at a meeting, is vested in the persons assembled, & not in the chairman.—R. v. CHESTER (ARCHDEACON) (1834), 1 Ad. & El. 342; 3 Nev. & M. K. B. 413; 2 Nev. & M. M. C. 277; 3 L. J. M. C. 95; 110 E. R. 1230.

Annotations:—Consd. Raker & Downing v. Wood (1837), 1 Curt. 507. Mentd. Campbell v. Maund (1836), 1 Nev. & P. K. B. 558; R. v. Birmingham (Rector, etc.) (1837), 7 Ad. & El. 254.

appeal, for suspension & interdict on the ground that no legal quorum was present at the meeting which passed

the resolutions, & because pending the appeal, the resolutions could not be enforced:—Refused.—EDWARDS v.

543. — [.]—R. v. D'OYLY, R. v. HEDGER, No. 498, ante.

544. For scrutiny of votes—Enforcement by mandamus.]—R. v. SHARPE (1845), 6 L. T. O. S. 158, 354; 9 J. P. Jo. 773; subsequent proceedings, sub nom. R. v. WAKEFIELD (VICAR) (1846), 7 L. T. O. S. 227.

#### (e) The Poll.

##### i. In General.

545. Proper mode of taking vote.]—The proper way of taking the vote at a vestry is by a poll, the meeting being adjourned for that purpose, if necessary or convenient.—Re EGHAM BURIAL BOARD (1857), 29 L. T. O. S. 343; 30 L. T. O. S. 163; 21 J. P. 563; 3 Jur. N. S. 958.

546. Whether show of hands condition precedent.]—One of two candidates for the office of churchwarden was elected at a vestry, & subscribed the declaration of office, but the election was alleged to have been so improperly conducted that the proceedings were void. To give the parties impugning the election an opportunity of trying its validity, the ct., considering a *prima facie* case to be presented, granted a *mandamus* calling on the rector & churchwardens to convene a vestry for electing a churchwarden for the remainder of the year. At an election in vestry, where the right of voting is regulated by Vestries Act, 1818 (c. 69), s. 3, it is no objection to the proceedings that the chairman directed a poll without first taking a show of hands: although a show of hands was demanded, & the poll was not demanded, but was objected to.—R. v. BIRMINGHAM (RECTOR, ETC.) (1837), 7 Ad. & El. 254; 1 J. P. 211; 1 Jur. 754; 112 E. R. 467.

Annotations:—Reftd. R. v. St. Martin's Grdns. (1851), 17 Q. B. 149; Ex p. Mawby (1854), 3 E. & B. 718. Mentd. Re Barlow (1861), 30 L. J. Q. B. 271.

547. — Votes calculated in writing.]—At a vestry to elect churchwardens, the chairman, after the minister had nominated his, & after two candidates had been proposed & seconded, refused, on a request & protest of ratepayers, to take a show of hands, but took down the names of those present, & their respective votes, & added them up, & then declared the one having a majority to be duly elected; whereupon a ratepayer demanded a poll, which was refused:—Held: (1) the proceedings were irregular, & a poll ought to have been granted; but (2) as the affidavits did not state that any ratepayers had been prevented from voting, a rule for a *mandamus* to re-assemble the vestry & proceed to a fresh election was refused.—R. v. GOOLE (INCUMBENT & CHURCHWARDENS) (1861), 4 L. T. 322; 25 J. P. 308.

Annotation:—As to (2) Consd. R. v. Ward (1873), L. R. 8 Q. B. 210.

548. Method of taking—With closed doors—Whether proper.]—In the election of churchwardens, if a poll be demanded, the votes are to be given by the qualified inhabitants present; but all qualified inhabitants, whether they were present or not at the show of hands, have a right to be admitted into the vestry-room & vote during such poll: although the qualified inhabitants present at the time of granting the poll resolve that the poll shall be confined to those then present. (2) It is not a sufficient ground for impeaching such election (on motion for a *mandamus* to elect) that the poll was taken with closed doors, unless it be expressly sworn that some qualified person who meant to vote was thereby

BEAUMIE (1847), 9 Dunt. (Ct. of Sess. 1384; 19 Sc. Jur. 608.—SCOT.

prevented from doing so. (3) *Semble*: if such an instance were shown, the ct. would grant a *mandamus*, without inquiring strictly whether the number of persons excluded was in fact such as to affect the result of the election.—*R. v. LAMBETH (RECTOR)* (1838), 8 Ad. & El. 356; 3 Nev. & P. K. B. 416; 1 Will. Woll. & H. 398; 2 J. P. 423; 2 Jur. 566; 112 E. R. 873; *subsequent proceedings*, *sub nom. R. v. D'OYLY, R. v. HEDGER* (1840), 12 Ad. & El. 139.

*Annotations*:—*As to* (1) *Reid. Westerton v. Davidson* (1854), 1 Ecc. & Ad. 385; *White v. Steele* (1862), C. B. N. S. 383; *R. v. How* (1863), 33 L. J. M. C. 53. *As to* (2) *Apld. R. v. Goole* (Incumbent & Churchwardens) (1861), 4 L. T. 322. *Consd. Shaw v. Thompson* (1876), 3 Ch. D. 233. *Reid. Westerton v. Davidson* (1854), 1 Ecc. & Ad. 385. *As to* (3) *Consd. R. v. Cousins* (1873), L. R. 8 Q. B. 216; *R. v. Ward* (1873), L. R. 8 Q. B. 210. *Reid. Re St. John's, Cardiff* (1847), 11 Jur. 183. *Generally, Mentd. Julius v. Oxford Bp.* (1880), 5 App. Cas. 214.

**549. — After show of hands — By ballot.**—At an election of churchwardens, where, after a show of hands, a poll is demanded by or on behalf of a candidate, it is illegal to conduct the election by ballot.—*STORY v. COLK* (1848), 6 Notes of Cases, Supp. 33.

*Annotation*:—*Reid. Westerton v. Davidson* (1854), 1 Ecc. & Ad. 385.

**550. — Sq as to prevent scrutiny.**—Though a poll must not be so taken as to prevent a scrutiny, & therefore must not be taken by ballot, a voter has no right to insist on a scrutiny.—*R. v. HAMMERSMITH (VICAR & CHURCHWARDENS)* (1852), 3 B. & S. 504, n.; 19 L. T. O. S. 203; 122 E. R. 190; *sub nom. Re HAMMERSMITH VESTRY, Ex p. STEVENS*, 16 J. P. 632.

*Annotations*:—*Reid. St. Michael, Oxford v. Luff* (1858), 7 W. R. 20; *R. v. Roberts* (1863), 3 B. & S. 495.

**551. — Ruling by chairman contrary to resolution of meeting—Whether election invalidated—No voters prevented from voting.**—The advoidson of a parish church being vested in trustees who were bound to present the nominee of the parishioners & inhabitants, a vacancy occurred, & at a meeting of parishioners convened by the churchwardens & presided over by one of them, Aug. 30 was fixed upon for a meeting to proceed to the election of a vicar. Meanwhile, upon the requisition of certain inhabitants, a meeting of Aug. 25, summoned by the churchwardens, but at which they declined to preside, was held, at which resolutions were passed to the effect that the election should be by ballot, on one day only, & at several polling places, & that the poll should be open from 9 to 9. On Aug. 30 the meeting resolved upon was held, candidates were nominated, a show of hands taken, & a poll demanded, & one of the churchwardens, who was in the chair, announced that the poll would be taken by open voting, on the following & two successive days, at one polling place only, & that the poll would be kept open from 8 to 8. Upon a parishioner rising to move amendments similar to those of Aug. 25, the chairman left the chair, & declared the meeting at an end. After the churchwarden had left the chair, another chairman was chosen, & a series of resolutions similar to those of Aug. 25, were moved & carried. The poll having been taken in the way announced by the chairman of the meeting of Aug. 30:—*Held*: (1) the conduct of the churchwardens had been erroneous & illegal; (2) there being no evidence of any voter having been deprived of an opportunity of voting, the election could not be disturbed. *Semble*: (3) an election by ballot, if duly resolved upon, is not at the present day an illegal mode of election.—*SHAW v. THOMPSON* (1876), 3 Ch. D. 233; 45 L. J. Ch. 827; 34 L. T. 721.

*Annotation*:—*Mentd. Bebb v. Law Soc.*, [1914] 1 Ch. 286.

**552. Amendment negating resolution—Whether separate poll necessary.**—The churchwardens of C. gave notice that a vestry of the parish would be held to make a rate for the repair of the parish church: & in the notice it was stated that a show of hands would be taken on each proposition or amendment which might be submitted to the meeting, & if a poll should be demanded, the polling would be taken at an adjourned meeting on all the propositions & amendments made at the original meeting. At the meeting a rate of 2d. in the pound was proposed, & an amendment was moved "that no rate be granted." The majority were in favour of the amendment. Upon a poll being demanded, the vestry was adjourned for the purpose of taking it. At the poll the voting was "for the motion" & "for the amendment"; & at the close of it the chairman declared the motion to be carried, & no other amendment was allowed to be put:—*Held*: the amendment being a direct negative of the original motion, it was not necessary to take the poll on each; & no amendment could be brought forward after the close of the poll.—*R. v. ROBERTS* (1863), 3 B. & S. 495; 32 L. J. M. C. 153; 122 E. R. 186; *sub nom. R. v. SURREY JJ.*, 7 L. T. 822; 27 J. P. 709; *sub nom. St. GILES, CAMBERWELL (CHURCHWARDENS) v. SURREY JJ.*, 11 W. R. 362.

**553. —**—At a vestry meeting, a motion having been made & seconded that a rate be made, an amendment was proposed that it was not legal or expedient to make a church rate for the district. The amendment, & afterwards the original question, was put to the meeting: the first was negatived & the latter carried. A poll was demanded on the amendment only, & the vestry was adjourned for that purpose. On the day to which the vestry had been adjourned the chairman declared the state of the poll under the headings (1) the number for the amendment & against the rate, (2) the number against the amendment & for the rate, & declared the majority to be for the rate; & then dissolved the meeting without having put the original motion a second time:—*Held*: the proceedings, though irregular, were not sufficiently so to vitiate the rate.—*THURKS v. HUTTON* (1866), L. R. 1 A. & E. 270; 35 L. J. Eccl. 11; 31 J. P. 23; 12 Jur. N. S. 1013.

**554. Right of chairman to have assessors.**—The vicar presiding at a poll for church rates may, if he pleases, call in an assessor to assist him in deciding upon the objections taken to the votes.—*R. v. WAKEFIELD (VICAR)* (1846), 7 L. T. O. S. 227; 10 J. P. Jo. 380.

**555. Election of disqualified person.**—*ANTHONY v. SEGER* (1789), 1 Hag. Con. 9; 161 E. R. 457. *Annotations*:—*Consd. Adey v. Theobald* (1836), 1 Curt. 447; *R. v. Sarum, Bp.*, [1916] 1 K. B. 466. *Reid. Campbell v. Maund* (1836), 2 Har. & W. 457; *Storoy v. Colk* (1848), 6 Notes of Cases Supp. 33; *Westerton v. Davidson* (1854), 1 Ecc. & Ad. 385; *St. Michael, Oxford (Churchwardens) v. Luff* (1858), 7 W. R. 20; *Tear v. Freebody* (1858), 4 C. B. N. S. 328; *It. v. St. Matthew, Bethnal Green Vestry* (1875), 32 L. T. 558; *Harrison v. Barrett* (1876), Trist. 43; *R. v. Wimbledon L. B.* (1882), 8 Q. B. D. 469.

#### ii. Right to and Demand of Poll.

**556. The right to a poll—Incident to election by show of hands—Election of parish officer.**—The right to demand a poll is by law incident to the election of a parish officer by a show of hands. At the election of a churchwarden of the parish of P. (subsequently to Vestries Act, 1818 (c. 69)), the show of hands was in favour of M. A poll was demanded by a ratepayer present, who required that it should be taken according to sect. 3 of

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above Act (allowing plurality of votes to individuals in respect of property), to which mode an inhabitant present objected. The poll was taken by plurality of votes, by which H. & G. had the majority; they also had the majority at the poll, reckoning by single votes. During the poll, several parishioners protested against the mode of taking it, & did not vote. By sect. 8 of above Act, nothing in that Act is to change or affect the right or manner of voting in any vestry or meeting holden by virtue of any ancient or special usage or custom. By a local Act, vestrymen of the parish of P. are to be elected by ballot, by plurality of votes, as under Vestries Act, 1818 (c. 69), s. 3; elections of churchwardens are to be conducted in such manner as hath been usual in the same parish; & overseers are to be nominated by the vestry as may be done by parishioners in vestry in other cases. Before either Act passed, & ever since, churchwardens were elected in P. by show of hands, no poll ever having been demanded:—*Held*: (1) assuming Vestries Act, 1818 (c. 69), s. 3, to be inapplicable to the parish of P, (G. & H. were duly elected, the irregularity in the form of demanding the poll, if any, having been waived by the poll being in fact taken without objection from either party to there being a poll; & H. & G. having a majority on the poll according to either way of reckoning the votes; (2) sect. 3 of above Act was applicable to P.; for that the fact of no poll ever having been demanded did not show that the usage *de facto* in P. excluded a poll, & the elections were, at the time of passing the local Act, subject to sect. 3 of Vestries Act, 1818 (c. 69), in the event of a poll being demanded; (3) a poll may be demanded at an election of parish officers, after the chairman has declared the result of a show of hands.—*CAMPBELL v. MAUND* (1836), 5 Ad. & El. 805; 2 Har. & W. 457; 1 Nev. & P. K. B. 558; 1 Nev. & P. M. C. 229; 6 L. J. M. C. 145; 111 E. R. 1394, Ex. Ch.

*Annotations*:—As to (1) *Refd.* Baker & Downing v. Wood (1837), 1 Curt. 507. As to (2) *Refd.* St. Michael, Oxford (Churchwardens) v. Luff (1858), 7 W. R. 20; R. v. Howe (1863), 33 L. J. M. C. 53; R. v. Wimbledon L. B. (1882), 8 Q. B. D. 459. As to (3) *Consd.* Story v. Colk (1848), 6 Notes of Cases Supp. 33. *Refd.* Beechey v. Quentory (1842), 11 L. J. Ex. 418; Westerton v. Davidson (1854), 1 Rec. & Ad. 385; White v. Steele (1862), 12 C. B. N. S. 383; R. v. St. Matthew, Bethnal Green Vestry (1875), 32 L. T. 558.

**557. — Whether excluded by custom — No evidence of poll having been demanded.**—*CAMPBELL v. MAUND*, No. 556, *ante*.

**558. — Conduct of elections governed by local Act.**—*CAMPBELL v. MAUND*, No. 556, *ante*.

**559. — Objection to churchwardens' accounts.**—A vestry meeting was held for the purpose of passing the churchwardens' accounts; & upon the motion being proposed that such accounts should be allowed, an amendment was proposed by an inhabitant, who objected to certain items, that such accounts should not be allowed. Upon this a show of hands was taken, when the chairman declared that the original motion was carried thereupon a poll was demanded, which the chairman refused to grant:—*Held*: he was wrong, & a *mandamus* was granted for the purpose of taking such poll.—*R. v. ROBINSON*, *Ex p. OXFORD* (1856), 27 L. T. O. S. 110; 20 J. P. 311.

**560. — Of whole parish — Effect of agreement.**—At a vestry, held under Vestries Act, 1818 (c. 69), for the purpose of electing surveyors of highways, of which public notice had been given, it was agreed that the vote should be taken by a

show of hands, leaving it open to any one to propose that the votes should be taken according to the statute. A. & B. were respectively proposed & seconded for the office of surveyor; & on a show of hands, A. had a majority. It was then proposed & seconded, on behalf of B., that the votes should be taken according to the statute. No objection was made; & on the votes being so taken, B. had a majority, & was declared duly elected. A. then demanded a poll of the whole parish:—*Held*: (1) the meeting having agreed to a poll being taken according to the statute, no one was entitled afterwards to demand a poll of the whole parish; (2) the election of B. was valid; (3) a *mandamus* for another meeting to elect would not lie.—*R. v. HILLINGDON* (VICAR, ETC.) (1852), 18 Q. B. 718; 19 L. T. O. S. 184; 16 J. P. Jo. 374; 118 E. R. 271.

*Annotations*:—As to (1) *Distd.* R. v. Cooper (1870), 39 L. J. Q. B. 273. *Refd.* St. Michael, Oxford (Churchwardens) v. Luff (1858), 7 W. R. 20.

**561. —**—*R. v. GOOLE* (INCUMBENT & CHURCHWARDENS), No. 517, *ante*.

*See, also*, No. 755, *post*.

**Enforcement of right—By mandamus.**—*See* No. 559, *ante*; & Nos. 566–569, *post*.

**562. — No practical injustice.**—*R. v. GOOLE* (INCUMBENT & CHURCHWARDENS), No. 517, *ante*.

**563. Time of demand—After declaration of result of show of hands.**—*CAMPBELL v. MAUND*, No. 556, *ante*.

**564. — During calculation of votes after abortive show of hands.**—A vestry was duly summoned to consider as to the mode of raising money to pay for rebuilding the parish church. A resolution was moved & seconded that an application should be made to the comrs. of public works, to which an amendment was moved & seconded, that "this vestry refuses to sanction the application." It being difficult to tell the numbers on a show of hands, the chairman suggested that the names be taken down in writing, to which no objection was made. The supporters of the amendment, however, seeing the numbers would be against them, one of them demanded during the reckoning that a poll be taken, & moved "that the vestry be kept open till Saturday." The chairman refused to grant a poll, on the ground that there was a resolution pending & not disposed of:—*Held*: the poll ought to have been granted, there being substantially a demand for it, & *mandamus* granted accordingly to the rector to re-assemble the vestry & grant a poll.—*R. v. WALTERS* (1860), 24 J. P. 421.

**565. Irregularity in demand—Waiver.**—*CAMPBELL v. MAUND*, No. 556, *ante*.

**566. Effect of refusal—Election imperfect.**—On the election of a surveyor of highways for a parish, the chairman of the vestry took a show of hands, but refused to allow a poll which was demanded. On an application on behalf of the person who appeared successful on the show of hands, the ct. granted a rule *nisi* for a *mandamus*, commanding the inhabitants to meet in vestry & take a poll, on the ground that the election was imperfect.—*Ex p. GROWSMITH* (1841), 5 Jur.; 551 *sub nom.* *Ex p. GROSSMITH*, 10 L. J. Q. B. 359.

**567. —**—*Highway Act, 1835* (c. 50), s. 18, enacts, that "if it shall be determined by a majority of two-thirds of the votes of the vestrymen present at the meeting," to form a highway board for the parish, it shall be lawful for the vestry to nominate & elect a certain number of persons to form the board. The majority of two-thirds of the vestrymen present at a vestry meeting of a



parish having voted for the appointment of such a board, a poll was demanded by the minority, which the chairman refused, & a board were then nominated & appointed:—*Held*: (1) a poll was demandable of common right; (2) the right was not excluded by the words of the statute; (3) the board were therefore not duly elected.—*R. v. How* (1863), 33 L. J. M. C. 53; 9 L. T. 385; 27 J. P. 773.

*Annotations*:—*As to* (1) *Consd. R. v. Wimbledon L. B.* (1882), 8 Q. B. D. 459. *Refd. R. v. St. Matthew, Bethnal Green Vestry* (1875), 39 J. P. 502. *As to* (2) *Consd. R. v. Wimbledon L. B.* (1882), 8 Q. B. D. 459.

#### 568. — Proceedings void—Church rate.]—

At a duly assembled vestry A. proposed a church rate of twopence in the pound, & was seconded by B., C. proposed, as an amendment, a halfpenny rate, & was seconded by D. On show of hands the amendment was negative; C. then demanded a poll, which the chairman refused; the original motion was then put & carried on show of hands. D. demanded a poll, the result of which was that the original motion was carried by 43 to 42:—*Held*: all proceedings subsequent to the refusal of the poll on the amendment were null, & the ct. pronounced against the rate.—*ST. MICHAEL, OXFORD (CHURCHWARDENS) v. LUFF* (1858), 31 L. T. O. S. 358; 7 W. R. 20.

569. — [—(1) The only legitimate way in which a parish can express its desire to do an act is, by convening a vestry, & duly conducting the proceedings therein to their legal determination, *viz.*, by show of hands, or by a poll when a poll is duly demanded. (2) A meeting of vestry was held for the purpose of considering the propriety of purchasing an additional burial-ground for the parish of P. A resolution to that effect having been put & agreed to by the majority of those present, a poll was demanded, & refused. The resolution of the vestry was communicated to the church building comrs., who thereupon authorised the parish to purchase the land & to levy rates to defray the expenses, under Church Building Act, 1819 (c. 134), s. 25, & Church Building Act, 1822 (c. 72), s. 26. Money was accordingly borrowed by the churchwardens, & a rate made. A parishioner declining to pay the rate, on the ground of invalidity, the churchwardens instituted against him a suit in the Consistory Ct., in which suit the respondent tendered a responsive allegation, stating that at the vestry a poll had been duly demanded, & refused. The judge of the Consistory Ct. having declined to admit this responsive allegation, the respondent appealed to the Ct. of Arches, by which ct. the decision of the ct. below was confirmed. Upon an application to this ct. for a writ of prohibition, on the ground that the judge of the Consistory Ct. had improperly refused to receive the responsive allegation, *appet.* was directed to declare in prohibition; & he having so done:—*Held*: there had been no legal expression of the desire of the parish, & the responsive allegation ought to have been admitted to proof in the ecclesiastical ct. (3) An appeal from the Consistory Ct. to the Ct. of Arches is no bar to an application for a prohibition.—*WHITE v. STEELE* (1862), 12 C. B. N. S. 383; 31 L. J. C. P. 265; 6 L. T. 680; 8 Jur. N. S. 1177; 142 E. R. 1191; *subsequent proceedings*, 13 C. B. N. S. 231.

*Annotations*:—*As to* (1) & (2) *Refd. R. v. How* (1863), 33 L. J. M. C. 53. *Generally, Mentd. London Corp'n v. Cox* (1867), L. R. 2 H. L. 239; *Ripplin v. Bastin* (1869), L. R. 2 A. & E. 386.

570. — Costs.]—E., the vicar of a parish, at an election of churchwardens, refused to grant a poll demanded by D., one of two candidates. A writ for a *mandamus* was obtained on June 11, (1855), 9 A. & E. 2. *M. & W.* 640. *Genr* 1 Hare, 1; *R. v. Hinc*

& afterwards made absolute on June 21, & then a writ of *mandamus* issued, to which E. made a return that he had obeyed the rule. E. had on June 16, before the rule was made absolute, given notice that he had refused the poll under a mistake, but would hold another vestry, & grant a poll, which he forthwith did:—*Held*: D. was not entitled to his costs of the rule & writ of *mandamus*, because on E.'s submission after the rule *nisi* was obtained, he had done all in his power to correct the mistake, & the further prosecution of the rule was quite unnecessary.—*R. v. ETTY* (1877), 42 J. P. 36.

#### iii. Time, Place, and Duration.

571. Time & place of holding—Who may fix.]—*R. v. D'OYLY, R. v. HEDGER*, No. 408, *ante*.

572. Place of holding—Private property—Whether proper place—Town Hall.]—Notice having been given of a meeting in vestry for the purpose of granting a church rate, & that if a poll should be demanded, that a meeting would be immediately adjourned to the town hall. The meeting being held & a poll demanded, the chairman immediately adjourned the meeting to the town hall, where the poll was taken:—*Held*: (1) the proceeding was regular, no business having been interrupted by it, & the adjournment being part of the original appointment; (2) the town hall was not an improper place to take the poll, by reason of its being private property, no person having been prevented from voting on that account; (3) the time for taking the poll being limited to eleven hours, such time was sufficient if due diligence had been used, 785 persons being the greatest number proved to have voted on any occasion.—*BAKER & DOWNING v. WOOD* (1837), 1 Curt. 507.

*Annotation*:—*As to* (3) *Folld. Westerton v. Davidson* (1854), 1 Ecc. & Ad. 385.

573. — Convenient place—Late voters prevented from voting by crowd—Whether ground for *mandamus*.]—Where at a vestry meeting a poll is demanded, if the time & place for taking such poll are convenient, it is no ground for a *mandamus* to hold another vestry for the same purpose, that in consequence of the crowded state of the place where the poll was taken, a number of voters were unable to give their votes. Voters should use diligence in voting, & if they hold back until a late period, & then in consequence of the crowd of voters, some of them are unable to vote before the poll closes, this ct. will not assist them.

*Semble*: when it is publicly announced by the chairman that the poll will continue for a certain length of time, he has no power to prolong it.—*R. v. SUTTON, LANCAIRE (CHURCHWARDENS & OVERSEERS)* (1864), 29 J. P. 56; 13 W. R. 187.

574. Duration—Reasonable period.]—*R. v. WINCHESTER, BISHOP'S COMMISSARY COURT*, No. 510, *ante*.

575. — What period is reasonable—Number of voters.]—*BAKER & DOWNING v. WOOD*, No. 572, *ante*.

576. — Electors prevented from voting.]—Election of churchwarden. After a show of hands a poll was demanded, which by mutual agreement was commenced immediately. The chairman agreed with one of the candidates that the poll should close at seven o'clock, which was accordingly done, & thereby some qualified electors were prevented from recording their votes. Election void.—*WESTERTON v. DAVIDSON* (1854), 1 Ecc. & Ad. 385.

577. — Whether alleged customary period



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**reasonable—How ascertained.]—R. v. WINCHESTER, BISHOP'S COMMISSARY COURT, No. 510, ante.**

**578. — Grounds for closing—Whether riot or disturbance.]—R. v. ASTON-JUXTA-BIRMINGHAM (RECTOR) (1843), 1 L. T. O. S. 313.**

**579. — — — — —.]—The chairman of a vestry meeting, held for the purpose of taking a poll for the election of a churchwarden, has no power to close the poll on account of disturbance.—R. v. GRAHAM (1861), 25 J. P. 437; 9 W. R. 738.**

**580. — Right of chairman to prolong.]—R. v. SUTTON, LANCASHIRE (CHURCHWARDENS & OVERSEERS), No. 573, ante.**

**581. — Discretion of incumbent.]—A vestry meeting of the parish of H., of which meeting notice had been posted on the church door, was held for the election of churchwardens. The rector nominated one churchwarden, & there were two candidates for the office of parishioners' churchwarden, one being the existing churchwarden, & the other a candidate put forward by a party dissatisfied with the administration of the parish charities. The show of hands was in favour of the last-named candidate. The poll was closed by the rector at five o'clock on the day of the election, when there appeared a majority of votes for the existing churchwarden. The validity of the election was questioned by a rule for a *mandamus* to the rector & churchwardens, to hold a new election:—*Held*: (1) the closing of the poll was a matter in the discretion of the rector, which had not been shown to be unreasonably exercised; (2) it had not been shown that, had the poll been kept open, the result of the election would have been different; (3) there had been too great delay in questioning the election. Rule discharged.—R. v. HANDBOROUGH (CHURCHWARDENS) (1877), 37 L. T. 400; 41 J. P. 807.**

**582. — Poll improperly closed—Costs of mandamus for new election.]—Where the ct granted a *mandamus* to a vicar & churchwarden to proceed to the election of a churchwarden, on the ground that the vicar had improperly closed the poll, but no corrupt motive was imputed to defts. & prosecutor failed at the election, the ct. refused to make defts. pay the costs of the *mandamus*.—R. v. ASTON (VICAR & CHURCHWARDEN) (1844), 2 L. T. O. S. 368; 8 J. P. Jo. 120.**

**583. — — — — —.]—Where a poll was closed too soon, the main cause of it being a great disturbance caused by the agent of one of the candidates, who also succeeded in getting a *mandamus* for a new election, the ct. refused to give costs of the *mandamus* against the churchwardens, on the ground that the party who obtained it was chiefly blameable.—R. v. GRAHAM (1862), 26 J. P. 103.**

#### iv. Voting.

**584. Who entitled to vote—Qualified inhabitants—Though not present at show of hands.]—R. v. LAMBETH (RECTOR), No. 548, ante.**

**585. Scrutiny—Whether demandable as of right.]—R. v. HAMMERSMITH (VICAR & CHURCHWARDENS), No. 512, ante.**

#### D. Under Local Laws or Customs.

**586. Effect of custom as to assessment of property—Plurality of votes.]—By Vestry Act, 1818 (c. 69), s. 3, persons rated to the poor in respect of any annual rent, profit or value, not amounting to £50, shall be entitled to one vote**

**& no more at vestry meetings, & to an additional vote in respect of every additional £25, to which they shall be rated, not exceeding six votes in the whole. Where, however, in the parish of St. M. the poor rates had, according to ancient custom been always assessed without regard to the annual value of property in the parish, but according to the supposed ability of the person assessed:—*Held*: persons so rated were not within the benefit of sect. 3 of the above Act, as to the plurality of votes, although assessed in respect of property exceeding £50 in amount.—NIGHTINGALE v. MARSHALL (1823), 2 B. & C. 313; 3 Dow. & Ry. K. B. 549; 2 L. J. O. S. K. B. 43; 107 E. R. 400.**

**587. Local Act—Election of guardians—Effect of Vestries Act, 1818 (c. 69)—Plurality of votes.]—A local Act passed before Vestries Act, 1818 (c. 69), for the regulation of parish vestries, created the office of guardians of the poor for a particular parish, & enacted, that vacancies should be annually filled up by the rated inhabitants assembled in the vestry room, who should elect persons in the room of those going out:—*Held*: after the passing of the above Act the inhabitants ought to be allowed in such election the number of votes, in proportion to their respective assessments, defined in the latter Act; for the local Act did not give this vestry such a peculiar constitution as to bring it within sect. 8 of the above Act, which preserved to vestries holden under any special Act, the powers & rights of voting which they previously enjoyed.—R. v. ST. JAMES, (CLERKENWELL. CHURCHWARDENS) (1834), 1 Ad. & El. 317; 3 L. J. M. C. 99; 110 E. R. 1226.**

**588. — Trusteeship of church funds—Erection of house for minister—Mandamus to account on application by minister.]—A local Act provides, that if there should be a surplus from fees & payments received by vestry of a parish on account of certain district churches, the surplus should be put aside by the vestry to form a fund, to erect a residence for the minister. A *mandamus* was granted against the vestry to return the accounts relating to a church on the application of the minister, when there were affidavits both as to the existence & non-existence of a surplus.—R. v. ST. MARYLEBONE VESTRY (1838), 2 J. P. 344.**

**589. — Election of officers—"Most proper & convenient" method—Power to select.]—A local Act enacted, that at a vestry meeting to be held on Easter Tuesday in every year, all the vacancies in the list of governors & guardians of the poor should "be filled up by poll or ballot, or in such way of election as should be deemed most proper & convenient." At a vestry meeting held accordingly, the mode of election pursued was as follows: Two candidates were proposed for each vacancy; on a show of hands being taken, the one, in whose favour it appeared to be, was declared elected; & then two other candidates were proposed for the next vacancy; & so on, till all the vacancies were filled up. One of the rejected candidates demanded a poll of the inhabitants of the parish, which was refused by the chairman, who proceeded to complete the elections according to the mode above described:—*Held*: (1) this mode of election could not be sustained; (2) it was the meeting itself, & not the chairman, which was to pronounce what was the "most proper & convenient" mode of election; the right to determine the mode of election being limited to a choice among such modes as might best fulfil the object of the section, which was to secure the filling up of the vacancies by a meeting of persons to the effect of two-thirds of meeting of a**

**613. Nomination of inspectors of votes—How effected.]**—As to the nomination of inspectors of votes, preliminary to the election of vestrymen, under Vestries Act, 1831 (c. 60), s. 14.

*Qu.* : if on such nomination a show of hands is taken & the result disputed, is the question to be determined by a division of those present, or by a general poll? At all events the decision of the returning officer as to the result of the show of hands is not conclusive, if it appear to have been influenced by partiality.—*R. v. ST. PANCRAZ (VESTRYMEN, ETC.)* (1839), 11 Ad. & El. 15; 4 Per. & Dav. 66; 9 L. J. M. C. 120, n.; 113 E. R. 317.

*Annotations* :—*Reid*. *R. v. D'Oyly, R. v. Hedger* (1840), 12 Ad. & El. 139. *Mentd.* *Elt v. St. Mary's, Islington Burial Board* (1854), Kay, 449; *R. v. St. Matthew, Bethnal Green Vestry* (1875), 39 J. P. 502.

#### G. The Vestry Clerk.

**614. Nature of office—Officer of those representing the parish.]**—Information filed against churchwardens & vestry clerk, to establish a charity. Vestry clerk demurred generally :—*Held* : he was bound to answer, as being the officer of those representing the parish, although no relief prayed against him.—*A. G. v. ST. MARGARET'S, WESTMINSTER (CHURCHWARDENS)* (1832), 1 L. J. Ch. 127.

**615. Appointment—Whether 'mandamus to admit lies.]**—A *mandamus* to admit a vestry clerk refused.

This is not a fixed permanent office, for which a *mandamus* will lie. It depends altogether on the will of the inhabitants, who may elect a different clerk at each vestry (*LORD KENYON, C.J.*)—*R. v. CROYDON (CHURCHWARDENS)* (1794), 5 Term Rep. 713; 101 E. R. 396.

**616. — Validity of election—How tested.]**—*Quo warranto* will lie to inquire into the validity of the election of a clerk to a vestry under Vestries Act, 1850 (c. 57), ss. 6, 7.—*R. v. BURROWS*, [1892] 1 Q. B. 399; 61 L. J. Q. B. 88; 66 L. T. 25; 40 W. R. 207; 55 J. P. Jo. 725, D. C.

*Annotation* :—*Mentd.* *R. v. Speyer, R. v. Cussel*, [1916] 1 K. B. 595.

**617. — Invalid election—Exercise of office—What amounts to.]**—In order to make the remedy by *quo warranto* applicable in the case of a non-corporate office there must be something more than the mere acceptance of the office. Deft., while holding the office of churchwarden, was proposed for the office of vestry clerk & declared elected. He published a letter thanking the electors, but never acted as vestry clerk. On an application for a *quo warranto* on the ground that the office of vestry clerk was incompatible with that of churchwarden :—*Held* : what deft. had done was not such an exercise of the office of vestry clerk as to render the remedy by *quo warranto* applicable.—*R. v. TIDY*, [1892] 2 Q. B. 179; 61 L. J. Q. B. 791; 67 L. T. 319; 56 J. P. 650; 41 W. R. 128; 8 T. L. R. 646, D. C.

**618. — Evidence of.]**—To an action brought by the vestry clerk of the parish of St. P., under a local Act, deft. pleaded that pltf. was not vestry clerk :—*Held* : (1) evidence of his acting as vestry clerk was sufficient *prima facie* evidence of his appointment; (2) one of the directors of the vestry was a competent witness for pltf.—*M'GAHEY v. ALSTON* (1836), 2 M. & W. 206; 2 Gale, 238; Tyr. & Gr. 981; 6 L. J. Ex. 29; 150 E. R. 731.

*Annotations* :—*As to* (1) *Reid*. *Doe d. Bowley v. Barnes* (1846), 8 Q. B. 1037; *McMahon v. Lennard* (1858), 6 H. L. Cas. 970. *As to* (2) *Reid*. *R. v. Bath Recorder* (1839), 9 Ad. & El. 714; *Sinclair v. Sinclair* (1845), 13 M. & W. 640. *Generally, Mentd.* *Hart v. Hart* (1841), 1 Hare, 1; *R. v. Hinckley Overseers* (1863), 3 B. & S. 885.

**619. Vestry-book—Right to possession—How enforced.]**—A *mandamus* to the churchwardens to deliver up a vestry-book to the vestry clerk was refused.

If the muniments belonged to him [the vestry clerk] as annexed to his office, he may bring an action of detinue or trover (*LORD ELLENBOROUGH, C.J.*)—*ANON.* (1816), 2 Chit. 255.

**620. — Production as evidence.]**—A vestry clerk who is called as a witness, cannot, on the ground that it may criminate himself, object to produce the vestry book, kept under Vestries Act, 1818 (c. 69), s. 2.—*BRADSHAW v. MURPHY* (1836), 7 C. & P. 612.

**621. Documents from parish chest—Production of.]**—The ct. will not compel the vestry clerk of a parish to produce & permit copies to be taken of documents from the parish chest in his custody, for any other than parochial purposes.—*MAY v. GWYNNE* (1821), 4 B. & Ald. 301; 106 E. R. 948.

**622. As party to action against churchwardens—Information to establish a charity.]**—*A. G. v. ST. MARGARET'S, WESTMINSTER (CHURCHWARDENS)*, No. 614, *ante*.

**623. Power to summon auditors to audit accounts—New auditors elected—Enforcement by mandamus.]**—Where a local statute confers a power of investigating accounts upon auditors to be annually elected, & to be summoned by the vestry clerk, at certain stated intervals, to audit the accounts, the ct. will not grant a *mandamus* to compel the latter, when new auditors have been elected for the succeeding year, to call a meeting of the old auditors to audit the accounts of the past year.—*Re ST. GILES & ST. GEORGE'S PARISHES* (1833), 1 Dowl. 540.

**624. Arrears of salary—Enforcement of payment.]**—A writ of *mandamus* will lie to the overseers of the poor of a parish commanding them to pay to the vestry clerk of the parish the arrears of his salary due under sect. 8 of Vestries Act, 1850 (c. 57), such salary being made chargeable upon & payable out of the moneys to be raised for the relief of the poor.—*R. v. DAVIES*, [1911] 2 K. B. 609; *sub nom.* *R. v. DAVIES, Ex p. PEAKE*, 80 L. J. K. B. 993; 104 L. T. 778; 75 J. P. 265; 9 L. G. R. 564, D. C.

#### SUB-SECT. 5.—PAROCHIAL CHURCH COUNCILS.

*See, generally*, Parochial Church Councils (Powers) Measure, 1921 (No. 1).

**625. Control of offertories & collections—At morning & evening prayer.]**—*MARSON v. UNMACK*, No. 441, *ante*.

**626. — At extra-legal services.]**—*MARSON v. UNMACK*, No. 441, *ante*.

**627. — At meeting held away from church.]**—*MARSON v. UNMACK*, No. 441, *ante*.

**Right to be heard in faculty case.]**—*See* No. 1774, *post*.

#### SUB-SECT. 6.—CHURCHWARDENS.

##### A. Number.

**628. Whether two necessary.]**—By custom there may be only one churchwarden in a parish (*LORD ELLENBOROUGH, C.J.*)—*R. v. EARL SHILTON (INHABITANTS)* (1818), 1 B. & Ald. 275; 106 E. R. 102.

*Annotation* :—*Reid*. *R. v. Catesby* (1824), 2 B. & C. 814.

**629. —.]**—*R. v. WHITCHURCH (VICAR)* (1875), 39 J. P. Jo. 101.

**Sect. 7.—Constitution of the Church into parishes:**  
*Sub-sect. 6, A., B. & C. (a) & (b), D. (a) & (b) i.]*

**630. Custom for one only.]**—An indenture binding out a poor apprentice, executed by S., churchwarden, & G., overseer of the poor of a hamlet maintaining its own poor separately from the parish at large, not being impeached by evidence negating its execution by a majority of the churchwardens & overseers of the hamlet, shall be deemed good by intending that there were two overseers for the hamlet as required by 13 & 14 Car. 2, c. 12, s. 21, & only one churchwarden by custom in the same place.

Can there be by law only one churchwarden? That may be regulated by custom, & by custom there may be only one in this place (LORD ELLENBOROUGH, C.J.).—*R. v. HINCKLEY (INHABITANTS)* (1810), 12 East, 361; 104 E. R. 142.

*Annotations:—*Consd. *R. v. Catesby* (1824), 2 B. & C. 814. *Refd. R. v. Fenton* (1841), 1 Gal. & Dav. 17. *Mentd. R. v. Ashburton* (1846), 2 New Sess. Cas. 316; *R. v. Stainforth* (1847), 3 New Sess. Cas. 53.

**631. —.]**—*R. v. EARL SHILTON (INHABITANTS)*, No. 628, *ante*.

**632. — Proof of custom.]**—Where a parish certificate was granted by two persons, who described themselves on the face of it to be, "the only churchwarden & the only overseer of the poor of the parish":—*Held*: after a lapse of 63 years, in the absence of evidence to the contrary, the ct. would intend, (1) that the parish had by custom but one churchwarden; & (2) that there had been originally two overseers, but that one had died, & consequently, that the certificate was valid, as having been granted by a majority of the existing body of overseers, with a Certificate Act, 1697 (c. 30).—*R. v. CATESBY (INHABITANTS)* (1824), 2 B. & C. 814; 4 Dow. & Ry. K. B. 434; 2 Dow. & Ry. M. C. 278; 107 E. R. 585.

*Annotations:—**Refd. R. v. Earl Shilton* (1825), 6 Dow. & Ry. K. B. 104; *R. v. Hewett* (1828), 7 L. J. O. S. M. C. 3; *R. v. Upton Gray* (1830), 10 B. & C. 807; *R. v. Fenton* (1841), 1 Gal. & Dav. 17.

**633. Three—Additional churchwarden in respect of chapel of ease.]**—*R. v. CHEADLE (CHURCHWARDENS)* (1877), 41 J. P. Jo. 292.

**634. Four—Two for township & two for remainder of parish.]**—In the parish of A., two churchwardens were elected for the township of B., & two others for the rest of the parish. Separate rates were made for these divisions:—*Held*: the churchwardens elected for the township of B. might maintain an action against their predecessors for money remaining in their hands, & were not bound to make all the present or late churchwardens of the parish plts. or defts.—*ASTLEY v. THOMAS* (1823), 2 B. & C. 271; 1 C. & P. 103; 3 Dow. & Ry. K. B. 492; 2 Dow. & Ry. M. C. 129; 2 L. J. O. S. K. B. 8; 107 E. R. 384.

*Annotations:—**Refd. R. v. Marsh* (1836), 2 Har. & W. 255; *R. v. Fenton* (1841), 1 Gal. & Dav. 17; *Bromner v. Hull* (1860), L. R. 1 C. P. 748. *Mentd. Doe d. Townsend v. Mace* (1839), 3 Jur. 628.

**635. — Parish divided into four tithings—One churchwarden elected by inhabitants of each tithing.]**—*R. v. MARSH, No. 746, post*.

**636. Five — St. Sepulchre, London.]**—*ST. SEPULCHRE (VICAR) v. ST. SEPULCHRE (CHURCHWARDENS)*, No. 747, *post*.

**B. Qualification.**

**637. Whether residence necessary.]**—*R. v. RAVEN* (1861), 25 J. P. Jo. 374.

**638. — New parish constituted under Church Building Act, 1819 (c. 134).]**—*R. v. HARDING* (1889), 6 T. L. R. 53; 53 J. P. Jo. 755, D. C.

*Annotations:—**Fold. R. v. Cree* (1892), 67 L. T. 556. *Apld. R. v. Townson, Ex p. Broderip* (1908), 99 L. T. 472. *Fold.*

*R. v. Bredwardine (Vicar & Churchwardens), Ex p. Burton-Phillipson*, [1920] 1 K. B. 47.

**639. — New parish constituted under Church Building Act, 1831 (c. 38).]**—It is provided by the above Act that where the population of a parish exceeds a certain number, & a new church is built within such parish, a district may be assigned to such new church; & it is enacted by sect. 16 that two fit & proper persons shall be appointed to act as churchwardens for every church built under the provisions of this Act at the usual period of appointing parish officers in every year, & shall be chosen one by the incumbent of the church for the time being, & the other by the renters of the pews in such church:—*Held*: a person not resident within the parish was not qualified to be elected as churchwarden of a church built under the provisions of the Act.—*R. v. CREE* (1892), 67 L. T. 556; 57 J. P. 72; 37 Sol. Jo. 11, D. C.

*Annotations:—**Apld. R. v. Townson, Ex p. Broderip* (1908), 72 J. P. 368. *Fold. R. v. Bredwardine (Vicar & Churchwardens), Ex p. Burton-Phillipson*, [1920] 1 K. B. 47.

**640. — Whether ownership of property sufficient.]**—A person to be legally qualified to fill the office of churchwarden in a parish must reside within that parish; it is not sufficient to qualify him for election, that he occupies land in the parish & spends a great part of his time there.—*R. v. BREDWARDINE (VICAR & CHURCHWARDENS), Ex p. BURTON-PHILLIPSON*, [1920] 1 K. B. 47; 89 L. J. K. B. 133; 122 L. T. 96; 83 J. P. 269; 36 T. L. R. 15; 18 L. G. R. 105, D. C.

*See Nos. 655–657, post.*

**641. Sufficiency of qualification—Residence—Room occasionally resorted to—Convenience or pleasure.]**—The occupation by a ratepayer of a room in a parish, to which he resorts for convenience or pleasure, is a good qualification for the office of churchwarden.—*HARRISON v. BARRETT* (1876), Trist. 43.

**642. — New parish constituted under Church Building Act, 1818 (c. 45)—Residence in portion of old parish.]**—An inhabitant ratepayer, in a parish constituted under the above Act, is eligible for the office of churchwarden in such parish, notwithstanding that he is resident in a portion of a consolidated chapelry carved out of the old parish, under Church Building Acts, 1815 (c. 70), & 1851 (c. 97); 19 & 20 Vict., c. 55.—*JONES v. HAYWORTH* (1881), Trist. 47.

**643. — Sleeping within parish—Joint-owner of property in parish.]**—At the annual Easter vestry meeting of a parish the rector nominated K. as rector's churchwarden. K.'s family owned property in the parish & neighbourhood, & K. was joint-owner of some property in the parish. He frequently stayed with his brother in an adjoining parish, but until the present year he had no residence of his own in the parish. Shortly before his nomination he rented a small cottage in the parish for six months. He slept in the cottage, but had no meals there, & there was no servant there. He stated that he intended to reside in the parish & perform his duties as churchwarden. He had two years previously been nominated by the rector as his warden, & had performed his duties as such:—*Held*. K.'s occupation was not a mere colourable occupation, & he had a sufficient legal qualification by residence to support his nomination as churchwarden.—*R. v. TOWNSON, Ex p. BRODERIP* (1908), 99 L. T. 472; 72 J. P. 368; 24 T. L. R. 690; 6 L. G. R. 1133, D. C.

*Annotation:—*Consd. *R. v. Bredwardine (Vicar & Churchwardens), Ex p. Burton-Phillipson*, [1920] 1 K. B. 47.

*See, also, No. 646, post.*

**644. Disqualifications—Allen.]**—ANTHONY v. SEGER (1789), 1 Hag. Con. 9; 161 E. R. 457.  
*Annotations:—***Apld.** Adey v. Theobald (1836), 1 Curt. 447.  
**Consd.** R. v. Sarum, Bp., [1916] 1 K. B. 466. **Refd.** Harrison v. Barrett (1876), Trist. 43. **Mentd.** Campbell v. Maund (1836), 2 Bar. & W. 457; Story v. Colk (1848), 6 Notes of Cases Supp. 33; Westerton v. Davidson (1854), 1 Ecc. & Ad. 385; St. Michael, Oxford (Churchwardens) v. Luff (1858), 7 W. R. 20; Tear v. Freebody (1858), 4 C. B. N. S. 228; R. v. St. Matthew, Bethnal Green Vestry (1876), 32 L. T. 558; R. v. Wimbledon L. B. (1882), 8 Q. B. D. 459.

**645. — Nonconformity—Wesleyan minister.]**  
 —JOHNSON v. LITTLE (1914), Times, May 20.  
 — **Quaker.]**—See No. 657, *post*.  
 — **Sex.]**—See No. 755, *post*.

### C. Liability to Serve.

#### (a) In General.

**646. Boarder with householder.]**—FORD v. CHAUNCEY (1715), 1 Hag. Con. 382, n.; 161 E. R. 589, n.

**647. Partner in business carried on in parish—Resident—But not householder.]**—FORD v. CHAUNCEY (1715), 1 Hag. Con. 382, n.; 161 E. R. 589, n.

**648. — Resident in another parish—London.]**  
 —BROOK v. OWEN (1718), 3 Phillim. 517, n.; cited 1 Hag. Con. 380; 161 E. R. 1402.

*Annotations:—***Fold.** Stephenson v. Langston (1804), 1 Hag. Con. 379. **Refd.** Harrison v. Barrett (1876), Trist. 43.

**649. — — — — —.]**—COOK v. FERRARS (1733), 1 Hag. Con. 383, n.; 161 E. R. 589, n.

**650. — — — — —.]**—BOLTON & GILL v. ZACHARY & STEVENS (1748), 1 Hag. Con. 383, n.; 161 E. R. 589, n.

**651. — — — — — Custom of the City of London.]**—I understand, from those who are well acquainted with the customs of the city of London that persons are eligible to civil offices, who are not personally resident in the parish, but are partners of a house of trade situate within it. This must be understood to be the rule in future, & if it is proper to be reversed, must be reversed elsewhere, by a superior ct. (SIR WILLIAM SCOTT). —STEPHENSON v. LANGSTON (1804), 1 Hag. Con. 379; 161 E. R. 588.  
*Annotations:—***Refd.** Harrison v. Barrett (1876), Trist. 43; R. v. Cree (1892), 67 L. T. 556.

**652. Non-resident parishioner.]**—*Qu.*: whether a non-resident parishioner elected to the office of churchwarden can be compelled to serve.

It may be that the true explanation of the apparent conflict on the point whether residence within the parish is or is not necessary to qualify for the office is this, that although non-residence does not disqualify for the office, a non-resident parishioner cannot be compelled to serve in the office (EVE, J.).—MEYERS v. HENNEL, [1912] 2 Ch. 256; 81 L. J. Ch. 794; 106 L. T. 1016; 76 J. P. 321; 28 T. L. R. 424; 56 Sol. Jo. 538.

*Annotation:—***Mentd.** Harries v. Crawford, [1918] 2 Ch. 158.

**653. Person elected in place of previously elected churchwarden—Previously elected churchwarden released or exempt.]**—Where the person, first elected churchwarden, had on payment of a fine been excused, a person elected in his place at the same vestry-meeting, is bound to serve, unless some exemption be shown.—BIRNIE v. WELLER & ELLIOTT (1831), 3 Hag. Ecc. 474; 162 E. R. 1231.

**654. — Rescission of previous election by vestry—Though on insufficient grounds.]**—BIRNIE v. WELLER & ELLIOTT (1831), 3 Hag. Ecc. 474; 162 E. R. 1231.

#### (b) Exemptions.

**655. Holder of parochial office in another parish.]**—GILCHRIST v. BRACEBRIDGE (1750), 1 Hag. Con. 383, n.; 161 E. R. 589.

**656. High sheriff—Appointment after election as churchwarden.]**—STEPHENSON v. LANGSTON (1804), 1 Hag. Con. 379; 161 E. R. 588.

*Annotations:—***Refd.** Harrison v. Barrett (1876), Trist. 43; R. v. Cree (1892), 67 L. T. 556.

**657. Quaker.]**—A Quaker having been elected churchwarden, the ct. under the circumstances declined to compel him to take upon himself the functions of the office.—ADEY v. THEOBALD (1836), 1 Curt. 447; 163 E. R. 157.

### D. Appointment.

#### (a) In General.

**658. Form of appointment—Whether instrument in writing necessary.]**—The office of churchwarden was by common law, & yet that is for a year without any deed or writing; so it is of a parish clerk, he is by common law an officer, & is in for life without deed (*per* CUR.).—ANON. (1713), Sess. Cas. K. B. 12; 93 E. R. 11.

**659. Control by patron.]**—The patrons of a church have no right to controvert the election of churchwardens; unless it can be shown that the parishioners have no right to elect churchwardens, & that the churchwardens of the particular parish are exempt from the jurisdiction of the ordinary.—ST. THOMAS'S HOSPITAL (GOVERNORS) v. TREHORNE (1752), 1 Lee; 126; 161 E. R. 47.

**660. Proof of appointment—Whether necessary—in action of ejectment.]**—In ejectment under Poor Relief Act, 1819 (c. 12), s. 17, for a parish house, on the demise of A. & B., stated in the declaration to be the churchwardens & overseers of a parish, the fact that they acted as churchwardens & overseers at the time of the alleged demise is sufficient *prima facie* proof, for the purposes of the action, that they held the offices at that time.—DOE d. BOWLEY v. BARNES (1846), 8 Q. B. 1037; 1 New Pract. Cas. 401; 15 L. J. Q. B. 293; 7 L. T. O. S. 139; 10 Jur. 520; 10 J. P. Jo. 309; 115 E. R. 1104.

*Annotations:—***Apld.** McMahon v. Lennard (1858), 6 H. L. Cas. 970; R. v. Roberts (1878), 38 L. T. 690.

**661. — — — — — By acting.]**—R. v. MITCHELL (1818), 2 Starkie on Evidence, 3rd ed. 307, n.

— — — — —.]—See, generally, PUBLIC AUTHORITIES.

#### (b) Mode of Appointment.

##### i. In General.

**662. Customary mode of appointment.]**—R. v. RICE (1697), 3 Salk. 90; 1 Ld. Raym. 138; 5 Mod. Rep. 325; Sett. & Rem. 218; Comb. 417; 91 E. R. 710; *sub nom.* R. v. REES, Carth. 393; 12 Mod. Rep. 116; *sub nom.* MORGAN v. CARDIGAN (ARCHDEACON), 1 Salk. 106.

*Annotations:—***Refd.** R. v. Williams (1828), 7 L. J. O. S. M. C. 46; R. Barlow (1861), 30 L. J. Q. B. 271; R. v. Sarum, Bp., [1916] 1 K. B. 466.

**663. — — — — —.]**—SLOCOMBE v. ST. JOHN (1820), Cripps' Church & Clergy Law, 7th ed. 178.

**664. Local custom—Existence of—Jurisdiction to try—Whether ecclesiastical or temporal court.]**—EVELIN'S CASE, No. 717, *post*.

**665. — — — — —.]**—CARPENTER'S CASE (1681), T. Raym. 439; 83 E. R. 230.

**666. — — — — —.]**—WILLIAMS v. VAUGHAN (1718), 1 Wm. Bl. 28; 96 E. R. 15.

**667. — — — — — Temporal court.]**—BANISTER v. HOPKIN (1710), 10 Mod. Rep. 12; 88 E. R. 602.

*Annotation:—***Fold.** Full v. Hutchins (1776), 2 Cowp. 422  
*See, generally,* CUSTOM & USAGES, Vol. XVII., pp. 19 *et seq.*

**668. — — — — — Whether abrogated by private Act.]**—

**Sect. 7.—Constitution of the Church into parishes :  
Sub-sect. 6, D. (b) iii. & (c), E. & F.]**

in which it was agreed that the ct. should draw inferences of fact:—*Held*: (1) the custom was valid & sufficiently proved, notwithstanding the occasional deviations; & the severance of the hamlet of Whitefield from the rest of the parish of Prestwich did not affect the validity of the ancient custom. Declarations of a deceased rector were received as evidence of the custom.

In 1863, the ratepayers of the township of Prestwich claimed to be entitled to appoint a churchwarden, or to nominate two persons to be submitted to the rector, for his choice; & at a meeting held for that purpose deft. was appointed churchwarden, & proceeded to collect a church-rate in the township of Prestwich. In an action by the five churchwardens appointed according to the above custom, to recover from him the money so levied:—*Held*: (2) the action was maintainable, although it appeared that some of plffs. had omitted to make the declaration prescribed by Statutory Declarations Act, 1835 (c. 62), s. 9, the ct. having power under Common Law Procedure Act, 1860 (c. 126), s. 19, to give judgment for such of plffs. as might be proved to be entitled; & *Semble*: a churchwarden of the former year, who had made the necessary declaration, might, if necessary, be substituted for the disqualified plff.

There remains an objection of form, viz., that one of the five plffs. had not made the declaration required by Statutory Declarations Act, 1835 (c. 62), s. 9, & therefore was not qualified to act as churchwarden. The answer to that objection is, that, if that person was incapable of acting, the former churchwarden for that township continues in office. The churchwarden is appointed for one year, & until a successor is legally appointed; & it cannot be necessary for a churchwarden so continuing in office to make a fresh declaration (*Emble, C. J.*).—*BREMNER v. HULL* (1866), L. R. 1 C. P. 748; 11 *Har. & Ruth.* 800; 35 L. J. C. P. 332; 15 L. T. 352; 12 *Jur. N. S.* 648; 14 *W. R.* 904.

*Annotations*:—As to (2) *Refd.* *Edney & Lunn v. Smallbones* (1869), 21 L. T. 506. *Generally, Mentd.* *R. v. Green* (1874), 31 L. T. 543.

**696.** — From names submitted by ratepayers.—*BREMNER v. HULL*, No. 695, *ante*.

**697.** — On disagreement between incumbent & parishioners.—*STUTTER v. PRESTON* (1717), 1 *Str.* 52; 93 *E. R.* 379.

**698.** — Without consent of parishioners.—(1) A perpetual curate is the minister of a parish within the general custom, by which, in conformity with Canon 89, the churchwardens are chosen by the joint consent of the minister & parishioners, & if they cannot agree, the minister chooses one & the parishioners the other. A perpetual curate has therefore a right to take part in the election of churchwardens, in the absence of proof of any other custom. To a *mandamus* directing the minister & churchwardens to call a vestry for the purpose of electing a churchwarden by the parishioners, in conformity with the above custom, the churchwardens returned that a vestry was duly held & the minister did not propose a person nor endeavour to obtain the consent of the parishioners to his election; & therefore the parishioners elected two churchwardens. To this prosecutor pleaded that the

parishioners had before & still denied the right of the minister to choose churchwardens jointly with the parishioners; wherefore the minister, as he lawfully might, nominated his churchwardens without attempting to get the parishioners' consent:—*Held*: the plea was good.

(2) Where a *mandamus* is addressed to churchwardens during their year of office & disobeyed by them during that period, it is no reason for refusing a peremptory writ that their year of office has expired.—*R. v. ALLEN* (1872), L. R. 8 Q. B. 69; 42 L. J. Q. B. 37; 27 L. T. 707; 21 *W. R.* 190; *sub nom.* *R. v. SHOULDHAM (VICAR)*, 37 J. P. 310.

*Annotation*:—As to (1) *Refd.* *R. v. Sallsbury, Bp.*, [1901] 1 K. B. 673.

**699.** — Whether curate included.—*HUBBARD v. PENRICE*, No. 671, *ante*.

**700.** — Whether perpetual curate included.—*R. v. ALLEN*, No. 698, *ante*.

Where incumbent under sentence of deprivation.—*See* No. 669, *ante*.

**701.** People's warden.—By outgoing churchwardens.—By custom.—*CATTEN v. BARWICK* (1719), 1 *Str.* 145; 93 *E. R.* 439.

*Annotation*:—*Refd.* *Bremner v. Hull* (1866), L. R. 1 C. P. 748.

**702.** Enforcement by *mandamus*—When granted.—The ct. would not grant a *mandamus* to a rector to appoint a churchwarden at the request of the clerk of the Ecclesiastical Ct., as it did not appear that the church was out of repair.—*R. v. MORGAN* (1824), 2 L. J. O. S. K. B. 221.

Effect of nomination by incumbent—On right to vote in vestry for people's warden.—*See* No. 529, *ante*.

Additional churchwarden in respect of chapel of ease.—*See* No. 686, *ante*.

(c) *Validity of Appointment.*

**703.** How tested.—*R. v. DAWBENY* (1743), 2 *Str.* 1196; 93 *E. R.* 1123.

*Annotations*:—*Folld.* *R. v. Shepherd* (1791), 4 *Term Rep.* 381. *Expld.* *Darley v. R.* (1816), 12 *Cl. & Fin.* 520.

**704.** —.—The ct. will not grant a *quo warranto* information to try the validity of an election to the office of churchwarden.—*R. v. SHEPHERD* (1791), 4 *Term Rep.* 381; 100 *E. R.* 1075.

*Annotations*:—*Refd.* *R. v. Birmingham (Rector)* (1837), 7 *Ad. & El.* 254; *Darley v. R.* (1816), 12 *Cl. & Fin.* 520; *Ex p. Mawby* (1854), 18 *Jur.* 906.

*See, generally*, *CROWN PRACTICE*, Vol. XVI., pp. 353 *et seq.*

**705.** —.—(1) Where, by custom in a parish, the rector nominates one churchwarden & the parishioners the other, & the rector nominated as churchwarden a person who was not resident nor the occupier of any house or land in the parish, & the person so appointed was afterwards sworn into office; & it was desired to question the validity of the appointment, on the ground that the person appointed was not legally qualified:—*Held*: an application for a *mandamus* to the rector to nominate a churchwarden was a proper course for that purpose.

(2) A *quo warranto* does not lie for usurping the office of churchwarden.—*Re BAHLOW* (1861), 30 L. J. Q. B. 271; 5 L. T. 289; 25 J. P. 727.

*Annotations*:—*Mentd.* *R. v. Hertford College* (1878), 3 Q. B. D. 693; *R. v. Joint Stock Companies Registrar* (1888), 21 Q. B. D. 131; *R. v. Lambourn Valley Ry.* (1888), 22 Q. B. D. 463; *R. v. Incorporated Law Soc.*, [1895] 2 Q. B. 456; *R. v. Leicester Grdus.*, [1899] 2 Q. B. 632.

**PART III. SECT. 7, SUB-SECT. 6.—  
D. (c).**

*R. Invalid appointment—How remedied—Injunction.*—A proprietary church was founded & endowed by a

lease & a deed of endowment & trust made in 1850. In 1913, the registered vestrymen of the church elected J., as parishioners' churchwarden. The election was in accordance with the provisions for the election of church-

wardens contained in the constitution of the Church of Ireland, framed by the general synod under the power conferred by Irish Church Act, 1869, but was inconsistent with the trusts in the deed of endowment & the provisions of the

**706. Test of validity by civil court—Procedure to obtain—Church built under Church Building Acts.]—SEARELL v. ROWLANDSON, No. 682, ante.**

**707. Evidence of validity.]—GANVILL v. UTTING, No. 901, post.**

**Invalid appointment—How remedied—Mandamus to vestry.]—See No. 582, ante.**

#### *E. Oath or Declaration.*

**708. Whether necessary.]—ANON. (1675), 1 Vent. 267; 86 E. R. 179.**

*Annotations:—***Obtd.** Bray v. Somer (1862), 2 B. & S. 374. **Refd.** R. v. Corfe Mullen (1830), 1 B. & Ad. 211; R. v. Marsh (1836), 5 Ad. & El. 468.

*See, also, No. 746, post.*

**709. Whether oath compulsory.]—A churchwarden, duly elected by his parish was directed to take the oath of office.—COOPER v. ALLNUTT (1820), 3 Phillim. 165; 161 E. R. 1289.**

**710. What oath may be required.]—ANON. (1671), 1 Vent. 127; 86 E. R. 87.**

*Annotations:—***Refd.** Marriott v. Tarpley (1838), 7 L. J. Ch. 245. **Mentd.** St. Stephen, Walbrook (Rector & Churchwardens), & Grocers' Co. v. Sun Fire Office, Trustees (1883), Trist. 103; Batten v. Gedye (1889), 41 Ch. D. 507.

**711. —.]—The Ecclesiastical Ct. may require an oath from the churchwardens, "to present all offences against the King's ecclesiastical laws, according to law," but not "to present all offences against the arts. of visitation."—WATERFIELD v. CHICHESTER (Bp.) (1670), 1 Freem. K. B. 288; 2 Mod. Rep. 118; 89 E. R. 208.**

*Annotations:—***Mentd.** Harman v. Delany (1731), 2 Stra. 898; R. v. Wright (1799), 8 Term Rep. 293; Stockdale v. Hansard (1839), 9 Ad. & El. 1.

**712. Administration of oath—Whether fee allowed.]—GOSLIN v. ELLISON (1694), 1 Salk. 330; 91 E. R. 291.**

*Annotation:—***Refd.** Pitts v. Evans (1738), 7 Mod. Rep. 254.

**713. —Whether discretionary or ministerial act.]—Swearing a churchwarden is only a ministerial act.—R. v. SIMPSON (1724), 1 Stra. 609; 8 Mod. Rep. 325; 93 E. R. 731; sub nom. R. v. SYMPSON, 2 Ld. Raym. 1379.**

*Annotations:—***Apprvd.** R. v. Sarum, Bp., [1916] 1 K. B. 466. **Refd.** R. v. Ward (1730), 1 Barn. K. B. 380; R. v. Sowter (Archdeacon), [1901] 1 K. B. 396.

**Refusal on ground of unfitness.]—See Nos. 731, 732, post.**

**714. Churchwardens continuing in office—Whether fresh declaration necessary.]—STOUGHTON v. REYNOLDS (1736), 2 Stra. 1045; Fortes. Rep. 108; Lee temp. Hard. 274; 93 E. R. 1023.**

*Annotations:—***Distd.** Bremner v. Hull (1866), L. R. 1 C. P. 748. **Refd.** Edney & Lunn v. Smallbones (1869), 21 L. T. 506. **Mentd.** Wilson v. M'Math (1819), 3 B. & Ald. 244, n.; R. v. Chester (Archdeacon) (1834), 1 Ad. & El. 342; Baker & Downing v. Wood (1837), 1 Curt. 507; R. v. D'Oyly (1840), 12 Ad. & El. 139; R. v. St. Mary, Lambeth (Churchwardens) (1840), 9 L. J. M. C. 113; R. v. Salisbury, Bp., [1901] 1 K. B. 573.

**715. —.]—BREMNER v. HULL, No. 695, ante.**

**716. —.]—Money was borrowed for the purpose of rebuilding & enlarging a parish church, from the Comrs. of Public Works, under 5 Geo. 4, c. 36. A rate was duly assessed & levied in order to repay an instalment of the above loan. Deft. refused payment of his assessment, & raised the following objection, among others, to the validity of the rate: that the promoters of the suit were not at the time of making the rate, nor afterwards, lawfully churchwardens of the parish, on the ground that one of them had not made the declaration required by Statutory Declarations Act, 1835 (c. 62), s. 9:—**Held:** this objection**

failed, since a churchwarden, who has made the declaration in a preceding year, & continues in office without renewing the declaration, though compellable to do so, may do legal acts by virtue of his office, which will be binding upon himself & the parishioners.—**EDNEY & LUNN v. SMALLBONES** (1869), 21 L. T. 506; 34 J. P. 102; *reversd.* on other grounds *sub nom.* **SMALLBONES v. EDNEY** (1870), L. R. 3 P. C. 444, P. C.

*Annotations:—***Mentd.** Asterley v. Adams (1871), L. R. 3 A. & E. 361; Meyers v. Hennell (1912), 76 J. P. 321.

#### *F. Admission to Office.*

**717. How enforced—Mandamus to administer oath.]—(1) A mandamus lies to the spiritual ct. to administer the oath to a person elected churchwarden by parishioners in London.**

(2) A custom that the parson shall choose a churchwarden shall be tried in the temporal ct.—**EVELIN'S CASE** (1839), Cro. Car. 551; W. Jo. 439; 79 E. R. 1074.

**718. —.]—ANON. (1674), 1 Freem. K. B. 366; 80 E. R. 272.**

**719. —.]—A mandamus lies to the ecclesiastical officer to swear in a churchwarden.—R. v. HENCHMAN (1735), Lee temp. Hard. 130; 95 E. R. 82.**

**During inhibition.]—See No. 195, ante.**

**720. —Form of mandamus.]—A mandamus to an archdeacon to swear in a churchwarden duly elected is absolute in the first instance.—ANON. (1815), 2 Chit. 254.**

**721. —.]—The rule for a mandamus commanding the ecclesiastical authorities to swear in a churchwarden duly appointed is absolute in the first instance.—*Ex p.* LOWE (1835), 4 Dowl. 15.**

**722. —.]—*Ex p.* NAPPERTON, YORKSHIRE (CHURCHWARDENS) (1848), 12 J. P. Jo. 771.**

**723. —.]—The ct. will grant a rule absolute in the first instance for a mandamus to the archdeacon, to swear in a party as churchwarden, on affidavit of due election, demand, & refusal, & of notice to the archdeacon of the application to the ct., the ground of refusal not appearing by the affidavit in support of the rule.—*Ex p.* WINFIELD (1835), 3 Ad. & El. 614; 111 E. R. 546.**

**724. —.]—A rule for a mandamus to the archdeacon to administer the oath of office to a churchwarden, is absolute in the first instance where there is no rival candidate, & no reason assigned for the refusal to administer the oath.—R. v. LICHFIELD & COVENTRY (ARCHDEACON) (1835), 1 Har. & W. 463; 5 Nev. & M. K. B. 42; 3 Nev. & M. M. C. 201.**

**725. —.]—The ct. will grant a rule absolute in the first instance to compel an archdeacon to swear in churchwardens, the duty being merely ministerial; but a peremptory mandamus will not be granted, for the party moved against must be enabled to make a return.—R. v. COVENTRY (ARCHDEACON) (1844), 1 New Mag. Cas. 113; 4 L. T. O. S. 92; 8 J. P. Jo. 749.**

**726. —.]—*Ex p.* PECK (1806), 30 J. P. Jo. 388.**

**727. —Right to appoint in dispute.]—The rule is absolute in the first instance for a mandamus to swear in a chapelwarden, where on the vacancy of a living there is a dispute between the curate & the sequestrator who should appoint,**

**Church Building Acts:—***Held:* the effect of Irish Church Act, 1869, s. 70, was to exclude a proprietary church from the

provisions of the constitution of the Church of Ireland as to the appointment of churchwardens, & the election

of J. as churchwarden was void.—**LEFANU v. RICHARDSON**, [1914] 1 I. R. 321.—**IR.**

*Sect. 7. Constitution of the Church into parishes: Sub-sect. 6, F., G. & H. (a).]*

& each has appointed one.—*Ex p. PENRUDDOCK* (1835), 1 Har. & W. 347.

**728.** ———— *Election disputed.*—The ct. will grant a *mandamus* by rule absolute in the first instance, to compel the official to administer the oath or declaration to a party claiming to have been elected as chapelwarden of a chapel, under a local Act, conferring upon the officer elected the power of a churchwarden for the purposes of the chapel, though other parties claim to have been elected.—*Ex p. DUFFIELD* (1836), 3 Ad. & El. 617; 6 Nev. & M. K. B. 865; 111 E. R. 548.

**729.** ———— *Where to a mandamus to admit B. to the place & office of churchwarden, alleging that he was nominated & chosen into the place, etc., the return was, that "B. was not nominated & appointed":—Held:* (1) it was competent for deft. to give evidence of an ancient & customary mode of election in the parish, by which other persons had been elected, the issue being really, whether B. had been duly nominated & chosen, which he could not be if such a custom prevailed, he having been elected according to the form prescribed by the canon law; (2) a custom for the retiring churchwardens to appoint two nominees, & the parish two others, & for those four to elect two more, & for these six nominees finally to elect the two churchwardens for the ensuing year, is a reasonable custom & good in law; & *Seemle:* it is not in the power of the majority of the parishioners, in vestry assembled, to set aside such a custom by refusing to appoint two nominees on their behalf; but in such an event, two nominees may be appointed on behalf of the parish, who may proceed to the election with the others, according to the custom.

(3) Where it appears that the chairman of a vestry meeting took notes of the proceedings thereat, which was his habit, as required by the statute, to enter in a book kept for that purpose:—*Held:* the notes & entry in that book are the only legal evidence of what took place at the meeting, & it is necessary to produce them, in order to go into such.—*R. v. ELY* (ARCHDEACON) (1839), 3 J. P. 469.

**730.** ———— *—Ex p. CLARK* (1807), 31 J. P. Jo. 739.

**731. Ground for refusal—Unfitness for office.**—(1) A return to a *mandamus* to swear in a churchwarden, "that he was a poor dairyman, & unfit for the office," is bad; for the parishioners are the proper judges whether the person they elect is fit for the office.

(2) Churchwardens are temporal officers.—*R. v. RICE* (1697), 5 Mod. Rep. 325; Comb. 417; 1 Ld. Raym. 138; 3 Salk. 90; Sett. & Rem. 218; 87 E. R. 684; *sub nom. R. v. REES*, Carth. 393; 12 Mod. Rep. 116; *sub nom. MORGAN v. CARDIGAN* (ARCHDEACON), 1 Salk. 166.

*Annotations.*—*Reid. R. v. Williams* (1828), 7 L. J. O. S. M. C. 46; *Re Barlow* (1861), 30 L. J. Q. B. 271; *R. v. Sarum*, Bp., [1916] 1 K. B. 466.

**732.** ———— *Where a person to whom no statutory or common law disability attaches has been elected to the office of churchwarden the bishop is bound to admit him to make the declaration required by Statutory Declarations Act, 1835 (c. 62), s. 9, notwithstanding that the bishop judging from his known character or from his words or conduct may not consider him a fit & proper person to hold the office of churchwarden.*—*R. v. SARUM* (BP.), [1916] 1 K. B. 466; 85

L. J. K. B. 544; 114 L. T. 366; 80 J. P. 53; 32 T. L. R. 203; 14 L. G. R. 335.

**Churchwarden not elected.**—*See CROWN PRACTICE*, Vol. XVI., p. 340, Nos. 1610, 1612, 1613.

**Churchwarden not duly elected.**—*See CROWN PRACTICE*, Vol. XVI., p. 339, Nos. 1607, 1608.

**Lis pendens.**—*See CROWN PRACTICE*, Vol. XVI., p. 340, No. 1616.

**733.** ———— *Administration of oath delayed till certain date.*—A rule *nisi* having been obtained for a *mandamus* to an archdeacon & surrogate, to swear in certain persons as churchwardens & sidesmen of a parish, it appeared by affidavit that the parties were colourably elected, but that the validity of the election was disputed; that there was an usage in the archdeaconry to swear in the parties elected, on a certain day subsequent to the election, appointed annually by the archdeacon; & that the surrogate, being applied to immediately after the election to swear in the parties, had said that they must wait till the day appointed, but that he would not disobey a *mandamus* from the ct.:—*Held:* this was a refusal, & the usage, if a good one, should be returned to the *mandamus*; & the ct. made the rule absolute, without entering into the question of the validity of the election.—*R. v. MIDDLESEX* (ARCHDEACON) (1835), 3 Ad. & El. 615; 5 Nev. & M. K. B. 494; 3 Nev. & M. M. C. 312; 5 L. J. M. C. 12; 111 E. R. 547.

**734.** ———— *Marriage with niece of deceased wife.*—*Ex p. PECK* (1866), 30 J. P. Jo. 388.

*G. Status.*

**735. Whether corporation.**—*STARKEY v. BERTON*, No. 751, *post*.

**736.** ———— *STARKEY v. WATLINGTON, SUSSEX* (CHURCHWARDENS) (1692), 2 Salk. 517; 91 E. R. 463.

**737.** ———— *STUTTER v. PRESTON* (1717), 1 Stra. 52; 93 E. R. 379.

**738.** ———— (1) A power to appoint a schoolmaster to an ancient foundation given to the vicar & churchwardens, of whom there were eleven, & in case of their neglect in appointing then to devolve to two corporate bodies in succession, & to result in the last resort to the same vicar & churchwardens to whom also the general power of managing the trust was committed, is well executed by the vicar & a majority of the churchwardens; especially if such an election be supported by usage.

(2) In the course of the argument deft.'s counsel said that the churchwardens of a parish are a corp'n. for a particular purpose, namely, to take care of the goods of the church; but, speaking in legal language, that is not so; they are in that case only *quid* a corp'n. If they were a corp'n., actions should be brought against them in their corporate name, & any damages recovered against them would be recoverable out of their corporate estate; whereas all actions must be brought against them in their individual names, for they have no corporate name; damages must be recovered against them personally, & not to be paid out of their corporate estate, for they have none; & if they go out of office before the action is concluded, it does not survive & go to their successors. Therefore I take it that they are *quid* a corp'n. only (LORD KENYON, C.J.).—*WITHNELL v. GARTHAM* (1795), 6 Term Rep. 388; 1 Esp. 321; 101 E. R. 610.

*Annotations.*—*As to* (2) *Follis v. Charity Lands, Official Trustee*, [1898] 2 Ch. 41. *Generally, Reid. Wilkinson v.*



Mallin (1632), 2 Cr. & J. 636; Grindley v. Barker (1798), 1 Bos. & P. 229; Blacket v. Blizard (1829), 9 B. & C. 851; R. v. Mashiter (1837), 6 Ad. & El. 153.

**739.** —[Churchwardens are not a corp'n. in the full sense of the word; they are not a corporate entity, & cannot sue or be sued by any corporate name, but they are a *quasi* corp'n. for the purpose of holding land & the devolution of property.—*FELL v. CHARITY LANDS OFFICIAL TRUSTEE*, [1898] 2 Ch. 44; 67 L. J. Ch. 385; 78 L. T. 474; 62 J. P. 804; 14 T. L. R. 376; 42 Sol. Jo. 488, C. A.

See, further, CORPORATIONS, Vol. XIII., pp. 272, 273, Nos. 13–19.

**740.** —[Churchwardens & overseers.]—The churchwardens & overseers are not, by Poor Relief Act, 1819 (c. 12), s. 17, made a complete body corporate, but are only empowered “to accept, take, & hold in the nature of a body corporate,” & therefore it is not necessary to show the acceptance of a demise by an instrument under a common seal.—*SMITH v. ADKINS* (1841), 8 M. & W. 362; 1 Dowl. N. S. 129; 11 L. J. Ex. 83.

*Annotations*.—*Mentd.* Ghislin v. Gregory (1848), 11 L. T. O. S. 124; Doe d. Lunsdell, etc. (Penbury Churchwardens) v. Gower (1851), 18 L. T. O. S. 135; *Re* Leeds Institute of Science, Art & Literature & Leeds City Council, [1909] 1 Ch. 500.

**741.** —[—]—*DOE d. — v. HAMMOND* (1846), 8 L. T. O. S. 116; 10 J. P. Jo. 739.

See, further, CORPORATIONS, Vol. XIII., p. 273, Nos. 20–22.

**742.** Whether officer.]—*BISHOP & TURNER'S CASE* (1619), Godb. 279; 78 E. R. 163.

**743.** —[Lay or spiritual.]—*ANON.* (1675), 1 Vent. 267; 86 E. R. 179.

*Annotations*.—*Mentd.* R. v. Corfe Mullen (1830), 1 B. & Ad. 211; R. v. Marsh (1836), 5 Ad. & El. 468; Bray v. Somer (1862), 2 B. & S. 374.

**744.** —[—]—*R. v. RICE*, No. 731, *ante*.

**745.** —[Of the ordinary.]—*LLOYD & CLARKE v. POOLE* (1831), 3 Hag. Ecc. 477; 162 E. R. 1232.

See, also, No. 747, *post*.

**746.** Whether churchwarden of whole parish.—Churchwardens elected by separate tithings.]—Where a parish is divided into four tithings separately maintaining their own poor, & having separate overseers, & by custom the inhabitants of each tithing, at a general parish meeting, separately choose a churchwarden, & each of the churchwardens though sworn in the usual form, to the faithful execution of the office within his parish, acts only for the particular tithing for which he is chosen, except that all the four churchwardens unite in signing the annual presentment, to the archdeacon, of the state of the repairs, of the church, & other presentable matters; each of such persons is a churchwarden for the whole parish. Therefore, where a comr. for inclosure of lands in an adjoining parish serves upon the churchwarden acting for one of such tithings a description of an ascertainment of boundaries between another of the tithings & such adjoining parish, such service is a sufficient compliance with 41 Geo. 3 (c. 109), s. 3. Where the validity of such an ascertainment of boundaries is disputed, on the ground that the description was not served upon a proper officer, the ct. will require such ground of objection to be fully & convincingly

made out:—*Held*: in such a case evidence that the comr., before ascertaining the boundaries, had not given the required notices, & had received evidence not upon oath, was not admissible.

*Semble*: a churchwarden continues in office until his successor is sworn in.—*R. v. MARSH* (1830), 5 Ad. & El. 468; 2 Har. & W. 255; 6 Nev. & M. K. B. 608; 3 Nev. & M. M. C. 728; 111 E. R. 1243.

*Annotations*.—*Consd.* R. v. Green (1874), 30 L. T. 255; *St. Sepulchre (Vicar) v. St. Sepulchre (Churchwardens)* (1879), 5 P. D. 64. *Mentd.* R. v. Fenton (1841), 1 Gal. & Dav. 17; Bray v. Somer (1862), 2 B. & S. 374.

**747.** —[Parish divided by city & county boundary.—Churchwardens elected by separate vestries for each part.]—The parish church of St. Sepulchre is within the city of London, but the parish of St. Sepulchre is situate partly within the city of London & partly in the county of Middlesex, & five churchwardens of the parish church are annually elected, three by the vestry of the portion of the parish within the city of London & two by the vestry of the portion of the parish in the county of Middlesex. The vicar & the churchwardens elected by the City portion of the parish having petitioned the Ordinary for a faculty to authorise certain repairs in the parish church, the churchwardens elected by the Middlesex portion of the parish appeared as opponents in the cause, & prayed the ct. to direct the faculty, if granted, to issue to them jointly with petitioners, & to declare what were the rights of the respective parties to the suit with respect to church management. It was admitted that the churchwardens elected by the City portion of the parish had for a long series of years had the sole control of a certain trust fund available for payment of the costs of the proposed alterations:—*Held*: (1) the churchwardens elected by each portion of the parish were equally officers of the Ordinary in all matters relating to the management of the parish church, & a faculty must issue to petitioners & the opponents jointly; (2) for convenience the practice is to join with the churchwardens in a faculty for the restoration of a church any person who may contribute or make himself responsible for the whole of the expenses of the restoration, & for him to sign the contract or the works; (3) the judge of the Consistory Ct. sits as representative of the bishop of the diocese, & where there is a fair & honest difference of opinion as to what alterations should be made in a parish church amongst the parishioners, either party is entitled to take the opinion of the Bishop's Ct. on the subject without being liable to condemnation in costs.—*ST. SEPULCHRE (VICAR) v. ST. SEPULCHRE (CHURCHWARDENS)* (1879), 5 P. D. 61; Trist. 92.

**748.** —[Chapelwarden.]—*R. v. LLANWIST* (1857), 29 L. T. O. S. 79; 21 J. P. Jo. 276.

## II. Rights, Powers and Duties.

### (a) In General.

**749.** Extent of jurisdiction.—Private chapel.]—*BOSANQUET v. HEATH, HEATH v. BOSANQUET*, No. 3875, *post*.

**750.** Extent of powers.—District assigned to chapel under Church Building Act, 1831 (c. 38)—

## PART III. SECT. 7, SUB-SECT. 6.—H. (a).

**s. Extent of powers.**—The churchwardens & vestry may exercise the powers given to “the rector, churchwardens & vestry,” by 29 Geo. III. c. 1, as well where there never has been a rector appointed, as where a vacancy is caused by the death or absence of the rector.—*DOE d. QUEENSBURY (RECTOR)*

*v. GUYOU* (1848), 1 All. 6.—*CAN.*

**t. Right to sue.**—Where a testator bequeathed unto the incumbent of a church property for the relief of the poor of the church, to be dispensed by the incumbent, & the churchwardens brought an action, on behalf of themselves & all the members of the congregation, against the executors, to have the estate

administered, & for a declaration that the incumbent was entitled to distribute the fund, & an order for payment over of all such sums as should have been distributed by the incumbent among the poor of the church:—*Held*: the churchwardens had no title to maintain the action, since they could not be said to represent the incumbent, to whom the bequest was made.—

*Sect. 7.—Constitution of the Church into parishes: Sub-sect. 6, H. (a) & (b) i. & ii.]*

**Churchwardens for ecclesiastical purposes only.]—**

A rule was obtained calling on the overseers of a parish to show cause why two justices should not issue their warrant, under Lighting & Watching Act, 1833 (c. 90), s. 38, to levy by distress on the goods of the overseers two sums of money ordered to be paid by the inspectors of a district within the parish, in which the provisions of that Act had been adopted. By the affidavits it appeared that the district was one assigned to a chapel for ecclesiastical purposes, under Church Building Act, 1831 (c. 38); & that the provisions of Lighting & Watching Act, 1833 (c. 90), had been adopted, more than two years before the application, at a meeting convened by the churchwardens of the district church. These churchwardens, as was shown affirmatively by the affidavits, were churchwardens for ecclesiastical purposes only, & never in the habit of calling meetings for secular purposes:—*Held*: the meeting was improperly convened, the churchwardens of the district church not being such churchwardens as are contemplated by Lighting & Watching Act, 1833 (c. 90), s. 5; consequently the provisions of the Act had never been duly adopted in the district; & the order of inspectors was void.—*R. v. KINGSWINFORD OVERSEERS* (1854), 3 E. & B. 688; 23 L. J. Q. B. 337; 18 J. P. 678; 118 E. R. 1299; *sub nom.* *R. v. LEIGH & CORP. STAFFORDSHIRE J.J.*, 18 Jur. 1073.

**751. Exercise of powers—Release of debt by one.]—**Churchwardens are a corp. for the benefit of the parish, & if one of them release a debt due to the parish, it will not bar the suit of his companion.—*STARKEY v. BERTON* (1611), Cro. Jac. 234; Yelv. 172; 79 E. R. 202; *sub nom.* *GORE v. STARK*, Noy, 120.

*Annotations:—Consd.* Fry & Greal v. Treasure (1865), 2 Moo. P. C. C. N. S. 539. *Reid.* R. v. Iling (1713), 11th. 85; Cooper v. Law (1859), 6 C. B. N. S. 502. *Mentd.* Rehov v. Bickerton (1721), Bunb. 81.

— **After action brought.]—**See No. 877, *post*.

**752. — Whether by one alone.]—**ITCHINGS v. CORDINGLEY, No. 789, *post*.

— **Legal proceedings.]—**See No. 1886, *post*.

— **Application for faculty for removal of illegal ornament.]—**See No. 1784, *post*.

**753. Right of one to pledge credit of other.]—**One of several churchwardens cannot pledge the credit of the others without their knowledge, even for work which, by the duties of their office, they are bound to have executed. Thus where one of several churchwardens gave orders to deft. to make certain necessary repairs in the church, & it did not appear that the other churchwardens

had authorised him to give such orders, or to pledge their credit:—*Held*: deft. was entitled to set off his claim for such repairs, in an action by the exor. if the churchwarden, by whose orders the work was performed.—*NORTHWAITE v. BENNETT* (1834), 2 Cr. & M. 316; 2 Nev. & M. M. C. 330; 4 Tyr. 236; 3 L. J. M. C. 3; 149 E. R. 781.

*Annotation:—Reid.* Klenck v. Farris (1904), 68 J. P. 321.

**754. Performance of duties—Jurisdiction to enforce—Chapelwarden of donative.]—**The spiritual ct. may compel the chapelwardens of a donative to perform such office.—*CATTLE v. RICHARDSON* (1726), 1 Barn. K. B. 5; 11 Mod. Rep. 406; 2 Stra. 715; 94 E. R. 4.

**755. — Right to perform—How enforced.]—**At the election at an Easter vestry of a people's churchwarden for a parish a woman was proposed & seconded, & a poll was demanded on her behalf. The chairman refused a poll, but the K. B. Div. granted a *mandamus* directing the vicar & inhabitants of the parish to hold a poll. At the election she was chosen people's churchwarden, but the vicar's churchwarden refused to allow her to perform the duties of the office:—*Held*: her remedy was to institute a criminal suit in the Ecclesiastical Ct. against the other churchwarden for the purpose of enforcing her right to perform her official duties.—*GORDON v. HAYWARD* (1905), 21 T. L. R. 298.

**756. Neglect of duties—Presentment by successor.]—***SELBY'S CASE* (1679), Freem. Ch. 298; 1 Freem. K. B. 298; 22 E. R. 1236.

(b) *In regard to Church.*  
i. *In General.*

**757. Possession of church—Jointly with incumbent.]—***JARRATT v. STEELE*, No. 401, *ante*.

**758. — — — — —.]—**Though the freehold of a parish church may be in a lay rector, the right of the possession of the church is in the minister & churchwardens; & therefore a lay rector cannot maintain trespass against the vicar of the parish for breaking open a door leading from the churchyard into the chancel.—*GRIFFIN v. DIGHTON* (1864), 5 B. & S. 93; 3 New Rep. 523; 33 L. J. Q. B. 181; 9 L. T. 814; 28 J. P. 260; 12 W. R. 441; 122 E. R. 767, Ex. Ch.

*Annotations:—Reid.* Ritchings v. Cordingley (1868), L. R. 3 A. & E. 113; St. Michael, Bassishaw (Rector, etc.) v. Parishioners of Same, [1893] P. 233; Fowke v. Berington, [1914] 2 Ch. 308. *Mentd.* Morley v. Leacroft, [1896] P. 92.

**759. Custody of church—Under incumbent.]—***LEE v. MATTHEWS*, No. 410, *ante*.

**760. Right of access to church—To repair & clean.]—***BELLARS v. GHEAT* (1741), Return of Appeals before the High Court of Delegates, No. 157 (Parliamentary Papers, 199, April 3,

*McCLENNAGHAN v. GRAY* (1883), 4 O. R. 329.—*CAN.*

a. — — — — —.]—Land was granted by the Crown in 1837 to certain officials to hold in trust, to be conveyed to the several corps. of the Church of England in the parishes where the lands were situated, when such corps. should be established. By 9 Vict. c. 17, the churchwardens & vestry of every church then, or thereafter to be erected in the province, should, when elected, be a corp. by the name of "the rector, churchwardens & vestry" of the parish to which they belonged; & in case of the death or absence from the province of any rector, or where no rector had been appointed, the churchwardens & vestry, should have the same power & authority as were given to the rectors, churchwardens & vestry; & that all

suits & proceedings by them should be done & prosecuted in the name of the rector, churchwardens & vestry:—*Held*: though no rector had been appointed to the parish, the election of churchwardens & vestrymen created a corp. by the Act; the title to the land vested in such corp. by the deed of the Church Society, & they could sue in the name of the rector, churchwardens & vestry.—*DOE d. ANDOVER (RECTOR) v. KENNEDY* (1886), 26 N. B. R. 83.—*CAN.*

b. — **Right to make agreement—On behalf of congregation.]—**An agreement by the churchwardens of a congregation, raising funds by voluntary contributions, to repay to the rector thereof, in consideration of his resigning his charge as desired by the congregation, the amount theretofore expended by him in repairs, & improve-

ments to the rectory-house, such amount to be settled by arbitration, is an agreement beneficial to the congregation & binding upon the churchwardens in the corporate capacity conferred upon them in that diocese by 47 Vict. c. 89 (O).—*Re KIRKBY & ALL SAINTS, COLLINGWOOD (CHURCHWARDENS)* (1904), 24 C. L. T. Occ. N. 358; 8 O. L. R. 385; 4 O. W. R. 142.—*CAN.*

**PART III. SECT. 7, SUB-SECT. 6.—**  
H. (b) 1.

c. **Right to close church.]—**In trespass for boarding up the doors & windows of a parish church, defts. justified as churchwardens, & that they had closed the church for repairs, but the evidence showed that they had closed it to prevent a clergyman who

1868), cited in Halsbury's Laws of England, Vol. XI., pp. 469, 656.

761. — **Whether right to keys included.** — *RITCHINGS v. CORDINGLEY*, No. 789, *post*.

*See, also*, No. 410, *ante*, No. 3082, *post*.

762. **Control of right of access to church—Parishioners—To meet about public business.** — *ANON.* (1732), 2 Barn. K. B. 166; 94 E. R. 425.

763. — **To attend service.** — *TAYLOR v. TIMSON*, No. 1031, *ante*.

764. — **When not open for divine service.** — *JARRATT v. STEELE*, No. 401, *ante*.

765. — **When no service being conducted.** — (1) Trespass for assaulting *pltf.*, & dragging him out of the clerk's desk in the parish church of W. & along the aisle thereof, & imprisoning *pltf.*, & keeping him so imprisoned for 24 hours. Plea as to the imprisonment, a justification on the ground of *pltf.*'s having conducted himself indecently in the church during divine service, & disturbed the congregation, wherefore *defts.*, being the churchwardens, after his refusal to leave the church, for the preserving of decency & reverence, & preventing disturbance of the congregation, removed him therefrom, & because he threatened to return & renew the disturbance, imprisoned him & kept & detained him so imprisoned for a reasonable time, two hours; *quæ est eadem*, etc. Replication, *de injuriâ*, & new assignment, that *defts.*, after the expiration of a reasonable time, etc., continued to imprison *pltf.*, & kept & detained him in prison, without reasonable or probable cause, for a long time, two hours:—*Held*: the replication & new assignment were good, & were not open to the objection of duplicity.

A second plea to the declaration, except as to the imprisonment, was that just before the time when, etc., *pltf.* wilfully & contemptuously came into the church during the time that divine service was being celebrated therein, & disturbed the same & the congregation there, by then wrongfully getting into the clerk's desk, & preventing the lawful clerk from getting therein, & by making loud noises & by reading & singing in a loud, noisy & unbecoming manner, & by otherwise conducting himself in an indecent & irreverent manner; whereupon *deft.*, T., then being one of the churchwardens for the preserving due decorum, decency & reverence in the church, & for removing the interruption & disturbance of the congregation, requested *pltf.* to leave the desk, & to cease such disturbances & noises, etc., which *pltf.* refused to do, & continued in the church, in the desk, during the time divine service was being celebrated therein, disturbing the same & the congregation thereof; wherefore *deft.*, T., as such churchwarden, & *deft.*, R., then being rector of the parish church, & the other *defts.*, being constables, in aid of T., & at his request, for the preserving of the decorum & reverence in the church, & for removing the interruption & disturbance, & because they could not otherwise preserve such decorum, etc., nor remove such disturbance, etc., gently laid their hands on *pltf.*, & forced him out of the desk & church:—*Held*: this plea was not supported by proof of misconduct in the church before the commencement of divine service.

(2) *Qu.*: whether a churchwarden has authority, as such, to turn out of the church a person who commits a trespass therein upon a week-day, or when service is not going on, or is not about to commence, or whether he ought not to justify

under the rector.—*WORTH v. TERRINGTON* (1845), 13 M. & W. 781; 2 Dow. & L. 352; 14 L. J. Ex. 7, 133; 4 L. T. O. S. 158, 418; 9 J. P. 346; 153 E. R. 328.

*Annotation*:—*As to* (1) *Reid*. *Cope v. Barber* (1872), 41 L. J. M. C. 137; *Asher v. Calcraft* (1887), 3 T. L. R. 485. **Control of seating.**—*See* Part VII., Sect. 9, C., *post*.

## II. As to Services.

766. **Duty to preserve order—General rule.**—They [the churchwardens & sidesmen] are primarily the officers whose duty it is to keep order in the church. [Their authority there] is paramount to the authority of any constable. In the execution of [their] duty they are protected by law: for example, if they take off a man's hat in church, or if they turn an obstinate disturber out of the church, without unnecessary violence, they are not guilty of an assault (*SIR JOHN NICHOLL*).—*PALMER v. TIJOU* (1824), 2 Add. 190; 102 E. R. 266.

*Annotation*:—*Consd.* *England v. Hurcomb*, *England v. Williams*, *England v. Richardson* (1824), 2 Add. 300.

767. — *King v. Rosier* (1860), 2 L. T. 150.

768. — **Right to expel—Interruption of service anticipated.** — *BURTON v. HENSON*, No. 974, *post*.

769. — **For disturbance of congregation.** — *WORTH v. TERRINGTON*, No. 765, *ante*.

770. — **Exclusion of inhabitant—No convenient accommodation.** — *TAYLOR v. TIMSON*, No. 1031, *post*.

771. — **& decent behaviour—Removal of person's hat.** — *HAW v. PLANNER* (1000), 2 Keb. 124; 1 Sid. 301; 84 E. R. 79; *sub nom.* *HAWES v. PLANNER*, 1 Wms. Saund. 10; *sub nom.* *HALL v. PLANNER*, 1 Lev. 196.

*Annotations*:—*Consd.* *Adey v. Theobald* (1836), 1 Curt. 447. *Apd.* *Burton v. Henson* (1842), 10 M. & W. 105. *Reid*. *Hartley v. Cook* (1833), 9 Bing. 728; *Worth v. Terrington* (1845), 13 M. & W. 781; *Cope v. Barber* (1872), 41 L. J. M. C. 137.

772. — *Palmer v. Tijou*, No. 706, *ante*.

Disturbance of public worship, generally, *see* CRIMINAL LAW, Vol. XV., pp. 656 *et seq.*

773. **Provision of articles for service.** —

(1) Question of practice:—*Held*: on a citation to appear on a day fixed, & receive articles, etc., a person is not entitled to demand that the arts. shall be delivered on the first ct. day, or that otherwise he shall be dismissed.

(2) Churchwardens are appointed to provide the furniture of the church, the bread & wine for the holy sacrament, the surplice, & the books necessary for the performance of divine worship, & such as are directed by law; but it is the minister who has the use. If, indeed, he errs in this respect, it is just matter of complaint, which the churchwardens are obliged to attend to, but the law would not oblige them to complain, if they had a power in themselves to redress the abuse (*SIR WILLIAM SCOTT*).

(3) In the service, the churchwardens have nothing to do, but to collect the alms at the offertory; & they may refuse the admission of strange preachers into the pulpit (*SIR WILLIAM SCOTT*).

(4) Again, if the minister introduces any irregularity into the service, they have no authority to interfere, but they may complain to the ordinary

claimed to be rector from officiating:—*Held*: in the absence of proof that there was any legally appointed rector, *defts.*

had no right to dismantle the church as against the church corpor., even though they were themselves members

of it. —*St. George's Church (Rector, etc.) v. Cougle* (1869), 1 Han. 620.—*CAN.*

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of his conduct. But to sing with plain congregational music is a practice fully authorised, particularly with respect to the concluding part of different portions of the service (SIR WILLIAM SCOTT).—HUTCHINS v. DENZILLOE & LOVELAND (1792), 1 Hag. Con. 170; 161 E. R. 514.

*Annotations:—As to (2) Reidd. Ritchings v. Cordingley (1868), L. R. 3 A. & E. 113; Evans v. Dobson (1874), Trist. 26; Asher v. Calcraft (1887), 3 T. L. R. 485; St. Michael, Bassishaw (Rector, etc.) v. Parishioners of Same, [1893] P. 233; Howell v. Holdroyd, [1897] P. 198; Lee v. Hawtrey, [1898] P. 63. As to (3) Reidd. Ritchings v. Cordingley (1868), L. R. 3 A. & E. 113. As to (4) Consd. Wilson v. M'Math (1819), 3 B. & Ald. 244, n. Reidd. Ritchings v. Cordingley (1868), L. R. 3 A. & E. 113. Generally, Mentd. Taylor v. Morley (1837), 1 Curt. 470; Burder v. Langley (1842), 1 Notes of Cases 542; Sanders v. Head (1843), 3 Curt. 565; Evans v. Evans (1844), 1 Rob. Eccl. 165; Barnes v. Shore (1846), 1 Rob. Eccl. 382; Sheppard v. Bennett (1869), L. R. 2 A. & E. 335; Girt v. Pillingham, [1901] P. 176.*

**774. — Right to reimbursement.] —**(AUDERN v. SELBY, No. 899, *post*.)

*See, generally, Sub-sect. 6, H. (c), post.*

**775. Form of service.] —**HUTCHINS v. DENZILLOE & LOVELAND, No. 773, *ante*.

**776. Service conducted by parson other than incumbent—Minister appointed under sequestration.] —**(1) A churchwarden cannot prevent a minister appointed under a sequestration, from officiating in the church.

(2) Augmented curacies stand on the same footing with respect to sequestrations as presentative livings.—PROUT v. CRESWELL (1752), 1 Lec. 36; 161 E. R. 15.

**777. — Strange preacher.] —**HUTCHINS v. DENZILLOE & LOVELAND, No. 773, *ante*.

**778. Authority to perform—During vacancy.] —**A.-G. v. ST. CROSS HOSPITAL, No. 3867, *post*.

**779. Authority to provide for—During vacancy.] —**A.-G. v. ST. CROSS HOSPITAL, No. 3867, *post*.

*iii. As to Church Property and Ornaments.*

**780. Ancient chapelry divided into districts—Ancient parish represented by one district.] —**Where, in an ancient chapelry, divided into three districts by order in council, one district represents the ancient parish; the churchwardens appointed for the district may maintain an action of detinue against the late churchwardens of the ancient chapelry, to recover the church books, etc., & the late churchwardens have no lien upon them for any expenses they may have incurred by virtue of their office.—MOSS v. THORNILEY (1856), 27 L. T. O. S. 101; 20 J. P. 600; 4 W. R. 514.

**781. Bells—Property in churchwardens.] —**STARKY v. WATLINGTON, SUSSEX (CHURCHWARDENS) (1692), 2 Salk. 547; 91 E. R. 463.

**782. — —.] —**Pltf.'s house being so near the church that the five o'clock bell rung in the morning disturbed her, pltf. came to an agreement in writing with the churchwardens & inhabitants at a vestry, that pltf. would erect a cupola & clock at the church, & in consideration thereof the five o'clock bell should not be rung in the morning: *Held*: this was a good agreement, & binding in equity.

The churchwardens are a corpn. & may sell the bells or silence them & make a reasonable agreement beneficial to the parish, & thereby bind their successors as also the succeeding churchwardens

*per* CUR.).—MARTIN v. NUTKIN (1724), 2 P. Wms. 266; 24 E. R. 724.

*Annotations:—Mentd. Dietrichsen v. Cabburn (1846), 2 Ph. 52; Lond v. Murray (1851), 17 L. T. O. S. 248; Lumley v. Wagner (1852), 1 De G. M. & G. 604.*

**783. — Control of ringing.] —**MARTIN v. NUTKIN, No. 782, *ante*.

**784. — — Whether against wishes of incumbent.] —**HARRISON v. FORBES & SISSON, No. 427, *ante*.

**785. Bell-ropes.] —**The property of the bell-ropes of a parish church is in the churchwardens of the parish: it is not actionable, therefore, to say of a churchwarden, that he stole the bell-ropes of his own parish.—JACKSON v. ADAMS (1835), 2 Bing. N. C. 402; 1 Hodg. 339; 2 Scott, 599; 5 L. J. C. P. 79; 132 E. R. 158.

*Annotations:—Reidd. Moss v. Thorniley (1856), 27 L. T. O. S. 101. Mentd. Heming v. Power (1842), 10 M. & W. 564; Cooper v. Law (1859), 5 Jur. N. S. 1263; Lemon v. Simmons (1888), 57 L. J. Q. B. 260; Alexander v. Jenkins (1892), 66 L. T. 391.*

**786. Monuments—Power to set up.] —**A custom for the churchwardens of a parish to set up monuments, etc., in a church, without either the consent of the rector or ordinary is illegal.—BECKWITH v. HARDING (1818), 1 B. & Ald. 508; 106 E. R. 187.

*Annotation:—Reidd. Winstanley v. North Manchester Overseers, [1910] A. C. 7.*

**787. Church furniture—Control over.] —**JARRATT v. STEELE, No. 401, *ante*.

**788. — —.] —**DEWDNEY v. FORD, No. 3082, *post*.

**789. Ornaments—Illegally set up—Power to remove.] —**(1) A lodge or superaltar was placed on the holy table in a parish church, by order of the incumbent without the consent of the ordinary; after a lapse of many months, a vestry meeting was held, at which a resolution was passed, that the churchwardens should take steps to remove the superaltar; the morning after the vestry meeting, deft., one of the churchwardens, sent to the incumbent for the keys of the church; the incumbent refused to give deft. the keys, but sent word that deft. could have access to the church that day between eleven o'clock in the forenoon & one o'clock in the afternoon. About one o'clock deft. went to the church with a workman, & found the church door locked; the workman, acting by the orders of deft., picked the lock, entered the church, in company with deft., & pulled down the superaltar:—*Held*: the conduct of deft. was illegal. (2) *Semble*: ornaments which have been illegally or irregularly placed in a parish church by the incumbent cannot be lawfully removed save under the sanction of the ordinary. (3) *Semble*: the powers conferred upon the churchwardens of a parish cannot be exercised by one of the churchwardens without the concurrence of his colleague.

(4) Churchwardens have a right of access to the church at proper seasons, but they are not entitled to the custody of the keys of the church.—RITCHINGS v. CORDINGLEY (1868), L. R. 3 A. & E. 113; *sub nom.* RICHINGS v. CORDINGLEY, 19 L. T. 26; 32 J. P. 611.

*Annotations:—As to (1) Follid. Evans v. Dodson (1874), Trist. 26. Reidd. St. Michael, Bassishaw (Rector, etc.) v. Parishioners of Same, [1897] P. 233; Wolfe v. Shirey County Council Clerk, Reeve v. Same, [1905] 1 K. B. 439. As to (2) Reidd. Batten v. Gedy (1889), 41 Ch. D. 507. As to (3) Follid. Powke v. Berington, [1914] 2 Ch. 308. As to (4) Reidd. St. Mary-at-Hill with St. Andrew, Hubbard (Rector, etc.) v. Parishioners of Same, [1892] P. 394.*

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**H. (b) iii.**

**d. Ornaments—Power to remove.] —**

Churchwardens have a right to remove from the church any articles they may deem injurious to its appearance or offensive to the members of the con-

gregation.—NEWMAN v. CHURCHWARDENS (1823), 1 Nfld. L. R. 310.—**NFLD.**

790. ————.]—DURST v. MASTERS, No. 2799, *post*.

**791. Collection boxes—Power to remove—Without faculty.**—The rector, the promoter of this suit, placed, without a faculty, & without the concurrence of the churchwardens, two collection boxes immediately above the two ancient poor boxes at the west end of the church, with an inscription: "For the Altar Flowers." Deft., as senior churchwarden, objected to their remaining there, on the ground that they intercepted alms from the poor. His objection being disregarded by the curate in charge, they were removed by the churchwarden's orders. The rector article'd deft. for having removed them without authority, & prayed the ct. to admonish him for having so done, & to order him to replace them in their former position, & to condemn him in costs:—*Held*: (1) deft. had committed an offence against Ecclesiastical Law by removing the boxes without the sanction of a faculty; (2) it would not be a proper exercise of the discretion of the ct. to order their restoration in opposition to the wishes of both the churchwardens, who must be assumed to represent the parishioners, as they were not directed to be placed in a church by the Rubrics, or the Canons; (3) the ct. was bound to admonish deft. for having removed the boxes without lawful authority, & to admonish him not to repeat the offence; (4) deft. ought to pay the costs necessarily incurred by the promoter for the purpose of obtaining the admonition, & of opposing the admission of deft.'s original plea; but the promoter ought to pay the costs incurred by deft. in resisting the order for the restoration of the boxes.—EVANS v. DODSON (1874), Trist. 20.

**792. Lighting & heating apparatus—Erected by incumbent at own expense.**—In an action of trespass by the churchwardens of the church at P. against the incumbent for taking away from the church certain gas-fittings & stoves, which had been erected by the incumbent for lighting & warming the church at his own cost & expense:—*Held*: plffs. were entitled to a verdict, on the ground that the property in the church being vested in the churchwardens, the vicar or rector had no power to remove the gas-fittings, unless at the time of putting them up, he had given notice that he should remove them at the time of his departure.—MOORE v. COOK (1841), 5 J. P. 467.

**793. — Installed by wish of majority of ratepayers—No restraint at instance of one ratepayer.**—The churchwardens of a parish who proceed *bonâ fide* to carry into effect the resolutions of the ratepayers to warm the church by the introduction of hot air or water pipes under the floor of the church, will not be restrained at the instance of one ratepayer from doing so. *Qu.*: whether such a bill can be sustained by a single inhabitant ratepayer.—WOODMAN v. ROBINSON (1852), 2 Sim. N. S. 201; 19 L. T. O. S. 8; 61 E. R. 318.

**794. Lead of coffin in private vault.**—In an indictment for larceny in stealing from a private vault in a public church, the lead which had composed a coffin therein deposited, the property in the lead is well laid in the churchwardens & overseers of the parish or township to which such church belongs, though it may be locally situated out of such, & in another parish or township, & though it may have been long disused for every

other purpose than the burial of the dead.—R. v. GARLICK (1843), 1 L. T. O. S. 479; 1 Cox, C. O. 52.

**795. Military colours presented to church.**—VINCENT v. EYTON, No. 426, *ante*.

**Custody of parish books.**—See No. 392, *ante*.

#### iv. As to Repairs.

**796. Power to repair—General rule.**—GAUDERN v. SELBY, No. 899, *post*.

**797. Duty to repair—Enforcement—By monition.**—A monition issued against churchwardens to repair & reinstate in its original form the spire of a church which had been destroyed by lightning.—MAYNARD v. BRAND & PHILPOT (1821), 3 Phillim. 501; 161 E. R. 1397.

*Annotations*:—*Consd.* Veley v. Burder (1841), 12 Ad. & El. 265. *Refd.* Millar & Simes v. Palmer & Kilby (1837), 1 Curt. 540; Gosling v. Veley (1850), 12 Q. B. 328; Lee v. Ridsdale (1873), 37 J. P. 801; Gordon v. Hayward (1905), 21 T. L. R. 208.

**798. Failure to repair—Liability to criminal proceedings.**—Criminal proceedings against churchwardens for "not repairing or keeping in proper order the parish church," & "for neglecting & disobeying the lawful orders & directions of the archdeacon." The church being still out of repair, & the archdeacon having ordered the same to be repaired, not sustained, there being no proof that the churchwardens had personally neglected their duty, or that they had wilfully disobeyed the order of the archdeacon:—*Held*: in order to justify criminal proceedings against churchwardens for neglecting to repair their parish church, it must be shown that they have been guilty of personal & wilful neglect, affirming the sentence of the Consistory Ct. of London.

If the church be out of repair, & *a fortiori*, if the archdeacon order the repairs according to circumstances, there are two modes of proceeding open, the two modes of proceeding cannot be resorted to indiscriminately; if the churchwardens are wilfully disobedient, & neglect to take all the clearly legal means in their power to have the church repaired, a criminal proceeding may properly be instituted against them. If no fault is ascribed personally to the churchwardens, but a question arises as to the propriety of the repairs, or if the churchwardens do, or are willing to do their duty, but obstacles out of their power intervene, then the proper mode of proceeding is in the civil form. MILLAR & SIMES v. PALMER & KILBY (1837), 1 Curt. 510, 550; 1 J. P. 6, 190; 163 E. R. 189.

*Annotations*:—*Refd.* Cooper v. Wickham (1839), 2 Curt. 303; Steward v. Francis (1813), 3 Curt. 209; Lee v. Ridsdale (1873), 37 J. P. 804; St. Stephen, Walbrook (Rector & Churchwardens) & Grocers Co. v. Sun Fire Office Trustees (1883), Trist. 103; Gordon v. Hayward (1905), 21 T. L. R. 298.

**799. Liability for expense—Whether joint or several Order given by one churchwarden.**—NORTHWAITE v. BENNETT, No. 753, *ante*.

**800. Right to indemnity for disbursements.**—GAUDERN v. SELBY, No. 899, *post*.

**801. — Effect of resolution by parishioners.**—A parish being indebted to A. for repairs done to the church, the parishioners agreed at a vestry that the parish officers should give a bond for the amount; that A. should give the parish 12 months' notice when he required payment, & that the parish should be at liberty to pay the debt by instalments: &, at another vestry held shortly afterwards, it was resolved that the obligors should

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be indemnified by the parishioners & out of the rates, & the parish officers for the time being were authorised & directed to pay the interest & the principal, when required, out of the rates. A., who was himself a parishioner, & several of the other parishioners, signed both the agreement & resolution; & he received the interest on his debt for several years, & part of the principal also, out of the rates, & never called on the obligors to pay the interest:—*Held*: as the parishioners had no power to bind the parish, the obligors were not exempted from their liability on the bond, notwithstanding A. had signed both the agreement & the resolution.—*JACQUET v. LEWIS* (1837), 8 Sim. 480; 6 L. J. Ch. 313; 59 E. R. 191; *sub nom.* *JACQUET v. LEWIS*, 1 Jur. 511.

**802. — Order for repairs signed by parishioners—Right of contribution.]**—Where churchwardens have neglected to make a prospective rate for raising a sum of money, necessary to the completion of repairs to the church, ordered by them pursuant to resolutions entered into at a vestry meeting, they are liable for the payment of them, & are not entitled to contribution from the parishioners attending the meeting, & signing the resolutions sanctioning the repairs being made. The attendance of those persons at such meeting, & their signature to such resolutions, is only to be considered as given by them in their character of vestrymen, & not in their individual capacity.—*LANCHESTER v. TRICKER* (1823), 1 Bing. 201; 8 Moore, C. P. 20; 1 L. J. O. S. C. P. 56; 130 E. R. 81.

*Annotations*:—*Refd.* *Lanchester v. Frewer* (1824), 9 Moore, C. P. 688; *Sprott v. Powell* (1826), 11 Moore, C. P. 398; *Farlar v. Chesterton* (1838), 2 Moo. P. C. C. 330; *Bull v. Fellowes* (1843), 3 Curt. 680.

**803. — — — — —.]**—Twenty parishioners joined at a vestry in signing an order for the repairs of the church, & one of them, a churchwarden, paid the artificers, but the rate for reimbursing him was quashed:—*Held*: he could not sue for contribution the persons who signed the order.—*LANCHESTER v. FREWER* (1824), 2 Bing. 301; 9 Moore, C. P. 688; 3 L. J. O. S. C. P. 40; 130 E. R. 345.

*Annotations*:—*Apld.* *Sprott v. Powell* (1826), 3 Bing. 478. *Refd.* *Chesterton & Hutchins v. Farlar* (1836), 1 Curt. 345.

*See, generally*, Sub-sect. 6, II. (c), *post*.

**804. Vote by churchwarden against church rate for repairs—Repairs not prevented—Whether ecclesiastical offence.]**—At a vestry meeting called, by notice signed by the churchwardens for the purpose of making a church rate for the repair of the church, a resolution was moved & seconded, "That this vestry, considering church rates at all times bad in principle & particularly unjust in practice, & quite uncalled for at the present time, resolved to adjourn all further consideration of the subject for which it has been called, till this day twelve-months," which resolution was carried:—*Held*: one of the churchwardens, in having voted in favour of the resolution & against the rate proposed, *2d.* in the pound, was not guilty of any ecclesiastical offence, it not being averred that in consequence of the refusal of the rate, the church was still out of repair.—*COOPER v. WICKHAM* (1830), 2 Curt. 303; 3 J. P. 802; 163 E. R. 420.

*Annotations*:—*Distd.* *Steward v. Francis* (1843), 3 Curt. 209. *Fold.* *Francis v. Steward* (1844), 5 Q. B. 984.

**805. Chancel—Promotion of criminal suit against lay rector.]**—*MORLEY v. LEACROFT*, No. 473, *ante*.

(c) *In regard to Churchyard.*

**806. Power to keep order in—During divine service.]**—*HAW v. PLANNER* (1666), as reported in 2 Keb. 124; 84 E. R. 79.

*Annotations*:—*Mentd.* *Hartley v. Cooke* (1833), 9 Bing. 728; *Adey v. Theobald* (1836), 1 Curt. 447; *Burton v. Henson* (1842), 10 M. & W. 105; *Worth v. Torrington* (1845), 13 M. & W. 781; *Cope v. Barber* (1872), 41 L. J. M. C. 137.

**807. Duty to maintain—Repair of footpath & fences.]**—*WALTER v. MOUNTAGUE & LAMPRELL*, No. 431, *ante*.

**808. — Repair of wall—Whether faculty necessary.]**—A contractor when rebuilding a house abutting on a churchyard unlawfully pulled down the churchyard wall for the purpose of obtaining for the lower windows of the house light & air from the churchyard, & rebuilt the house a few inches from the site of the old wall, & outside the churchyard. The rector & churchwardens, in order to vindicate their right to rebuild the wall, placed an iron screen of the same height as the old wall immediately opposite to the windows of the new house. On an application by the rector & churchwardens for a faculty to rebuild the wall:—*Held*: where a churchyard wall has been wilfully pulled down, or fallen down, it is the duty of the churchwardens to rebuild it, & if they do so without alteration no faculty is necessary, unless their right to rebuild it is in dispute.—*ST. STEPHEN, WALBROOK (RECTOR & CHURCHWARDENS) & GROCERS CO. v. SUN FIRE OFFICE TRUSTEES* (1883), *Trist.* 103.

*See, also*, No. 855, *post*.

**809. Construction of new footpath.]**—*WALTER v. MOUNTAGUE & LAMPRELL*, No. 431, *ante*.

**Disused burial ground—Duty to maintain.]**—*See BURIAL & CREMATION*, Vol. VII, p. 551, No. 289.

**Right of indemnity for costs of maintenance.]**—*See BURIAL & CREMATION*, Vol. VII, p. 551, No. 290.

(d) *In regard to Offertories.*

**810. Right to collect—Alms.]**—*HUTCHINS v. DENZLOE & LOVELAND*, No. 773, *ante*.

**811. —.]**—Upon an information under Ecclesiastical Courts Jurisdiction Act, 1860 (c. 32), s. 2, against resps., for unlawfully molesting applt., "then being a clergyman in holy orders celebrating divine service" in the parish church, the evidence was that applt., the incumbent, whilst engaged in collecting the offertory during the reading of the offertory sentences by another clergyman was obstructed by resps., who claimed as churchwardens the right of themselves collecting. The magistrates decided that resps. had not been guilty of the offence charged, inasmuch as applt. was not, at the time he was so obstructed, "ministering or celebrating any sacrament or any divine service, rite, or office":—*Held*: their decision was right; the duty of collecting the offertory being a lay duty imposed by the rubric upon the "deacons, churchwardens, or other fit person" of lower degree, "appointed for that purpose."—*COPE v. BARBER* (1872), L. R. 7 C. P. 393; 41 L. J. M. C. 137; 26 L. T. 891; 20 W. R. 885; *sub nom.* *COPE v. BARBER, CLARKE & HOBSON*, 30 J. P. 439.

**812. Refusal to deliver up—In church—Whether ecclesiastical offence.]**—(1) By the accustomed practice of a parish church, when collections from the congregations were made either at the morning or the evening service on Sundays, the collecting bags were brought after the collection up to the chancel steps & placed in the alms dish there held by the minister for the purpose of





*Sect. 7.—Constitution of the Church into parishes: Sub-sect. 6, I., J. & K. (a).]*

**832. — Costs of solicitor—Apart from special agreement.]**—Where a churchwarden employs a solr. in respect of parochial affairs:—*Held*: he is personally liable unless he makes a special agreement to the contrary.—*ROBINSON v. PRICE* (1886), 2 T. L. R. 242.

**On promissory note—Signed “as churchwarden.”]**—See *AGENCY*, Vol. I., p. 645, No. 2058.

#### *J. Accounts.*

**833. Duty to keep.]**—Every churchwarden is bound by law to keep an accurate account of the parochial funds during his continuance in office, & at the expiration thereof, to produce the same to his successors. Where this production of such accounts is delayed by the outgoing churchwarden, & no satisfactory excuse alleged for the delay, the ct. will enforce the production of the accounts, & visit the late churchwarden with a fine.—*CHAMBERS v. PARKER* (1841), 5 J. P. 277.

**834. Duty to produce—Jurisdiction of magistrates to enforce.]**—*R. v. PECKE* (1663), 1 Keb. 574; 83 E. R. 1120.

**835. — Jurisdiction of spiritual court to enforce.]**—The Ecclesiastical Ct. has power to compel churchwardens to deliver in their accounts, but has no jurisdiction to examine them.—*HOOPER v. LEACH* (1784), 3 Doug. K. B. 434; 99 E. R. 735.

**836. — — —.]**—The Spiritual Ct. may compel the churchwardens to deliver in their account, but cannot decide on the propriety of the charges. Therefore, if they take any step after the accounts are delivered in, it is an excess of jurisdiction, for which a prohibition will be granted even after sentence.—*LEMAN v. GOULTY* (1789), 3 Term Rep. 3; 100 E. R. 421.

*Annotation:—Mentd.* Gordon v. Hayward (1905), 21 T. L. R. 298.

**837. — To successor—Enforcement.]**—*CHAMBERS v. PARKER*, No. 833, *ante*.

**838. Approval of account Commissary.]**—*R. v. PECKE* (1663), 1 Keb. 574; 83 E. R. 1120.

**839. — Jurisdiction of spiritual court—Nature of account.]**—*STYRROP v. STOAKES* (1691), 12 Mod. Rep. 9; 88 E. R. 1130.

**840. — — —.]**—*ADAMS v. RUSH* (1740), 2 Stra. 1133; 93 E. R. 1083.

**841. — — —.]**—*HOOPER v. LEACH*, No. 835, *ante*.

**842. — — —.]**—*LEMAN v. GOULTY*, No. 836, *ante*.

**843. — — — After account allowed by vestry.]**—*NUTKINS v. ROBINSON* (1727), Bunb. 247; 145 E. R. 602.

**844. — — —.]**—After a churchwarden's accounts have been allowed by a vestry, the spiritual ct. will not proceed against him to account on oath.—*SNOWDEN v. HERRING* (1730), Bunb. 280; 145 E. R. 677.

**845. — — —.]**—*WAINWRIGHT v. BAGSHAW* (1731), Cunn. 33; 7 Mod. Rep. 208; *Ridg. temp.* 11. 55; 2 Stra. 974; *Andr.* 11, n.; 94 E. R. 1045; *sub nom.* *WAINWRIGHT v. BRADSHAW*, 2 Barn. K. B. 421.

**846. Right of inspection—Special reason must be alleged.]**—Where a party applies for a *mandamus* to compel churchwardens to allow him to inspect their accounts according to Poor Relief Act, 1744 (c. 38), he must state some special reason for which

he wishes to see the accounts.—*R. v. CLEAR* (1825), 4 B. & C. 899; 7 Dow. & Ry. K. B. 393; 3 Dow. & Ry. M. C. 438; 4 L. J. O. S. K. B. 53; 107 E. R. 1293.

*Annotations:—Fold. Exp.* Briggs (1859), 1 E. & E. 881. *Mentd.* *R. v. Wiltshire & Berkshire Canal Navigation Co.* (1835), 5 Nev. & M. K. B. 344; *R. v. London & St. Katharine's Docks Co.* (1874), 31 L. T. 538; *R. v. St. George the Martyr, Southwark Vestry* (1892), 61 L. J. Q. B. 398.

**847. — — —.]**—There is no general unqualified right on the part of the ratepayers to inspect & take extracts from the churchwardens books of accounts. To entitle a ratepayer to a *mandamus* to compel such inspection some special & public ground must be shown.

Therefore, where the affidavit stated that the application had been made *bonâ fide*, & for the purpose of enabling appt. & other parishioners & ratepayers to take part in the proceedings of the vestry, & that he & they might properly understand & act upon the business to be brought before it, & not for any unlawful or improper purpose or object:—*Held*: a *mandamus* commanding the churchwardens to permit appt. to inspect & take extracts from the churchwardens books of accounts ought not to be granted.—*Ex p. BRIGGS* (1859), 1 E. & E. 881; 28 L. J. Q. B. 272; 120 E. R. 1141; *sub nom.* *R. v. DAVENTRY (CHURCHWARDENS)*, 33 L. T. O. S. 134; 23 J. P. 700; 5 Jur. N. S. 940; 7 W. R. 445.

**848. — For parochial purposes only.]**—The ct. will not compel parish officers to produce the parish books, for the inspection even if a parishioner, unless he show that it is for parochial purposes only that he desires the inspection.—*R. v. OSMOND* (1825), 4 L. J. O. S. K. B. 52.

**849. Authorised charges—Refreshment & visitation expenses.]**—As to the illegal expenses, I find bills to Dry & Morton for £14 for a parish feast, & another year £17 for visitation expenses. Now, I can understand that large expenses may be incurred by churchwardens who are living far off, & obliged to attend visitations, for necessary refreshments; but here they are distant only two miles & a half; & I do not think there can be any ground for this expense; & as to the salary of the sidesmen I do not see how that is to be maintained; but as to the clothes of the clerk & sexton, which were ordered at a proper vestry, these, I think, may be legal charges, & so a moderate sum for drink to the bell-ringers (SIR H. JENNER *furst*).—*HORNCHURCH (CHURCHWARDENS) v. PIGOTT* (1842), 6 Jur. 608.

**850. — Salary for sidesmen.]**—*HORNCHURCH (CHURCHWARDENS) v. PIGOTT*, No. 849, *ante*.

**851. — Clothing for clerk & sexton.]**—*HORNCHURCH (CHURCHWARDENS) v. PIGOTT*, No. 849, *ante*.

**852. — Drink for bell-ringers.]**—*HORNCHURCH (CHURCHWARDENS) v. PIGOTT*, No. 849, *ante*.

#### *K. Actions and Proceedings.*

*(a) Actions and Proceedings by Churchwardens.*

**853. What actions may be brought—Trespass—Goods removed in time of predecessors.]**—Churchwardens may maintain trespass for goods taken in the time of their predecessors.—*HADMAN v. RINGWOOD* (1589), Cro. Eliz. 145; 78 E. R. 402. *Annotation:—Mentd.* Dent v. Prudence & Bond (1729), 2 Stra. 852.

**854. — Monument defaced.]**—*BISHOP & TURNER'S CASE* (1619), Godb. 279; 78 E. R. 163.

**855. — Chancery proceedings—To restrain**

tributions of the congregation are the only means of meeting the expenses, no personal responsibility rests upon

the churchwardens in respect of the incumbent's salary; the measure of their liability to him is the extent to

which they receive moneys whereout to pay his salary.—*DAW v. ACKERILL* (1898), 28 O. R. 452; 25 A. R. 37.—*CAN.*

**pulling down of churchyard wall.]**—A suit by the churchwardens of a parish to restrain a person from pulling down the churchyard wall is maintainable: & the churchwardens, notwithstanding their office has ceased, may file a supplemental bill for the purpose of stating facts occurred since the filing of the original bill, & may join their successors as co-plffs. with them in the supplemental suit.—**MARRIOTT v. TARPLEY** (1838), 9 Sim. 279; 7 L. J. Ch. 245; 2 Jur. 404; 59 E. R. 365.

**Annotations:**—**Refd.** St. Stephen, Walbrook (Rector & Churchwardens) & Grocers Co. v. Sun Fire Office, Trustees (1883), Trist. 103; **Batten v. Gedye** (1889), 41 Ch. D. 507.

**856. — Recovery of money from predecessors—Though not immediate predecessors.]**—Churchwardens *de facto* may maintain an action against a former churchwarden, for money received by him for the use of the parish, though the validity of the election of plffs. to the office be doubtful, & though they be not the immediate successors of deft.—**TURNER v. BAYNES** (1795), 2 Hly. Bl. 559; 126 E. R. 702.

**Annotations:**—**Mentd.** Lorant v. Scuddling (1849), 13 Q. B. 706; **Moss v. Thornley** (1850), 27 L. T. O. S. 101; **Wilkinson v. Verity** (1871), L. R. 6 C. P. 206.

**857. — — — — —.]**—**ASTLE v. THOMAS**, No. 631, *ante*.

**858. — Ejectment—Lands held in trust for general parochial purposes—Borough corporation also trustees.]**—Where lands have been held jointly by the churchwardens & overseers of a parish & by the corpn. of a borough in which it lies, the latter holding as trustees, not on any special trust but for general parochial purposes, the churchwardens & overseers may bring ejectment for such lands as vested in them by Poor Relief Act, 1819 (c. 12), s. 17.—**DOE d. EDNEY v. BENHAM, DOE d. EDNEY v. BILLETT** (1845), 7 Q. B. 976; 14 L. J. Q. B. 342, 343; 5 L. T. O. S. 408; 10 J. P. 38, 39; 9 Jur. 602; 115 E. R. 756.

**Annotations:**—**Consd.** Rumball v. Munt (1816), 10 Jur. 539. **Refd.** St. Nicholas, Deptford (Churchwardens) v. Sketchley (1846), 17 L. J. M. C. 17.

**859. Right of action by one barred—Whether both barred.]**—The vestry clerk of a parish, upon his appointment by the vestry to the office, was told that it would be part of his duty to collect the church rate & poor rate, & to apply them as his predecessor had done. In pursuance of these instructions, & in accordance with a practice which had prevailed in the parish for fifty or sixty years, the vestry clerk applied a portion of the money arising from a church rate made in plffs.' year of office as churchwarden to the payment of certain parochial charges not legally payable out of the church rate:—**Held:** inasmuch as one of the churchwardens was aware of the manner in which the money was about to be disposed of; he having previously filled the office of overseer, & also of auditor of the parish accounts: & did not object, the two were precluded from suing the vestry clerk for this misapplication of the rate.—**COOPER v. LAW** (1859), 6 C. B. N. S. 502; 28 L. J. C. P. 282; 5 Jur. N. S. 1263; 141 E. R. 552.

**860. Right to institute proceedings in spiritual court—Ecclesiastical offence by parson.]**—**JONES v. BANGOR (BP.)** (1671), Return of Appeals before the High Court of Delegates, No. 63 (Parliamentary Papers, 199, April 3, 1868), cited in 3 Q. B. D. p. 771.

**Annotations:**—**Consd.** Martin v. Mackonochie (1878), 3 Q. B. D. 730; **Mackonochie v. Penzance** (1881), 6 App. Cas. 424.

**861. — — — — —.]**—**BURDER v. SPEER**, No. 1356, *post*.

**862. — Against predecessor—Acts done ratione officii.]**—**BISHOP & TURNER'S CASE** (1619), Godb. 279; 78 E. R. 163.

**863. Proof of right to bring action.]**—**Qu.:** is acting as churchwardens sufficient to prove their official title, so as to maintain ejectment?—**DOE d. BURT v. BAINES** (1815), 5 L. T. O. S. 51; 9 J. P. Jo. 263.

**864. Where validity of appointment disputed.]**—**TURNER v. BAYNES**, No. 850, *ante*.

**865. In whose name proceedings taken—Certiorari.]**—A notice of an application for a *certiorari*, signed by an attorney on behalf of appets.:—**Held:** a good notice within 13 Geo. 2 (c. 18), s. 5; & where appets. were the churchwardens & overseers of a parish, it was unnecessary that it should give their names.—**R. v. SOLLY** (1810), 9 Dowl. 115; Woll. 6; 4 J. P. 749.

**Annotations:**—**Consd.** R. v. Westmoreland JJ. (1813), 1 Dowl. & L. 178. **Mentd.** R. v. Sevenoukes (1815), 9 J. P. 483.

**866. Effect of vacating office—On right to bring action.]**—Churchwardens cannot commence a suit in their own names after their year is expired. But if commenced within, they may proceed in it after.—**DENT v. PRUDENCE** (1729), 2 Stra. 852; 93 E. R. 893.

**Annotation:**—**Refd.** Marriott v. Tarpley (1838), 9 Sim. 279.

**867. — On right to file supplemental bill.]**—**MARRIOTT v. TARPLEY**, No. 855, *ante*.

**868. Parties—Whether one can sue alone.]**—G., one of the churchwardens of a parish, instituted a suit for church rate in the names of himself & F., the other churchwarden. A proxy was first filed for G. only, & it was declared that F. proceeded no further with the suit. A subsequent proxy was filed, purporting to be for both churchwardens, but signed by G. only. Deft. appeared all along under protest, on account of the non-joinder of F., who in fact had nothing to do with the suit:—**Held:** one churchwarden cannot sue alone. He had no implied authority to give a proxy for the other, or to join him in a suit. Nor can the ct. compel or dispense with the joinder of the unwilling churchwarden.—**FRY & GREATA v. TREASURE** (1865), 2 Moo. P. C. C. N. S. 539; 11 L. T. 753; 29 J. P. 147; 11 Jur. N. S. 205; 13 W. R. 476; 15 E. R. 1003, P. C.; *sub nom.* GREATA v. TREASURE, 5 New Rep. 383.

**Annotations:**—**Apld.** Rithings v. Cudingley (1868), L. R. 3 A. & E. 113. **Follid.** Fowke v. Perington, [1911] 2 Ch. 308.

**869. — Joinder of new churchwarden—After issue of inhibition.]** Complainant in the matter of a representation under Public Worship Regulation Act, 1874 (c. 85), in which the incumbent of a parish church was the party complained of, was at the time of the making of the representation one of the churchwardens of the parish, & continued in his office as churchwarden until after an inhibition had issued in the suit inhibiting the incumbent from performing divine service within the diocese. Subsequently to the issue of this inhibition another person was elected as churchwarden in the place of complainant, & complainant ceased to reside in the parish. Afterwards the newly appointed churchwarden applied to the ct. by motion for leave to intervene in the suit or to be substituted as party therein in place of the complainant. The ct. refused the motion.—**PERKINS v. ENRACHT** (1881), 7 P. D. 31.

**870. — Substitution of new churchwardens.]**—**HARRIS v. PERKINS**, No. 1480, *post*.

#### PART III. SECT. 7, SUB-SECT. 6.— K. (a).

##### 870 i. Parties—Substitution of new

churchwardens.]—A bill was filed by the churchwardens, & during the progress of the suit the churchwardens were changed at the vestry meeting; the new churchwardens were not made parties. The suit not being brought

*Sect. 7.—Constitution of the Church into parishes: Sub-sect. 8, K. (a) & (b) & L.; sub-sects. 7 & 8, A. (a).]*

**871.** — Separate churchwardens for township & remainder of parish—Action in respect of township funds.]—*ASTLE v. THOMAS*, No. 634, *ante*.

**872.** — Lands held jointly by parish officers & borough corporation as trustees for parish.]—*DOE d. EDNEY v. BENHAM*, *DOE d. EDNEY v. BILLETT*, No. 858, *ante*.

**873.** — Whether by one alone—Action for subtraction of church rate.]—*FRY & GREATA v. TREASURE*, No. 868, *ante*.

**874.** — —.]—*FOWKE v. BERINGTON*, No. 1886, *post*.

**875.** Abatement—Churchwarden ceasing to hold office.]—*DENT v. PRUDENCE*, No. 866, *ante*.

**876.** — Churchwarden instituting suit ceasing to be parishioner.]—*HARRIS v. PERKINS*, No. 1480, *post*.

**877.** Compromise—Release by one—Whether valid.]—A prohibition may be awarded after sentence in the spiritual ct., as if a simoniacal bargain of an advowson be pretended in the spiritual ct., a prohibition lies. No prohibition lies where in a suit for a legacy it is pretended that the testator was idiot or *non compos mentis*. It does not lie in any suit the cognisance of which belongs to the spiritual ct.; as where they reject a matter not proved by two witnesses. If two churchwardens sue A. in the spiritual ct. for repairs & one of them releases, it will not avail him, for it belongs to the parishioners. This release also is worth nothing in our law. No prohibition shall be awarded where the principal case belongs to their cognisance, but all incidents to it shall be determined by their law (*per CUR.*).—*ANON.* (1005), *Jenk.* 305.

*See, also*, No. 751, *ante*.

**878.** Costs—Recovery from successors.]—*RADNOR PARISH IN WALES* (1718), 2 *Eq. Cas. Abr.* 203, pl. 3; 22 *E. R.* 173.

**879.** — —.]—*CHAMBRES v. JONES* (1850), 5 *Exch.* 220; 10 *L. J. Ex.* 230; 15 *L. T. O. S.* 93; 15 *J. P.* 164; 155 *E. R.* 98.

*Annotation:—Reid.* Penfold v. West (1864), 9 *L. T.* 650.

Petition for investment of fund in court—Proceeds of sale of parish lands.]—*See* *COMPULSORY PURCHASE OF LAND & COMPENSATION*, Vol. XI., p. 250, No. 1535.

#### (b) Actions and Proceedings against Churchwardens

**880.** When action lies—Release of right of action against one.]—*STARKEY v. BERTON*, No. 751, *ante*.

**881.** — Money had & received—Money paid over before action brought.]—An action for money had & received cannot be maintained against a churchwarden to recover back dues, which, previous to the commencement of the action, had been paid over to the treasurer of the trustees of a chapel.—*HORSFALL v. HANDLEY* (1818), 8 *Taunt.* 136; 2 *Moore, C. P.* 5; 120 *E. R.* 334.

*Annotation:—Mentid.* Gray v. Gutteridge (1827), 3 *C. & P.* 40. *See, generally*, *CONTRACT*, Vol. XII., pp. 552, 553, Nos. 4587-4595.

**882.** — Non-performance of duties by predecessors.]—Bill against churchwardens, because they refused to make a rate for reimbursing pltf. according to a vote & order of vestry. They being

to a hearing within the time required by the practice.—*Held: a notice to dismise the bill served on pltf's. solicitor was regular.*—*McKENNEN v. DIXON* (1870), 3 *Ch. Ch.* 84.—*CAN.*

out of office the decree was prayed against their successors.—*BATTILY v. COOKE* (1692), 2 *Vern.* 202; *Prec. Ch.* 42; 23 *E. R.* 770.

**883.** — Acts of predecessors in discharge of office.]—*A.-G. v. BARKER* (1843), cited in *Halsbury's Laws of England*, Vol. XI., p. 466.

**884.** — Remuneration of surveyor instructed by vestry.]—Pltf., a surveyor, who, at the request, as he alleged, of the vestry of a parish in the City of London, had performed certain services in connection with opposition to bills before Parliament for the construction through the parish of underground railways which threatened the safety of the parish church, brought an action against the churchwardens & overseers, in their capacity of churchwardens & overseers, for remuneration:—*Held:* (1) no such action would lie against the churchwardens & overseers; (2) on the facts, there was no evidence of any promise to pay pltf. for his services.—*KLENCK v. FARRIS* (1904), 69 *J. P.* 41; 3 *L. G. R.* 89, *C. A.*

**885.** Nature of proceedings—Criminal proceedings in ecclesiastical court—For breaches of ecclesiastical law.]—*RAWLISON v. MEDWIN & HURST* (1852), 19 *L. T. O. S.* 375.

**886.** Parties—Whether all necessary parties—Goods ordered by one only.]—Where goods were ordered by one of two chapelwardens for the use of the church:—*Held:* the warden giving the order might be sued separately, without joining his brother officer.—*SHAW v. HISLOP* (1824), 4 *Dow. & Ry. K. B.* 241; 2 *L. J. O. S. K. B.* 168.

*Annotation:—Reid.* Ritchings v. Cordingley (1868), *L. R.* 3 *A. & E.* 113.

**887.** — — Ecclesiastical offence alleged against one—Offence committed in official capacity.]

—Where an ecclesiastical offence is alleged against a parishioner who is also churchwarden, it is not necessary to make his co-churchwarden a co-def., although from the tenor of the charge, it appears that the alleged offence was committed in his official capacity.—*ADLAM v. COLTHURST* (1867), 36 *L. J. Eccl.* 14; 15 *L. T.* 635; 31 *J. P.* 295; *subsequent proceedings*, *L. R.* 2 *A. & E.* 30.

**888.** — Cause of action arising in discharge of office—Joinder of successors.]—*A.-G. v. BARKER* (1843), cited in *Halsbury's Laws of England*, Vol. XI., p. 466.

**889.** Effect of vacation of office—Non-performance of duties.]—*BATTILY v. COOKE* (1692), 2 *Vern.* 202; *Prec. Ch.* 42; 23 *E. R.* 770.

**890.** — Jurisdiction of court to pronounce decree.]—An information filed against churchwardens, *nominatim*, will not prevent the ct. making a decree, though one of them had ceased to hold the office at the time it was made.—*A.-G. v. SALKELD* (1853), 16 *Beav.* 554; 22 *L. J. Ch.* 741; 21 *L. T. O. S.* 30; 17 *Jur.* 173; 51 *E. R.* 893.

**891.** — Previous disobedience to mandamus—Whether liable to peremptory writ.]—*R. v. ALLEN*, No. 698, *ante*.

*See, also*, No. 883, *ante*; No. 893, *post*.

**892.** Costs—Action dismissed as vexatious.]—*LEWIS v. JAMES* (1754), 1 *Lee*, 612; 161 *E. R.* 224.

**893.** — Whether recoverable after office vacated.]—An action was brought to recover possession of certain premises in the occupation of A., to which the parish of B. claimed title. A vestry of such parish being held upon the subject, they resolved that the action should be defended by an attorney, who defended it accordingly, & judg-

ment against two churchwardens, by name, describing them as "the churchwardens of Christ's church in the village of W." etc., for the use & occupation of a house rented by the

#### PART III. SECT. 7. SUB-SECT. 6.—K. (b).

*g. When action lies—Contract by previous churchwardens.*—Upon an

ment was ultimately given for *pltf.*, but long after the parish officers who were in office at the time of the resolution had gone out of office. Upon an application for a rule calling upon such parish officers to pay the costs:—*Held*: they were not liable.—*FIELD v. MERRISON* (1863), 7 L. T. 754; 27 J. P. 119; 11 W. R. 473.

#### L. Duration and Vacation of Office.

**894. Duration—Until successor sworn in.]**—*R. v. MARSH*, No. 746, *ante*.

**895.** ———.]—A churchwarden remains in office till his successor is sworn in.—*DOE d. TOWNSEND v. MACE* (1839), 3 Jur. 628.

**896.** ———.]—On an information for not signing the jury lists pursuant to Juries Act, 1825 (c. 50):—*Held*: an outgoing churchwarden, whose year of office had expired, continued in office until his successor was not only elected, but had made the declaration substituted for the oath by Statutory Declarations Act, 1835 (c. 62), s. 9.—*BRAY v. SOMER* (1862), 2 B. & S. 374; 31 L. J. M. C. 135; 6 L. T. 49; 26 J. P. 279; 8 Jur. N. S. 716; 10 W. R. 354; 121 E. R. 1113.

*Annotations*:—*Fold*. Lane v. Norman (1891), 61 L. J. Ch. 149. *Reid*. Kidney & Lunn v. Smallbones (1869), 21 L. T. 506; *Meyers v. Hennell*, [1912] 2 Ch. 256.

**897.** ———.]—A churchwarden elected for one year continues to act after the termination of the year of office, not only until another has been elected to take his place, but until all necessary formalities have been observed, such as the swearing in after election (*NORTH, J.*).—*LANE v. NORMAN* (1891), 61 L. J. Ch. 149; 66 L. T. 83; 40 W. R. 268.

*Annotations*:—*Mentd*. Pottle v. Sharp (1896), 65 L. J. Ch. 908; *Meyers v. Hennell*, [1912] 2 Ch. 256; *Harries v. Crawford*, [1918] 2 Ch. 158.

**898.** ——— Custom.]—(*GIBBS v. FLIGHT*, No. 605, *ante*).

**899. Vacation—By removal—Power of parishioners to remove.]**—(1) A churchwarden, from office, is bound to keep the old edifice in repair. He cannot buy a new bell, or build gallery, or make any addition, & he does not want authority of parishioners for those repairs any further than by their election of him to office, nor can parishioners object the repairs improvident; if they are injured, it is by the indiscretion of their own choice. They may remove the churchwarden by proper application to the *ct.*, but they cannot refuse to indemnify him for sums actually expended in repairs, other articles of expense, wine for sacrament, sweeping of the church, attendance on visitation (*per CUR.*).

(2) A vestry, to authorise churchwardens to make repairs, is not necessary (*per CUR.*).—*GAUDERN v. SELBY* (1799), 1 Curt. 394; 163 E. R. 135; *affg.*, 3 Curt. 272, n.

*Annotations*:—*As to* (1) *Consd.* Veley & Joalin v. Burder (1837), 1 Curt. 372. *Reid*. Gosling v. Veley (1853), 4 H. L. Cas. 679. *As to* (2) *Reid*. Veley v. Burder (1841), 12 Ad. & El. 265; *R. v. Thomas* (1842), 6 Jur. 1122. *Generally, Mentd.* Veley v. Gosling (1843), 3 Curt. 253.

**900.** ——— What operates as termination—Whether non-residence.]—*STEPHENSON v. LANGSTON* (1804), 1 Hag. Con. 370; 161 E. R. 588.

*Annotations*:—*Reid*. Harrison v. Barrett (1876), Trist. 43; *R. v. Cree* (1892), 67 L. T. 556.

previous churchwardens for the rector:—*Held*: (1) under 3 & 4 Vict., c. 74, s. 6 the action was properly brought; (2) the taking of the premises & occupation by the clergyman under the previous churchwardens, with the sanction of the vestry & *deft.*, was sufficient to bind them as churchwardens.—*MAYNARD v. GAMBLE* (1863), 13 C. P. 56; *disd.* *BRATY v. GREGORY*,

28 O. R. 60.—*CAN.*

#### PART III. SECT. 7, SUB-SECT. 7.

*h. Church of Ireland—Proprietary church—Appointment of Sidesmen.*—A proprietary church was founded & endowed by a lease & a deed of endowment & trust made in the year 1850. In 1913 the registered vestry-

**901.** ———.]—(1) Proof that a party holds the office of churchwarden is *prima facie* evidence of his having been lawfully appointed, even where the question turns on his title to the possession of land in his capacity of such churchwarden.

(2) *Semble*: a churchwarden who, during the continuance of his office, ceases to reside in the parish, does not *ipso facto* cease to be churchwarden, although it is a good ground for appointing another in his place.—(*JANVILL v. UTTING* (1845), 9 Jur. 1081).

**902.** ——— To hand over parish books—Enforcement.]—A *mandamus* will not lie to the old churchwardens to deliver the parish books to their successors.—*R. v. STREET & STRAND* (1722), 8 Mod. Rep. 98; 88 E. R. 77.

——— Duty to render accounts.]—*See* Sub-sect. 6, *J., ante*.

**903.** ——— Effect of—Liability for non-performance of duties—Presentment.]—No prohibition will issue to the Spiritual Ct. for citing churchwardens, after the expiration of their year of office, to make a presentment by virtue of their oath of office.—*ANON.* (1677), 1 Freem. K. B. 200; 89 E. R. 210.

——— On right of action.]—*See* No. 866, *ante*, No. 1480, *post*.

#### SUB-SECT. 7.—SIDESMEN.

**904. Payment of salary—Whether allowed.]**—*HORNCHURCH (CHURCHWARDENS) v. PIOTT*, No. 849, *ante*.

**905.** ——— Out of church rate.]—Charges for “sidesmen, their salary & gowns,” for ringers, & for insurance, are admissible items in a church rate, if the vestry assents to the estimate which includes them at the time the church rate is granted.—*RAND & GRIMWADE v. GREEN & GREEN* (1860), 6 Jur. N. S. 303; *subsequent proceedings*, 9 C. B. N. S. 470.

#### SUB-SECT. 8.—PARISH CLERKS, SEXTONS, AND ORGANISTS.

##### A. Parish Clerks.

##### (a) Nature and Tenure of Office.

**906. Whether temporal or spiritual.]**—The office of parish clerk is merely temporal; & where by custom he is elected by the parishioners, if the parson proceed in the Ecclesiastical Ct. to deprive him, a prohibition will be granted.—(*LAUDYES CASE WITH NEWMAN* (1611), 2 Brownl. 38; 123 E. R. 802; *sub nom.* *PARISH CLERK*, 13 Co. Rep. 70.

*Annotations*:—*Apld.* *Pitts v. Evans* (1738), 7 Mod. Rep. 251. *Fold.* *Lawrence v. Edwards*, [1891] 2 Ch. 72. *Mentd.* *Phillips v. Bury* (1694), Skin. 447; *Davis v. Nichols* (1868), 17 W. R. 291.

**907.** ———.]—The office of parish clerk is a temporal, not a spiritual function.—*WALLIPOOLE'S CASE* (1624), Benl. 142; 73 E. R. 1012.

*Annotation*:—*Reid.* *Peak v. Bourne* (1732), 2 Stra. 942.

**908.** ———.]—A parish clerk is a spiritual officer, & the spiritual *ct.* may deprive him for a

men of the church appointed six of their number to be sidesmen:—*Held*: no power to appoint sidesmen was given by the constitution of the Church of Ireland, or the trust deed, or the Church Building Acts, & the election of the sidesmen was void.—*LEFANU v. RICHARDSON*, [1914] 1 I. R. 314.—*IR.*

**Sect. 7.—Constitution of the Church into parishes:**  
**Sub-sect. 8, A. (a) & (b).]**

temporal offence.—**TOWNSEND v. THORPE** (1727), 2 *Ld. Raym.* 1507; 2 *Str.* 776; 92 *E. R.* 479.

**Annotations:—****Expld.** *Speak v. Born* (1731), 1 *Barn. K. B.* 450; *Peak v. Bourne* (1732), 2 *Str.* 942. **Consd.** *Barton v. Ashton* (1753), 1 *Lee*, 350; *Free v. Burgoyne* (1826), 5 *B. & C.* 400; *Burder v. —* (1844), 3 *Curt.* 822. **Foll.** *Lawrence v. Edwards*, [1891] 2 *Ch.* 72. **Refd.** *Newcam v. Higgs* (1730), 1 *Barn. K. B.* 412; *Middleton v. Croft* (1736), *Cum.* 55; *Free v. Burgoyne* (1828), 1 *Dow. & Cl.* 115; *Grace v. Ossory* (Lord Bp.) (1848), 4 *Cox. C. C.* 159. **Mentd.** *Mackonochie v. Penzance* (1881), 6 *App. Cas.* 424.

**909. —.**—(1) Prohibition to suit in the spiritual ct. by a clerk of a parish for fees.

(2) He is a temporal officer (*per Cur.*).—**PITTS v. EVANS** (1730), 2 *Str.* 1108; 7 *Mod. Rep.* 254; *Barnes*, 428; 93 *E. R.* 1063.

**Annotation:—***As to (2)* **Foll.** *Lawrence v. Edwards* (No. 2) (1891), 64 *L. T.* 343.

**910. —.**—**TARRANT v. PAXBY**, No. 968, *post*.

**911. —.**—The office of parish clerk is a temporal office; & although appointed by the minister if removed by him without sufficient cause, a *mandamus* will lie to restore him.—**R. v. WARREN** (1770), 1 *Cowp.* 370; 98 *E. R.* 1135.

**Annotation:—****Expld.** *Ex p. Ramshay* (1852), 18 *Q. B.* 173.

**912. —.**—The office of parish clerk is a temporal office.—**LAWRENCE v. EDWARDS**, [1891] 2 *Ch.* 72; 60 *L. J. Ch.* 330; 64 *L. T.* 343; 39 *W. R.* 411; *previous proceedings*, [1891] 1 *Ch.* 144.

**913. —.**—**Mode of nomination.**—(1) A parish clerk may execute the office without licence of the Ordinary.

(2) *Qu.*: whether a temporal or a spiritual officer.

Whether the clerk comes into his office by the nomination of the parson, or by the election of the parish, the office must be considered the same in one case as in the other (*per Cur.*).

(3) *Qu.*: whether he can appoint a deputy.—**PEAK v. BOURNE** (1732), 2 *Str.* 942; 2 *Lee*, 587; 93 *E. R.* 950; *sub nom.* **PEAT v. BIRK**, *Fitz-G.* 272; *sub nom.* **SPEAK v. BORN**, 1 *Barn. K. B.* 377, 450; 2 *Barn. K. B.* 52, 195; *sub nom.* **BEACH v. BOURN**, *Kel. W.* 219.

**Annotations:—***As to (2)* **Consd.** *Lawrence v. Edwards*, [1891] 2 *Ch.* 72. *As to (3)* **Consd.** *Nichols v. Davis* (1868), *L. R.* 4 *C. P.* 80. **Refd.** *Pindar v. Barr* (1854), 1 *Jur. N. S.* 205.

**914. —.**—(1) A proceeding against a parish clerk for deprivation, ought to be plenary, & by articles.

(2) If a parish clerk is nominated by the parishioners he is a temporal officer, whereas if he is nominated by the incumbent, he is a spiritual officer.—**BARTON v. ASHTON** (1753), 1 *Lee*, 350; 101 *E. R.* 129; *subsequent proceedings*, 1 *Lee*, 400; (1754), 1 *Lee*, 533.

*See, also*, Nos. 942, 944, *post*.

**915. Tenure.**—**ANON.** (1713), No. 658, *ante*.

**916. —.**—The office of parish clerk is *prima facie* an office for life, & does not require assessment.—**MIDDLESEX ELECTION CASE (ASHFIELD)** (1804), 2 *Peck.* 88.

**Annotations:—****Mentd.** *Copland v. Bartlett* (1848), 2 *Lut. Reg. Cas.* 102; *Ford v. Harrington* (1869), *L. R.* 5 *C. P.* 282; *R. v. Dymock*, [1915] 1 *K. B.* 147.

**917. —.**—**Nomination by incumbent.**—Parish clerk nominated by the parson is in for life, & gains a settlement.—**GATTON PARISH v. MILWICH PARISH** (1712), 2 *Salk.* 536; *Foley* 123; 91 *E. R.* 455; *sub nom.* **GATON & MILWICH (INHABITANTS)**, *Portes Rep.* 230.

**Annotations:—****Consd.** *R. v. Stogursey* (1831), 1 *B. & Ad.* 795. **Appld.** *R. v. Bobbing* (1836), 5 *Ad. & El.* 682. **Refd.** *Anon.* (1713), *Sess. Cas. K. B.* 12; *Townsend v. Thorpe* (1727), 2 *Ld. Raym.* 1507; *Peak v. Bourne* (1732), 2 *Str.* 942. **Mentd.** *Stone Parish v. Kniver Parish* (1725), *Sess. Cas. K. B.* 158.

**918. —.**—**R. v. OVER (INHABITANTS)** (1773), *Burr. S. C.* 746.

**Annotations:—****Consd.** *R. v. Stogursey* (1831), 1 *B. & Ad.* 795. **Mentd.** *R. v. Lew* (1828), 3 *Man. & Ry. K. B.* 369; *R. v. Orsett* (1851), 16 *Q. B.* 975.

**919. —.**—**Whether “annual office”**—**Within Poor Relief Act, 1691 (c. 11).**—The office of parish clerk in K. being vacant, the pauper began, & continued for eleven years, to perform the duties, for which he received a yearly salary from the parish. It did not further appear how he came into the office. The appointment was in the vicar:—**Held**: as the pauper was not even colourably appointed or chosen, he did not by his service as clerk, execute an office within the parish so as to gain a settlement under Poor Relief Act, 1691 (c. 11), s. 6.

*Qu.*: whether the place of parish clerk be a “public annual office or charge” within the above statute.—**R. v. STOGURSEY (INHABITANTS)** (1831), 1 *B. & Ad.* 795; 9 *L. J. O. S. M. C.* 48; 109 *E. R.* 982.

**Annotations:—****Consd.** *R. v. Orsett* (1851), 16 *Q. B.* 975. **Refd.** *R. v. Clibby* (1832), 4 *B. & Ad.* 153.

**920. —.**—The curate of a district church in the township of A., established under Church Building Acts, 1818 (c. 45) & 1810 (c. 134), dismissed the clerk of the district church, & appointed T. in his stead. T. continued to act as such clerk for eight years, with the full knowledge of the vicar who, during that time, held the cure of the parish in which part of the district lay. At the time of the appointment, the vicar denied the power of the curate to appoint, but he took no further or subsequent objection. On appeal against an adjudication of T.’s settlement in another township:—**Held**: the office was a public annual office within Poor Relief Act, 1691 (c. 11), & T. acquired a settlement in township A.—**R. v. OSSETT (INHABITANTS)** (1851), 16 *Q. B.* 975; 4 *New Sess. Cas.* 663; 20 *L. J. M. C.* 205; 17 *L. T. O. S. F.* 74; 15 *J. P.* 498; 15 *Jur.* 823; 117 *E. R.* 1155.

**Annotation:—****Expld.** *Jackson v. Courtenay* (1857), 8 *E. & B.* 8.

**921. —.**—**Parish constituted under Church Building Acts.**—**PLT.** was appointed to perform the duties of parish clerk of a church in a parish constituted under Church Building Acts, 1818 (c. 45) & 1810 (c. 134), & he was paid a weekly salary in addition to fees:—**Held**: he was a parish clerk within Church Building Act, 1818 (c. 45), s. 29, & his office was an annual one.—**BAILEY v. EDMUNDSON** (1909), 25 *T. L. R.* 681.

**Whether “incorporeal hereditament”**—**Within County Courts Act, 1846 (c. 95), s. 58.**—*See* **COUNTY COURTS**, Vol. XIII., p. 480, No. 300.

**922. Whether assignable.**—N., having been appointed parish clerk of the parish of Manchester before the passing of 13 & 14 *Vict.* c. 41, purported to assign by deed his office of parish clerk to D. By 13 & 14 *Vict.*, c. 41, s. 6, an Act passed for subdividing the parish of Manchester, it was provided that there should be paid to the rectors of the new parishes for marriages, churchings, & burials, the fees usually payable at the parish church during the continuance in office of the chaplains, minor canons, & clerks of the parish church then being in office, or any of them; & that the rectors should pay same to one of the chaplains or minor canons, who should distribute them to the persons entitled. All the chaplains & minor canons had ceased to hold office. N. having sued the rector of one of the parishes created under the Act for his portion of the marriage fees:—**Held**: (1) the office of parish clerk could not be assigned, & N. was, therefore, still

the parish clerk; (2) the mode by which the fees received by the rectors were to be paid to the parties entitled was only machinery appointed by the Act for the purpose, & there being no chaplains or minor canons remaining through whom it could be carried out, N. was entitled to recover by action from the rector the amount due to him.—*NICHOLS v. DAVIS* (1868), L. R. 4 C. P. 80; 38 L. J. C. P. 127; *sub nom.* *DAVIS v. NICHOLS*, 17 W. R. 291.

(b) *Appointment.*

**923. Form of appointment—Whether deed necessary.**—*ANON.* (1774), *Lofft*, 434; 98 E. R. 733.

**924. — — — — —**—*ANON.* (1713), No. 658, *ante*.

**925. — — — — —**—*Pauper*, upon a vacancy of the offices of parish clerk & sexton of B., was requested by the rector to perform the duty of clerk for a Sunday, which he did; & the rector afterwards said to him, "I shall appoint you my regular clerk & sexton, & to follow me in marriages & funerals." *Pauper* accordingly entered upon the office. Soon afterwards, two parishioners objected to what the rector had done, who answered that he should persist. The parish were in the habit of paying a salary to the parish clerk & sexton; the overseer refusing to pay the pauper, the rector threatened him with legal proceedings, upon which the salary was paid, & the vestry afterwards increased it. *Pauper* executed the office, & received the emoluments, residing in B., for several years:—*Held*: he was well appointed, & gained a settlement in B.—*R. v. BOBBING (INHABITANTS)* (1836), 5 Ad. & El. 682; 2 Har. & W. 418; 1 Nev. & P. K. B. 166; Nev. & P. M. C. 49; 6 L. J. M. C. 13; 111 E. R. 1323.

*Annotation*:—*Reid*. R. v. Onsett (1851), 16 Q. B. 975.

**926. — — — — —**—(1) The appointment of a parish clerk need not be by deed.

(2) A parish clerk by virtue of his appointment was entitled to a twelfth share of 20 acres of freehold land in the parish, of sufficient value to confer a vote for the county, so long as he continued clerk, & his predecessors in the office had always enjoyed same:—*Held*: the clerk had a freehold interest in his share, in respect of which he was entitled to be registered.—*ROBERTS v. DREWITT* (1864), 18 C. B. N. S. 48; *Hop. & Ph.* 132; 144 E. R. 358.

**927. Who may be appointed—Layman.**—*PARKSON v. HINDE* (1773), 3 Wood. 440.

**928. By whom appointed—Custom for appointment by parish—Whether good.**—*GAUDYES CASE WITH NEWMAN*, No. 906, *ante*.

*See, also*, Nos. 913, 914, *ante*, Nos. 937, 942, 958, 968, *post*.

**929. — — — — — During suspension of incumbent.**—*D.*, the vicar of F., was suspended, for misconduct, by the bishop of the diocese, from performing the duties & receiving the profits of the vicarage, for two years, & further, until he should exhibit a certificate of good behaviour. K. was licensed by the Bishop to act as curate of F., & officiated. After the expiration of the two years, & before the exhibition of a certificate, the parish clerk of F. died. K. appointed *pltf.* to be parish clerk during the suspension of D. D., during the continuance of the suspension, appointed *deft.* as parish clerk, who received fees in that character. *Pltf.* having, during the continuance of the suspension, sued *deft.*, in respect of these fees, for money had & received:—*Held*: (1) K. had the right of appointing the parish clerk; (2) the appointment of *pltf.*

was good; (3) a general appointment by K. would be more advisable than one limited to the time of D.'s suspension.—*PINDER v. BARR* (1854), 4 E. & B. 105; 2 C. L. R. 1613; 24 L. J. Q. B. 30; 23 L. T. O. S. 254; 18 J. P. 824; 1 Jur. N. S. 205; 2 W. R. 589; 119 E. R. 41.

*Annotation*:—*As to* (1) & (2) *Consd.* *Lawrence v. Edwards* [1891] 1 Ch. 144.

**930. — — — — — During sequestration.**—(1) The rector of a parish having been adjudicated a *bkpt.*, the bishop issued a sequestration, & appointed & licensed a stipendiary curate for the performance of the ecclesiastical duties of the parish. The office of parish clerk having become vacant during the sequestration, the rector appointed *pltf.* to be parish clerk, & subsequently, the curate appointed *deft.* to the same office. On a motion by *pltf.* to restrain *deft.* from receiving the fees & emoluments of the office:—*Held*: the appointment of parish clerk had been rightly made by the rector, notwithstanding the sequestration, & *pltf.* was accordingly entitled to an injunction.

(2) The rights & position of an incumbent after sequestration, except so far as they are interfered with by the express terms of Sequestration Act, 1871 (c. 45), remain unaltered.—*LAWRENCE v. EDWARDS*, [1891] 1 Ch. 144; 61 L. T. 77; 7 T. L. R. 129; *subsequent proceedings*, [1891] 2 Ch. 72.

**931. — — — — — Chapel of ease constituted separate district.**—Under 28 Geo. 3, c. 10, & 30 Geo. 3, c. 69, a chapel became vested in trustees to be used as a chapel of ease to the parish church; & in 1843, *deft.* & *pltf.* were respectively appointed, by the vicar of the parish, minister & clerk of such chapel. By an Ord. in Council, made in 1854, under Church Building Acts, 1819 (c. 134), s. 16, & 1839 (c. 49), s. 3, a district was assigned to the chapel so as to form a district chapelry. By Church Building Act, 1819 (c. 134), s. 29, the clerk in every church & chapel erected, built, or acquired or appropriated under the provisions of that Act, or of Church Building Act, 1818 (c. 45), shall be annually appointed by the minister of the church or chapel. By Church Building Act, 1845 (c. 70), s. 17, the church of any district chapelry shall be a perpetual curacy & benefice; & the minister shall be a perpetual curate, & shall not be in anywise subject to the control or interference of the rector of the parish. *Pltf.* never received any appointment as clerk from *deft.*, but continued to act as clerk without interruption until Aug. 18, 1855, when he received from *deft.* a notice to quit on Aug. 26. On Sept. 26, 1855, *pltf.* went to the vestry of the chapel to perform his duties as clerk, when *deft.* ordered him to leave, & on his refusal, had him turned out of the vestry room. In answer to questions raised by an arbitrator upon the reference of an action by *pltf.* for an assault:—*Held*: (1) the office of clerk was an annual appointment in the power of *deft.* as minister of the chapel, & the continuance of *pltf.* in the office in successive years without an express reappointment should be construed to amount to a reappointment in each year; (2) the appointment of clerk was an office, & *deft.* had no power to dismiss from the office during the year of office without cause, & therefore, the notice to *pltf.* to leave in Aug., there being no evidence when the year of office began, did not remove *pltf.*; (3) the possession of the vestry room was in *deft.* as minister, so as to make the entry & remaining of *pltf.*, the clerk, therein after a prohibition by *deft.* a wrong which justified *deft.* in removing *pltf.*, & entitled *deft.* to judgment upon a plea alleging such facts by way of justification.—

*Sect. 7.—Constitution of the Church into parishes :  
Sub-sect. 8, A. (b), (c) & (d).]*

JACKSON v. COURTENAY (1857), 8 E. & B. 8; 27 L. J. Q. B. 37; 29 L. T. O. S. 262; 3 Jur. N. S. 889; 5 W. R. 752; 21 J. P. Jo. 499; 120 E. R. 3.

932. ————]—FITZGERALD v. FITZPATRICK, No. 382, *ante*.

933. ———— United parish—Former right of appointment in incumbent & parishioners respectively.]—Two parishes having been united, in which before the union the parish clerk was appointed by the parishioners & the rector:—*Held*: after the union, an appointment by the rector alone was invalid.—HARTLEY v. COOK (1833), 9 Bing. 728; 5 C. & P. 441; 3 Moo. & S. 230; 2 L. J. C. P. 141; 131 E. R. 787.

*See, also*, No. 981, *post*.

934. How enforced—By mandamus to rector.]—R. v. ST. ANNE'S, SOHO (RECTOR) (1700), 3 Burr. 1877; 97 E. R. 1140.

935. Validity of appointment—Whether exercise of duties sufficient.]—R. v. STOGURSEY (INHABITANTS), No. 919, *ante*.

936. ———— Improper appointment by curate of district—Acquiescence by vicar.]—R. v. OSSEY (INHABITANTS), No. 920, *ante*.

937. Admission to office—Enforcement—Appointment by parishioners.]—On a custom for parishioners to choose a parish clerk, the ct. will grant a *mandamus* to the archdeacon to swear him in.—ORME v. PEMBERTON (1640), Cro. Car. 589; 79 E. R. 1106.

938. Duration of appointment—By incumbent & parishioners—Not limited to incumbency.]—PARKSON v. LINDE (1773), 3 Wood, 410.

939. ———— Appointment general—Confirmation by bishop during pleasure.]—Parish clerk appointed generally, confirmed by the bishop during pleasure.—MIDDLESEX ELECTION CASE (KENTISH) (1804), 2 Peck. 1, 92.

*See, also*, Nos. 978, 979, *post*.

940. Continuance in office—Whether express reappointment necessary.]—JACKSON v. COURTENAY, No. 931, *ante*.

941. Jurisdiction of courts to control—Spiritual court.]—GAUDYER CASE WITH NEWMAN, No. 906, *ante*.

942. ————]—A prohibition lies to the spiritual ct., if they proceed to swear a parish clerk named by the parson when he ought to be named by the vestry.—JERMYN'S CASE (1624), Cro. Jac. 670; 79 E. R. 580.

*Annotations:—*Refd. Peak v. Bourne (1732), 2 Stra. 942; PITT v. EVANS (1738), 7 Mod. Rep. 254.

943. ————]—TOWNSEND v. THORPE, No. 908, *ante*.

944. ————]—AUSTIN v. GERVAS (1733), 2 Barn. K. B. 242; 94 E. R. 475.

*Compare* No. 968, *post*.

(c) Fees.

945. Recovery—By action—Whether spiritual court has jurisdiction.]—Prohibition was granted to stay a suit for a salary of a parish clerk in the spiritual ct.—ANON. (1701), 12 Mod. Rep. 583; 88 E. R. 1535.

946. ————]—(1) If a parish clerk sue churchwardens in the spiritual ct. for money due to him by custom:—*Qu.*: if the ct. will grant a prohibition on the suggestion that there is no such custom.

(2) A spiritual person may sue in the ecclesiastical ct. for a pension, although not originally granted or confirmed by the ordinary.—PARKER v. CLERK

(1704), 6 Mod. Rep. 252; Holt, K. B. 599; 3 Salk. 87; Sett. & Rem. 197; 87 E. R. 999.

947. ————]—PITTS v. EVANS, No. 909, *ante*.

— Whether county court has jurisdiction—Right to fees disputed.]—*See* COUNTY COURTS, Vol. XIII., p. 480, No. 300.

948. ———— Fees received by rector—Parish of Manchester Division Act, 1850 (c. 41).]—NICHOLS v. DAVIS, No. 922, *ante*.

949. District chapelry—Rights of clerk of original parish.]—In 1810, a chapel was purchased for the purpose of being consecrated as a chapel of ease in the parish of A. The chapel was consecrated under the provisions of a deed, dated Aug. 25, 1810, by which the parish clerk & sexton were to be entitled to the fees for christening, burials & marriages in the chapel & cemetery thereof, as if they had taken place in the mother church. By an Ord. in Council, of Aug. 2, 1853, the chapel was created a district chapelry under Church Building Act, 1819 (c. 134), s. 16. By sect. 10 of that Act, when any parish shall be divided under the provisions of Church Building Act, 1818 (c. 45), or this Act, all fees belonging to the parish clerk or sexton respectively of any such parish, which shall thereafter arise "in any district or division of any parish divided" under the provisions of Church Building Act, 1818 (c. 45), shall belong to & be recoverable by the clerks & sextons of each of the divisions of the parish to which they shall be assigned. Pltf., who was clerk & sexton of the parish of A., having brought an action for money had & received, against deft., the clerk & sexton of the chapel, for the fees received by him for christenings, burials, & marriages in the chapel:—*Held*: (1) the action for money had & received would lie for these fees; (2) this being a "district chapelry" was not within Church Building Act, 1819 (c. 134), s. 10. & therefore, pltf., as clerk & sexton of the parish, was entitled to the fees arising at the chapel.—ROBERTS v. AULTON (1857), 2 H. & N. 432; 29 L. T. O. S. 280; 21 J. P. 629; 157 E. R. 178; *sub nom.* AULTON v. ROBERTS, 26 L. J. Ex. 380.

*Annotations:—*As to (2) *Fold.* Hampstead Parish Clerk's Fee Case, *Re* Langmead (1876), Trist. 54. *Distd.* White v. Norwood Burial Board (1885), 54 L. T. 81. *Refd.* Ormerod v. Blackheath Burial Board (1873), 21 W. R. 539.

950. ————]—HAMPSTEAD PARISH CLERK'S FEE CASE, *Re* LANGMEAD, No. 383, *ante*.

951. Ancient fee payable on grave being opened in churchyard—Whether payment issuing out of or charged on land.]—A. was in 1826 appointed parish clerk of St. J., Dover; & by licence under the seal of the Archbishop of Canterbury, dated in 1832, he was confirmed in his office, "together with all & singular the fees, salaries, & profits either by law or ancient custom belonging to same." Part of the emoluments attached to the office consisted of the clerk's share of an ancient due payable to the clerk & sexton upon the opening of every grave in the churchyard of the parish. The parish clerk had not himself to perform any of the work of or incident to the opening of the graves, this being done by the sexton:—*Held*: the ancient fee was in the nature of a remuneration for services rendered in conducting the funeral rites, & not a payment or emolument issuing out of or charged upon any land.—BUSHELL v. EASTES (1861), 11 C. B. N. S. 106; K. & G. 484; 31 L. J. C. P. 44; 5 L. T. 580; 26 J. P. 72; 8 Jur. N. S. 645; 10 W. R. 153; 142 E. R. 735.

In respect of burials in burial grounds under Burial Acts, 1852 (c. 85), & 1853 (c. 134).]—*See* BURIAL, Vol. VII., p. 545, No. 243.



**952. Compensation in lieu of fees—District chapelry created under Church Building Acts.]—**HAMPSTEAD PARISH CLERK'S FEE CASE, *Re* LANGMEAD, No. 383, *ante*.

**953. — Portion of closed burial ground acquired for public purposes.]—**(1) A burial ground provided by Act of Parliament, but of which the rector was the freeholder, was closed by ord. in council. Subsequently a portion of the land was taken for public purposes, & a sum paid into ct. under Lands Clauses Act, 1845 (c. 18):—*Held*: inasmuch as the freehold was in the rector, & he received the burial fees, he was entitled to receive the dividends of the fund in ct.

*Semble*: (2) the parish clerk & sexton had no right to any interest in the fund, although they received certain fees for burials.—*Ex p. LIVERPOOL* (RECTOR) (1870), L. R. 11 Eq. 15; 40 L. J. Ch. 65; 23 L. T. 354; 35 J. P. 212; 19 W. R. 47.

*Annotations*:—*As to* (1) *Expld. & Apld. Ex p. St. Martin's, Birmingham* (1870), L. R. 11 Eq. 23. *Refd. St. Martin Organs* (1890), Trist. 145; *St. John the Baptist, Cardiff (Vicar) v. Parishioners of Same*, [1898] P. 155. *Generally, Mentd. Westminster Corpn. v. St. George, Hanover Square* (1909), 78 L. J. Ch. 581.

**Extracts from parish registers—Search not made by clerk.]—***See* BURIAL, Vol. VII., p. 562, No. 375. *See, generally, REGISTRATION OF BIRTHS, MARRIAGES & DEATHS.*

#### (d) Removal from Office.

**954. Power of removal—General rule.]—**A parish clerk is not removable without cause.—*R. v. WALL* (1709), 11 Mod. Rep. 261; 88 E. R. 1027.

**955. — — —.]—***R. v. WARREN*, No. 911, *ante*.

**956. — During year of office.]—**JACKSON *v. COURTENAY*, No. 931, *ante*.

**957. — Who may remove—Clerk elected by parish.]—**GAUDYES CASE WITH NEWMAN, No. 900, *ante*.

**958. — — —.]—**KID *v. WATKINSON* (1709), 11 Mod. Rep. 221; 88 E. R. 1002.

**959. — Clerk appointed by incumbent.]—***R. v. WARREN*, No. 911, *ante*.

**960. — — —.]—**(1) If a parish clerk has been deprived of his office, the *mandamus* to restore him must be directed to the incumbent, & not to the churchwardens.

(2) To authorise such a *mandamus*, it must clearly appear that he has been deprived of his office.

*Semble*: (3) he may be deprived by the incumbent for cause.—*Ex p. CIRKETT* (1835), 3 Dowl. 327; *subsequent proceedings, sub nom. CIRKETT v. WING* (1838), 2 J. P. 474, 712.

**961. Grounds for removal—Drunkenness & lewdness.]—**Prohibition denied to a suit against a parish clerk put in by the parson, in the spiritual ct., promoted for a deprivation, for drunkenness, lewdness, etc.—*NEWCUMB v. HIGGS* (1731), Fitz-G. 189; 1 Barn. K. B. 412; 94 E. R. 714.

**962. — Intoxication—Evidence.]—**(1) Where a vicar, after summons to the parish clerk to attend & answer a charge of intoxication, removes him upon insufficient evidence of the intoxication, the ct. will issue a *mandamus* requiring the vicar to restore the clerk.

*Qu.*: whether it would be sufficient ground to remove a clerk, that amongst his neighbours he was notorious as a drunkard, without proof of particular acts of intoxication & indecorum.

(2) If one act of intoxication be relied on, the intoxication & consequent incapacity of the clerk to perform the duties of his office, when required to do so, should, at all events, be distinctly

proved.—*R. v. NEALE* (1835), 4 Nev. & M. K. B. 868; 3 Nev. & M. M. C. 108.

*Annotations*:—*As to* (1) *Consd. R. v. Smith* (1844), 5 Q. B. 614. *Generally, Mentd. Osgood v. Nelson* (1869), 10 B. & S. 119.

**963. — Refusal to perform duties without fee.]—***Pltf.* obtained a rule for a *mandamus* to show cause why he should not be restored to the office of parish clerk, from which he had been twice removed by deft., who, in his return thereto, alleged various acts of misconduct prior to the first removal, as well as subsequent to his restoration, & prior to his second removal. In an action to try the truth of the return:—*Held*: deft. would be confined to the acts committed between the restoration & second removal, & a refusal to publish a notice for a parish meeting, which he was required by deft. to publish unless he was paid a fee of 1s., & likewise to fetch & deliver up the keys of the church & register chest when required by the minister & churchwardens to do so, were sufficient grounds to justify a dismissal. *Semble*: the demand of a fee for publishing a notice in church was illegal in 1834, when notices were by law allowed to be there published.—*CIRKETT v. WING* (1838), 2 J. P. 474.

**964. Procedure—Plenary & by articles.]—**BARTON *v. ASHTON*, No. 914, *ante*.

**965. — Right to be heard.]—**(1) To a *mandamus* to restore a parish clerk:—*Held*: the vicar's return was insufficient as it did not appear that before removal, the clerk was summoned or called upon to answer or explain the charges.

(2) Party demurring is entitled to be first heard as in ordinary cases of demurrer.—*R. v. SMITH* (1844), 5 Q. B. 614; 1 Dav. & Mer. 564; 13 L. J. Q. B. 166; 2 L. T. O. S. 400; 9 J. P. 5; 8 Jur. 599; 114 E. R. 1381.

*Annotations*:—*As to* (1) *Refd. Abergavenny v. Llandaff* (1888), 20 Q. B. D. 460. *Generally, Mentd. R. v. Dartington Free Grammar School* (1844), 6 Q. B. 682; *Ex p. Toother* (1850), 1 L. M. & P. 7.

**966. — Right to begin.]—**To a *mandamus* to a rector to restore a parish clerk, the rector returned, that the clerk was guilty of acts of intoxication, & therefore, he dismissed him. The clerk brought an action for a false return, & in his declaration recited the return, & negatived the allegations contained in it. The rector, by his plea, repeated the charges contained in the return. On these pleadings:—*Held*: deft. had the right to begin.

Deft. ought to begin. The affirmative is certainly upon him, & as the presumption is, that *pltf.* has not been guilty of the misconduct imputed to him until the contrary is shown, deft. ought to proceed to prove such misconduct on the part of *pltf.*—*BOWLES v. NEALE* (1835), 7 C. & P. 262.

*Annotation*:—*Refd. R. v. Marshland Smeeth, & Fen District Comrs.*, [1920] 1 K. B. 155.

**967. — Notice—Time for giving.]—**JACKSON *v. COURTENAY*, No. 931, *ante*.

**968. Remedy for unlawful removal—What court has jurisdiction.]—**Prohibition to the spiritual ct. to stay proceedings for restoring a parish clerk granted.—*TARRANT v. HAXBY* (1757), 1 Burr. 367; 97 E. R. 355.

*Annotation*:—*Refd. Lawrence v. Edwards*, [1891] 2 Ch. 72. *Compare Nos. 942, 944, ante.*

**969. — Mandamus to restore.]—**A *mandamus* awarded, for restoring a person to the office of parish clerk.—*R. v. ASHTON* (1754), Say. 159; 96 E. R. 837.

*Annotation*:—*Refd. R. v. Warren* (1776), 1 Cowp. 370.

**970. — Directed to incumbent.]—**(1) *Mandamus* lies to a clergyman to replace a parish clerk whom he has discharged.

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(2) The affidavit for the *mandamus* should state, that the clerk was appointed for life; but it is not absolutely necessary.—*ANON.* (1814), 2 Chit. 254.

*Annotation:—As to (1) Refd. Pindar v. Barr* (1854), 24 L. J. Q. B. 30.

**971. ———— Return.]**—(1) *Mandamus* lies to a minister to restore a parish clerk removed by him without just cause.

(2) The ct. will not judge of the justice of the cause of removal upon the *ex p.* statement of the minister; he must state it in his return to the *mandamus*, & give the clerk an opportunity of answering it.—*R. v. DAVIES* (1827), 9 Dow. & Ry. K. B. 234; 4 Dow. & Ry. M. C. 310; 5 L. J. O. S. M. C. 46.

**972. ———— Loss of right to relief—Delay in application.]**—*Mandamus* to restore parish clerk refused, where appet. had been guilty of great delay in making the application through poverty, & had been dismissed for misconduct after previous investigation.—*R. v. NEWCOMBE* (1843), 1 L. T. O. 8. 313.

**973. ———— ]**—*R. v. GIFFORD* (1847), 11 J. P. Jo. 317.

*See, generally, CROWN PRACTICE, Vol. XVI., pp. 324, 325.*

**974. ———— Quo warranto against successor.]**—

(1) It is the duty of the churchwardens to preserve public peace & decorum during the celebration of divine service, & in the execution of that duty, they are not bound to enter into any inquiry as to the circumstances under which any breach of that peace & decorum is committed, or the conflicting rights of parties engaged therein.

(2) For the purpose of preserving peace & decorum, the churchwardens have authority to remove all parties committing any breach thereof, or who they may reasonably apprehend are about to do so, from the church itself, even though the service may not have actually commenced.

(3) Where A. was removed by the vicar from the office of parish clerk, & that fact was intimated to the churchwardens:—*Held*: they were justified in turning him, A., out of the church, as well as from the clerk's pew, just before the commencement of divine service, on his persisting in taking possession of the pew from the person appointed to succeed him in his office by the vicar, & that it mattered not to them whether he had been legally removed or not by the vicar from the office in question.

(4) If a parish clerk has been removed from that office by the vicar without the due forms, his remedy is by *quo warranto*, or by action for money had & received against his successor.—*BURTON v. HENSON* (1842), 10 M. & W. 105; 11 L. J. Ex. 348; 152 E. R. 401; *sub nom.* *BARTON v. HINSON*, 6 J. P. 377.

*Annotation:—As to (1) Consd. Taylor v. Timson* (1888), 57 L. J. Q. B. 216.

**975. ———— Action for money had & received against successor.]**—*BURTON v. HENSON*, No. 974, *ante*.

(e) *Other Cases.*

**976. Right to appoint deputy.]**—*PEAK v. BOURNE*, No. 913, *ante*.

**977. Provision of clothes at charge of parish—Whether legal.]**—*HORNCHURCH (CHURCHWARDENS) v. PIGOTT*, No. 849, *ante*.

*B. Sextons.*

(a) *Nature and Tenure of Office.*

**978. Nature of office—Public office.]**—*ISLES'S CASE* (1671), 2 Keb. 820; T. Raym. 211; 84 E. R. 518; *sub nom.* *ILE'S CASE*, 1 Vent. 153; *sub nom.* *R. v. KINGSCLEERE (CHURCHWARDENS)*, 2 Lev. 18.

*Annotations:—Consd. Olive v. Ingram* (1739), 7 Mod. Rep. 263; *R. v. Dymock*, [1915] 1 K. B. 147. *Refd. Peak v. Bourne* (1732), 2 Stra. 942. *Mentd. Eddleston v. Collins* (1852), 10 Hare, 99.

**979. Tenure—Whether freehold.]**—There is no presumption of law that the office of sexton in an ancient parish is a freehold for life. The ct. will therefore not issue a *mandamus* to restore a person to the office of sexton unless evidence is given that he held the office as a freehold for life.—*R. v. DYMOCK (VICAR & CHURCHWARDENS)*, [1915] 1 K. B. 147; *sub nom.* *R. v. DYMOCK (VICAR & CHURCHWARDENS)*, *Ex p. BROOKE*, 84 L. J. K. B. 294; 79 J. P. 91; 31 T. L. R. 11; 13 L. G. R. 48; *sub nom.* *R. v. ST. MARY, DYMOCK (VICAR & CHURCHWARDENS)*, *Ex p. BROOKE*, 112 L. T. 156.

(b) *Appointment.*

**980. Who may appoint—How tested.]**—(1) If it be made to appear, that a considerable number of the parishioners are desirous of having a vestry called, & they are not enabled to call a vestry, from the refusal of the minister & churchwardens to aid them in doing so, the ct. will grant a *mandamus* to the ministers & churchwardens to convene a vestry.

(2) Where the application was to convene a vestry to elect a sexton, the office being full by the appointment of the rector, the ct. required, that there should be very strong evidence of the existence of a custom for the parishioners to elect to that office, before they would grant a *mandamus* to try the right; there being another remedy, by action for money had & received, brought by a party wishing to dispute the title of the sexton against him, the fees having been paid under a protest or by refusal to pay the fees, when the sexton would have his action against the party so refusing.—*R. v. STOKES DAMEREL (MINISTER & CHURCHWARDENS)* (1836), 5 Ad. & El. 584; 2 Har. & W. 346; 1 Nev. & P. K. B. 56; 6 L. J. M. C. 14; 111 E. R. 1286.

*Annotation:—Consd. Cansfield v. Blenkinsop* (1849), 4 Exch. 234.

**981. ———— Whether incumbent, churchwardens or parishioners at large.]**—The appointment to the office of sexton, *prima facie* is not vested in the inhabitants of the parish at large. Where the duties of that office consist in the care of the sacred vestments & vessels, in the care of the church, by keeping it clean, in ringing the bells, & in opening & closing the doors for divine service, the presumption is, that the churchwardens have the right of appointment; & where the duties are confined to the churchyard in digging graves, etc., the presumption is that the appointment is in the incumbent; & where the office embraces both the above-mentioned duties, the presumption

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**B. (b).**

**k. Who may appoint—Rector of parish.]**—Where the rector of a parish, in whom was vested the absolute appointment to the office of sexton

gave to a candidate for the situation a letter containing the following words: "This is to certify that I approve of J. being appointed to the situation of sexton of the parish of St. A., vacant by the resignation of T. C., W. B., Vicar. To all whom it may

concern"—*Held*: this letter was a valid appointment, & parol evidence was not admissible to show that the concurrence of the curates of the parish in the above appointment was intended.—*NEWENTHAM v. SMITH* (1859), 34 L. T. O. S. 38.—*IR.*

is that his appointment is vested in the churchwardens & incumbent jointly.—*CANSFIELD v. BLENKINSOP* (1849), 4 Exch. 234; *Cripps' Church Cas.* 217; 3 New Mag. Cas. 216; 18 L. J. Ex. 361; 13 L. T. O. S. 285; 13 J. P. 521; 154 E. R. 1197.

**982.** — Where offices of clerk & sexton combined.]—*CANSFIELD v. BLENKINSOP*, No. 981, *ante*.

— Lord of manor—Evidence of right.]—*See* COPYHOLDS, Vol. XIII., p. 11, No. 14.

**983.** Who may be appointed—Whether woman eligible.]—A woman may be chosen sexton, & may vote at elections.—*OLIVE v. INGRAM* (1739), 7 Mod. Rep. 263; 2 Stra. 1114; 87 E. R. 1230.

*Annotations*:—*Consd.* Chorlton v. Lings (1868), L. R. 4 C. P. 374. *Refd.* R. v. Stubbs (1788), 2 Term Rep. 395.

**984.** Enforcement—By mandamus—To whom writ directed.]—*R. v. STOKE DAMEREL* (MINISTER & CHURCHWARDENS), No. 980, *ante*.

*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 333, 334.

**985.** Right to admission to office—How enforced.]—Rule for a *mandamus* to admit to the office of sexton, granted.—*BARBER v. LONG SUTTON* (CHURCHWARDENS) (1837), 1 J. P. 370.

**986.** Duration of appointment—General appointment.]—A general appointment of sexton, not held to be for life.—*MERRICK'S CASE* (1804), 2 Peck. 91.

*Annotation*:—*Consd.* R. v. Dymock, [1915] 1 K. B. 147.

**987.** — Presumption.]—*R. v. DYMCK* (VICAR & CHURCHWARDENS), No. 979, *ante*.

**988.** Validity of—How tested.]—*R. v. STOKE DAMEREL* (MINISTER & CHURCHWARDENS), No. 980, *ante*.

#### (c) Rights and Duties.

**989.** Duties—Care of the church.]—*ISLES' CASE* (1671), 2 Keb. 820; 84 E. R. 510, 518; *sub nom.* *ILE'S CASE*, 1 Vent. 153; *sub nom.* *R. v. KINGSCLEERE* (CHURCHWARDENS), 2 Lev. 18.

*Annotations*:—*Consd.* *Olive v. Ingram* (1739), 7 Mod. Rep. 263; *R. v. Dymock* (Vicar & Churchwardens), [1915] 1 K. B. 147. *Refd.* *Peak v. Bourne* (1732), 2 Stra. 942. *Mentd.* *Eddleston v. Collins* (1852), 10 Hare, 99.

**990.** — Digging graves.]—(1) If a churchyard lie in two parishes, the sexton may gain a settlement in the one in which he resides, although no part of the church lies within that parish.

(2) There is no doubt but that part of the office of sexton consists in digging graves (LORD KENYON, C.J.).—*R. v. LIVERPOOL* (INHABITANTS) (1789), 3 Term Rep. 118; 110 E. R. 486.

*Annotation*:—*Refd.* *R. v. Woodbridge* (1833), 4 B. & Ad. 711.

*See, also*, No. 981, *ante*, No. 992, *post*.

**991.** Rights—Whether entitled to keys of Church.]—*Mandamus* to deliver up the keys of a church to the sexton refused.—*ANON.* (1814), 2 Chit. 255.

**992.** — Where office of sexton & gravedigger separated by custom.]—The office of sexton & gravedigger had been held distinctly in a parish for many years, & had also separate duties & fees. A rule for a *mandamus* was moved for on the part of the sexton, for delivery to him of the implements of gravedigging & keys of the vaults under the church, but it appearing that the gravedigger had always kept them, the rule was dismissed.—*R. v. ST. JAMES, CLERKENWELL* (CHURCHWARDENS) (1838), 2 J. P. 309.

*See, also*, No. 990, *ante*.

— In respect of burial ground under Burial Acts.]—*See* BURIAL, Vol. VII., p. 545, Nos. 243, 244.

**993.** — Appointment of deputy.]—*ST. MAR-*

*GARET'S, ROCHESTER BURIAL BOARD v. THOMPSON* (1871), L. R. 6 C. P. 445; 40 L. J. C. P. 213; 24 L. T. 673; 36 J. P. 6; 19 W. R. 892.

#### (d) Fees.

**994.** Burial fees—Chapel of ease created district chapelry.]—*ROBERTS v. AULTON*, No. 919, *ante*.

*See, further*, BURIAL, Vol. VII., pp. 546, 547.

**995.** Recovery—Money had & received—Sexton of district chapelry.]—*ROBERTS v. AULTON*, No. 919, *ante*.

**996.** Compensation in lieu of fees—Portion of closed burial ground acquired for public purposes.]—*Ex p. LIVERPOOL* (RECTOR), No. 953, *ante*.

#### (e) Removal from Office.

**997.** At pleasure—By parishioners—By custom.]—Return to a *mandamus* that L. was not duly elected sexton according to ancient custom; that there is a custom for the inhabitants, etc., to remove at pleasure, & that L. was removed pursuant to such custom, is good.—*R. v. TAUNTON ST. JAMES* (CHURCHWARDENS) (1776), 1 Cowp. 413; 98 E. R. 1160.

*Annotations*:—*Consd.* *R. v. Cambridge Corp.* (1788), 2 Term Rep. 456. *Refd.* *R. v. Lyme Regis Corp.* (1779), 1 Doug. K. B. 79.

**998.** Right to be heard.]—(1) The practice of this ct. to interfere by writ of *mandamus* for the restoration of a person who has been dismissed from the office of sexton, or any freehold office, without a hearing, will not now be departed from if a case be made out, although it appear that the prosecutor has a remedy by action for money had & received, to recover the fees of the office.

(2) The hearing which the ct. requires in such cases must be one in the nature of a judicial inquiry; the party proceeded against must have notice of it; & to justify his removal for want of appearance, the notice must distinctly acquaint him that the inquiry takes place with a view to his removal.—*Ex p. JOHNSON* (1853), 17 J. P. 538.

**999.** Wrongful removal—Nature of remedy.]—*ISLES' CASE* (1671), 2 Keb. 820; T. Raym. 211; 84 E. R. 518; *sub nom.* *R. v. KINGSCLEERE* (CHURCHWARDENS), 2 Lev. 18; *sub nom.* *ILE'S CASE*, 1 Vent. 153.

*Annotations*:—*Consd.* *R. v. Dymock*, [1915] 1 K. B. 147. *Refd.* *Olive v. Ingram* (1739), 7 Mod. Rep. 263. *Mentd.* *Peak v. Bourne* (1732), 2 Stra. 942; *Eddleston v. Collins* (1852), 10 Hare, 99.

**1000.** — Loss of right to relief—Delay in application.]—A party desiring the assistance of this ct. by way of *mandamus* must apply promptly.

On July 9, 1855, *appet.* was removed by the rector from his office of parish sexton. On June 10, 1856, he applied to this ct. for a rule, calling upon the rector to show cause why a *mandamus* should not issue, commanding him to restore him to his office. No special circumstances were stated why the application was not sooner made:—*Held*: the application was not made within a reasonable time, & was, therefore, too late.—*R. v. TOWNSEND*, *Ex p. JOHNSON* (1856), 28 L. T. O. S. 100; 20 J. P. Jo. 740.

*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 324, 325.

#### C. Organists.

**1001.** Appointment—Whether vicar, churchwardens & parishioners bound to appoint.]—A *mandamus* will not lie to the vicar, churchwardens, & inhabitants of a parish, to elect an organist to the parish church, though there has always been such an officer beyond the time of living memory,

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& a yearly salary has been invariably paid him out of the church rates, as it is optional with the parishioners whether the organ shall be played.

Upon a vacancy in the office of organist to a parish church, the vestry unanimously resolved that the course adopted on the previous election should be pursued; & thereupon, appointed a committee to reduce the number of candidates to six, each of whom should take the service on a Sunday; & this resolution was, at a subsequent vestry, unanimously confirmed. The committee having selected six out of the sixty candidates who presented themselves, at the time of the election a motion was made & seconded, that A., a candidate, who had not been thus selected, should be eligible, but this was negative on a division. Afterwards, a poll having been demanded, a greater number of votes were tendered, & received as tendered only, on behalf of A. than on behalf of any other candidate:—*Held*: this was a reasonable mode of conducting the election, it never having been objected to at the previous meetings, & the votes given for A. were thrown away, & a *mandamus* would not lie to compel her admission to the office.—*R. v. ST. STEPHEN'S, COLEMAN STREET (VICAR, CHURCHWARDENS & INHABITANTS)* (1844), 14 L. J. Q. B. 34; 4 L. T. O. S. 161; 9 J. P. 344; 9 Jur. 255; *sub nom. Ex p. LE CREN*, 2 Dow. & L. 571.

**1002. — Obligation to appoint proper officers & servants—Whether organist included—Construction of local Act.**—*R. v. LIVERPOOL CORPN.* (1891), 55 J. P. Jo. 324.

**1003. — Obligation to decently preserve & keep the church—Whether appointment of organist included—Construction of local Act.**—*R. v. LIVERPOOL CORPN.* (1891), 55 J. P. Jo. 324.

**1004. — By election—Votes given for candidate not selected by committee of vestry.**—*R. v. ST. STEPHEN'S, COLEMAN STREET (VICAR, CHURCHWARDENS & INHABITANTS)*, No. 1001, *ante*.

**1005. Control of—Organist appointed & paid by vestry.**—The organist of a parish church, although appointed & paid by the vestry, is guilty of an ecclesiastical offence if he plays on the organ immediately before or during, or immediately after divine service, contrary to the directions of the incumbent.

In a criminal suit promoted by the vicar of a parish against the organist of his parish church for playing on the organ of the church contrary to the directions of the vicar, *deft.* filed a responsive plea, in which it was alleged that by the ecclesiastical law the incumbent of a parish had not an unlimited right to control the use of the organ, or to put a stop to the ordinary musical services of the church, in an arbitrary manner, without reasonable or proper cause, or the sanction of the ordinary, & that the promoter, in prohibiting *deft.* from playing on the organ, had acted without such sanction, & without reasonable or proper cause. The responsive plea further alleged in effect that *deft.* had been appointed organist, & was paid a salary by the vestry, & that the majority of the parishioners were anxious that the customary performance on the organ should continue. On application on behalf of the promoter:—*Held*: the responsive plea would be rejected as inadmissible.—*WYNDHAM v. COLE* (1875), 1 P. D. 130.

**1006. Salary—Whether “disbursement relative to the church—Construction of local Act authorising compulsory church rate.”**—*ST. MATTHEW,*

**BETHNAL GREEN, VESTRY v. PERKINS** (1885), 53 L. T. 634; 1 T. L. R. 621, H. L.  
*Annotation*:—*Reid. L. C. v. St. Botolph, Bishopsgate*, [1914] 2 K. B. 660.

#### SUB-SECT. 9.—PARISHIONERS.

##### A. In General.

**1007. Who are—Occupier of lands within parish—Though not resident.**—(1) The occupier of lands in a parish, living in another parish, is liable to the repairs of the parish church of the parish where his lands lie.

(2) The occupier of lands, though living out of the parish, is in judgment of law a parishioner & inhabitant, & may come to the assemblies of the parishioners.—*JEFFREY'S CASE* (1589), 5 Co. Rep. 66 b; 77 E. R. 155.

*Annotations*:—As to (1) *Folld. Paget v. Crumpton* (1599), Cro. Eliz. 659. *Reid. Chapman v. Monson* (1729), 2 P. Wms. 665; *Veley v. Burder* (1841), 12 Ad. & El. 265. As to (2) *Reid. R. v. Mainwaring* (1820), 10 B. & C. 66; *Rutter v. Chapman* (1841), 8 M. & W. 1. *Generally, Mentd. Norris v. Staps* (1616), Hob. 210; *Walwyn v. Awherry* (1677), 1 Mod. Rep. 258; *Merchants Adventurers v. Rebow* (1686), Comb. 52; *Browster v. Kitchin* (1698), Comb. 424; *Gosling v. Veley* (1853), 4 H. L. Cas. 679.

**1008. — — — — —.**—(1) Where there was only a general allegation as to the right of election to a curacy, & not examined into, or proved, the ct. would not make any decree, but dismissed the information with costs.

(2) Parishioner is a very large word, takes in not only inhabitants of the parish, but persons who are occupiers of lands, that pay the several rates & duties, though they are not resident, nor do contribute to the ornaments of the church:—*(LORD HARDWICKE, C.)*.

(3) Inhabitants is still a larger word, takes in housekeepers, though not rated to the poor, takes in also persons who are not housekeepers, as, for instance, such who have gained a settlement, & by that means become inhabitants (*LORD HARDWICKE, C.*)—*A.-G. v. PARKER* (1747), 3 Atk. 576; 1 Ves. Sen. 43; 26 E. R. 1132.

*Annotations*:—As to (1) *Consd. Re St. Stephen's, Coleman Street, Re St. Mary the Virgin, Aldermanbury* (1888), 39 Ch. D. 492. *Reid. Davis v. Jenkins* (1814), 3 Ves. & B. 151. *Milligan v. Mitchell* (1835), 4 L. J. Ch. 281. As to (2) *Folld. Etherington v. Wilson* (1875), 1 Ch. D. 160. *Reid. Carter v. Cropley* (1857), 26 L. J. Ch. 246. As to (3) *Consd. A.-G. v. Forster* (1805), 10 Ves. 335. *Reid. Carter v. Cropley* (1857), 26 L. J. Ch. 246. *Generally, Consd. A.-G. v. Newcombe* (1807), 14 Ves. 1; *Shaw v. Thompson* (1876), 3 Ch. D. 233. *Mentd. Withnell v. Gartham* (1795), 6 Term Rep. 388; *Waterpark v. Pennell* (1859), 7 H. L. Cas. 651.

**1009. — — — — — Payment of parish rates.]**

—*BATTEN v. GEDYE*, No. 465, *ante*.

*See, also*, Nos. 2768, 2892, *post*.

— **Within charity scheme.]**—*See CHARITIES*, Vol. VIII., p. 318, No. 995.

**1010. Ownership of parish property.]**—It is said in the books, that the churchwardens are a *corpn.* but very improperly; for all the parishioners are the body, & the churchwardens are only a name to sue by in personal actions; but the property is in the parishioners; & in all actions brought by churchwardens, it must be laid *ad damnum parochianorum* (*LORD MACCLESFIELD, C.*)—*WHITMORE v. BRIDGES* (1723), 2 Eq. Cas. Abr. 204; 22 E. R. 174.

**1011. Mode of expressing opinions—In vestry.]**—

*WHITE v. STEELE*, No. 569, *ante*.

*See, generally*, Sub-sect. 4, *ante*.

##### B. Duties.

###### (a) Repair of Church.

**1012. The nave—Common law obligation.]**—

(1) Though the church & churchyard be in law the

soil & freehold of the parson, yet the use of the body of the church, & the repair & maintenance of it is common to all the parishioners, & for avoiding of confusion, the distribution & disposing of seats & charges of repair belong to the Ordinary, & therefore, no man can challenge a peculiar seat without a special reason. (2) But a pew may be claimed by prescription, though in the body of his church. (3) So an aisle or chapel adjoining to the body of his church may be repairable by some particular persons by prescription (*per cur.*).—*Boothly v. Baily* (1614), Hob. 69; 80 E. R. 218.

*Annotations*.—*As to (1) Reidd. Jacob v. Dallow* (1698), 12 Mod. Rep. 233; *Churton v. Frewen* (1866), L. R. 2 Eq. 634; *Stilleman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749. *As to (2) Reidd. Jacob v. Dallow* (1698), 12 Mod. Rep. 233; *Churton v. Frewen* (1866), L. R. 2 Eq. 634; *Stilleman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749. *As to (3) Reidd. Churton v. Frewen* (1866), L. R. 2 Eq. 634.

1013. ———.]—*BALL v. CROSS*, No. 418, *ante*.

1014. ———.]—*PENSE v. PROUSE*, No. 420, *ante*.

1015. ———.]—(1) Parishioners are bound to repair by common law. The common law obligation may be limited by Act of Parliament (*DR. LUSHINGTON*).

(2) The rule of construction laid down by the highest cts. is, that if you are in doubt & difficulty as to the true meaning of an Act of Parliament, you must adopt that construction which will not lead to a palpable absurdity (*DR. LUSHINGTON*).

(3) Tables of fees settled by the Ordinary never can be legal fees; they may be fees which the Ordinary may think fit & proper to be received; but legal fees can only be by immemorial usage, or created by Act of Parliament (*DR. LUSHINGTON*).—*VARTY & MORSEY v. NUNN* (1841), 2 Curt. 877; 1 Notes of Cases 191; 5 Jur. 1138; *affd. sub nom. NUNN v. VARTY & MORSEY* (1843), 3 Curt. 352.

*Annotations*.—*As to (3) Reidd. R. Haigh with Aspull*, New Parish, [1919] P. 143. *Generally, Mentd. Edney & Lamm v. Smallbones* (1869), 21 L. T. 506; *Taylor v. Thomson* (1888), 20 Q. B. D. 671.

1016. ———.]—(1) The majority of the parishioners in vestry assembled having refused to make a rate for necessary repairs of the parish church, the churchwardens cannot, of their own authority, at a subsequent time, & not at any parish meeting, make a valid rate.

(2) If a rate be so made, & proceedings be taken by the churchwardens in the ecclesiastical ct. to enforce its payment, a ct. of common law will grant a prohibition.

(3) The obligation by which the parishioners, that is, the actual residents within, or the occupiers of lands or tenements in every parish, are bound to repair the body of the parish church whenever necessary, & to provide all things essential to the performance of divine service therein, is an obligation imposed on them by the common law of the land. That such obligation is not grounded on the force of the general ecclesiastical law, is manifest from this, that, according to the authority of all writers on the general canon law, the repairs of the whole of the parish church, both the body & the chancel, fall upon the rectors or owners of the tithes, except that, by custom in some countries, part falls upon the parishioners (*TINDAL, C.J.*).

(4) Where the spiritual ct., having taken upon itself to declare the common law, declares it in a manner different from that in which the common law cts. would do, as in the present instance, where the very groundwork & foundation of the proceeding in the spiritual ct. is the holding of a

supposed church rate to be a valid rate, which, in a ct. of common law, is held to be no rate at all; in these cases, in order to prevent the conflict which would arise from a decision one way in the spiritual ct., & the opposite way in the cts. of common law, the prohibition is allowed to go (*TINDAL, C.J.*).—*VELEY v. BURDER* (1841), 12 Ad. & El. 265; *Arn. & H. 194*; 10 L. J. Ex. 532; 5 J. P. 401; 5 Jur. 1013; 113 E. R. 813, Ex. Ch.; *affg. S. C. sub nom. BURDER v. VELEY* (1840), 12 Ad. & El. 233; *previous proceedings, sub nom. VELEY & JOSLIN v. BURDER* (1837), 1 Curt. 372.

*Annotations*.—*As to (1) Consd. R. v. Thomas* (1842), 3 Q. B. 589. *Reidd. Seale v. Veley* (1841), 1 Notes of Cases 170; *Rose v. Watson* (1874), 63 L. J. M. C. 108. *As to (3) Apld. Francis v. Steward* (1844), 5 Q. B. 984. *Reidd. Still v. Palfrey* (1811), 2 Curt. 902; *Varty v. Nunn* (1841), 2 Curt. 877. *As to (4) Reidd. Mackonochie v. Penzance* (1881), 6 App. Cas. 424. *Generally, Mentd. Steward v. Francis* (1843), 3 Curt. 209; *Es. p. Story* (1852), 8 Exch. 195; *White v. Steele* (1862), 12 C. B. N. S. 383; *London Corp. v. Cox* (1867), L. R. 2 H. L. 239.

1017. The chancel.—By custom.—Upon an application for a prohibition *propter defectum traditionis*, the Ct. of Arches had been enjoined from proceeding as to a custom till an issue was tried. The record of the judgment, setting forth a verdict finding a custom for the parishioners to repair the chancel, is conclusive evidence in the ecclesiastical ct. of the existence & validity of the custom.

In London such a custom exists generally (*SIR JOHN NICHOLL*).—*ELY (BP.) v. GIBBONS & GOODY* (1833), 4 Hag. Ecc. 156; 163 E. R. 1405.

*Annotation*.—*Reidd. Morley v. Leacroft*, [1896] P. 92.

1018. ———.]—Custom of the City of London.]—*BALL v. CROSS*, No. 418, *ante*.

1019. ———.]—*ELY (BP.) v. GIBBONS & GOODY*, No. 1017, *ante*.

1020. Personal liability.—Attendance at vestry meeting.—Signing order for repairs.]—*LANCHESTER v. FREWEN*, No. 803, *ante*.

1021. Exemption.—Whether by repair of private aisle.]—*Scmble*: building & repairing an aisle will not exonerate anyone from the repairs of the church, unless he sits in the aisle & has no benefit of the nave.—*WEEKS v. OXENDON* (1681), 1 Freem. K. B. 301; 80 E. R. 218.

1022. Who are liable.—Occupiers of land within parish.—Though not resident.]—*JEFFREY'S CASE*, No. 1007, *ante*.

1023. ———.]—An occupier of land in one parish may be charged to the repairs of the church, though he resides in another parish.—*PAGET v. CRUMITON* (1599), Cro. Eliz. 659; 78 E. R. 898.

Occupiers as parishioners, generally, *see* *Now*. 465, 1007, 1008, *ante*.

1024. ———.]—Inhabitants of chapelry.—Liability for repair of parish church.]—*ASTON PARISH v. CASTLE BIRMIDGE CHAPEL* (1614), Hob. 66; 80 E. R. 215.

*Annotations*.—*Reidd. Line v. Harris* (1752), 1 Lec. 146; *Craven v. Sanderson* (1838), 7 Ad. & El. 880. *Mentd. Woodward v. Bonithan* (1660), T. Raym. 3; *Wise v. Creech* (1676), 3 Keb. 809; *Breedon v. Gill* (1696), 1 Ld. Raym. 219; *Smith v. Waller* (1699), 1 Ld. Raym. 587; *Pitts v. Evans* (1738), 7 Mod. Rep. 254; *A.-G. v. Brereton* (1752), 2 Ves. Sen. 425; *Hartley v. Cook* (1833), 9 Bing. 728.

1025. ———.]—*BALL v. CROSS*, No. 418, *ante*.

1026. ———.]—An inhabitant of the parish of W. was libelled for non-payment of rates imposed for the repair of the parish church, & of certain chapels built within the parish, under Church Building Acts, 1818 (c. 45), 1819 (c. 134), & 1822 (c. 72). He declared in prohibition, alleging that the rate was improperly laid on a part of the parish only, excluding the township



6 Mod. Rep. 188; 3 Salk. 88; Holt, K. B. 141; 87 E. R. 94.

*Annotation* :—*Refd.* Middleton v. Croft (1736), Cunn. 55, 114.

(c) *Provision of Church Ornaments, Furniture and Articles for Divine Service.*

**1034. Church ornaments—Who are liable.**—Church ornaments are a personal charge upon the inhabitants, & not upon those who live elsewhere, though they occupy lands in that parish.—*WOODWARD'S CASE* (1688), 3 Mod. Rep. 211; 87 E. R. 136; *sub nom.* *WOODWARD v. MACKPETH*, Comb. 132; *sub nom.* *WOODWARD v. MAKEPEACE*, 1 Salk. 164.

*Annotations* :—*Mentd.* Collett v. Collett (1843), 3 Curt. 726; *Re* Palatine Estate Charity (1888), 39 Ch. D. 54.

**1035. — Limitation on liability.**—*BUTTERWORTH v. WALKER* (1765), 3 Burr. 1689; 97 E. R. 1048.

**1036. Church furniture—Reading desk.**—*SERJEANT v. DALE*, No. 1760, *post*.

**1037. Articles for divine service.**—*VELEY v. BURDER*, No. 1016, *ante*.

**1038. — Holy communion.**—*WESTBURY'S (RECTOR) CASE* (1687), Comb. 70; 90 E. R. 353.

**1039. — Effect of special endowment.**—*FRANKLYN v. ST. CROSS (MASTER & BRETHREN)* (1721), Bunb. 78; 2 Wood. 185; 145 E. R. 601.

*Annotations* :—*Mentd.* Prevost v. Bennett (1816), 2 Price, 272; Leathes v. Newitt (1847), 4 Price, 355; Batchellor v. Smallcombe (1818), 3 Madd. 12; Husk v. Lewis (1821), Jac. 363; Lewis v. Young (1824), McCle. 113.

*See, also*, Nos. 773, 899, *ante*.

### C. Rights.

#### (a) In relation to Church.

**1040. Rights of ownership—Church furniture—Pews.**—(1) Pews in a church belong to the parish for the use of the inhabitants & cannot be sold nor let excepting under the provisions of an Act of Parliament.

(2) Churchwardens must exercise a just discretion in the allotment of them subject to the correction of the Ordinary.

(3) A pew can only be appropriated to a house by faculty or prescription. Where the occupier of a pew merely allotted to him by the churchwardens ceases to reside in the parish he cannot let the pew with & thus annex it to his house, but it reverts to the disposal of the churchwardens.—*WYLLIE v. MOTT & FRENCH* (1827), 1 Hag. Ecc. 28; 102 E. R. 495.

**1041. — — — — —**—*SERJEANT v. DALE*, No. 1760, *post*.

**1042. — — — — — Clerk's desk.**—*SERJEANT v. DALE*, No. 1760, *post*.

**1043. Right of user—Body of church.**—*BOOTHLY v. BAILY*, No. 1012, *ante*.

**1044. — Chancel.**—*RICH v. BUSHNELL*, No. 416, *ante*.

**1045. As to services—Performance of divine service in parish church.**—(1) Lapse of time is not an absolute bar to a criminal suit where the evil complained of is a customary one, e.g. that a church was unroofed & dismantled, whereby the parishioners were & still are prevented from resorting to their parish church; but the ct. expected the delay to be accounted for, & unless a reasonable explanation can be given, might not, although the suit proceeded to a sentence against deft., accompany that sentence with costs.

(2) Where the contents or substance of a document, e.g. of an order in council, are pleaded, the document itself must be annexed to the articles.

(3) Parishioners have a right to demand that divine offices should be celebrated in their own parish church, unless such right has been limited by lawful authority.

(4) Notwithstanding the delay in instituting proceedings the ct. was bound to order A. to restore the ancient parish church of B. to the state it was in when he had it dismantled, & to condemn him in the costs of the suit.—*ST. DAVID (BP.) v. DE RUTZEN (BARON)* (1861), 4 L. T. 90; 25 J. P. 803; 7 Jur. N. S. 884.

**1046. — Administration of Holy Communion.**—*HENLEY v. BURSTOW* (1666), 1 Keb. 947; 83 E. R. 1335.

**1047. — — — — —**—*The prima facie* right of a parishioner to partake of the Holy Communion being distinctly declared by 1 Edw. 6, c. 1, s. 9, the only cause which is sufficient under the rubric to justify a minister in repelling him of his own authority, is that he is "an open & notorious evil liver"; & under Canon 27, that he is "a common & notorious depraver of the Book of Common Prayer."

Appl., a man of irreproachable moral character, published a book entitled "Selections from the Old & New Testaments," for use at family worship, & also a book of family prayers compiled from the Prayer Book. Afterwards, at the request of resp., the vicar of the parish, he wrote a private letter to him in which he stated that he omitted certain parts of the Bible from his family reading because he did not concur in the construction which in his opinion was usually put upon them :—*Held* : (1) resp. was not justified in repelling him from the Communion either under the rubric or the canon, omission not being rejection, nor rejection necessarily depravation; (2) the conduct of resp., being unjustifiable when it took place, could not be affected by anything which occurred afterwards between him & his bishop, there being nothing in the rubric or canon to shift the responsibility to the latter; (3) proceedings were properly taken against resp., under Church Discipline Act, 1840 (c. 86), without a previous appeal to the bishop.—*JENKINS v. COOK* (1876), 1 P. D. 80; 45 L. J. P. C. 1; 34 L. T. 1; 40 J. P. 260; 21 W. R. 439, P. C.

*Annotations* :—*As to* (1) *Consd.* R. v. Diddin, [1910] P. 57. *Refd.* *Re* Petty Almshouses, [1898] 1 Ch. 391.

**1048. — — — — —**—*R. v. DIDDIN*, No. 10, *ante*.

**1049. — Attendance Though no seat available.**—*TAYLOR v. TIMSON*, No. 1031, *ante*.

**1050. — Preservation of order—Removal of disturber.**—To an action of assault & battery, a plea that plff. disturbed a congregation while the minister was performing the rites of burial, & that deft., though neither constable, churchwarden, nor other officer, *molliter manus imposuit* to prevent such disturbance, is a good justification.—*GLEVER v. HYNDE* (1673), 1 Mod. Rep. 168; 86 E. R. 806; *sub nom.* *LEVER v. HIDE*, 1 Freem. K. B. 131.

*Annotation* :—*Refd.* Burton v. Henson (1842), 10 M. & W. 105.

**1051. Seat in church.**—Faculty for erecting a gallery, for the accommodation of the increased population of the parish, granted. Objections, on the part of certain parishioners, overruled.

It is distinctly proved that new houses have been built, & that several families are prevented from going to the parish church by want of seats, while others are obliged to go to neighbouring churches; that repeated applications have been

### PART III. SECT. 7, SUB-SECT. 9. — C. (a).

1. *Seat in church—Pew.*—*ST. ANDREW'S CHURCH (TRUSTEES) v. FERGUSON* (1868), 1 Han. 273.—**CAN.**  
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*Sect. 7.—Constitution of the Church into parishes:*  
*Sub-sect. 9, C. (a), (b), (c), (d), (e) & (f) & D.*  
*Sect. 8.]*

made to the churchwardens for pews, that the church is not capable of holding more than 200 persons, & that there are 70 or 80 families, which, on the lowest calculation, will be too many for the present capacity of the building. These then are inconveniences against which the parish is bound, & may be compelled by ecclesiastical censures, to provide, for every man, who settles as a householder, has a right to call on the parish for a convenient seat. The inference, indeed, is almost admitted by the objectors, & on their own showing, that the church is insufficient—for, how do they attempt to prove the contrary? First, that several persons omit coming to church. It is impossible to sanction an objection to a reasonable increase of the accommodation of the church, on the supposition that any of the parishioners neglect their duty. The ct. must rather adopt the supposition that they are desirous of doing their duty, & of availing themselves of their right to be accommodated. . . . I am bound to conclude, that the erecting a gallery is conformable to the wishes of the parishioners, & that their opinions have been fairly obtained; & thinking some addition is necessary, & no other method being proposed, of which I can judiciously take notice, I am of opinion that this faculty ought to be granted (SIR WILLIAM SCOTT).—GROVES & WRIGHT v. HORNSEY (RECTOR, ETC.) (1793), 1 Hag. Con. 188; 161 E. R. 521.

*Annotations:—*Consid. Evans v. Slack & Smith (1869), 38 L. J. Eccl. 38. *Reid*, Bullen v. Great Baddow (Parishioners) (1856), 28 L. T. O. S. 118; Steple Langford (Rector) v. Churchwardens (1856), 28 L. T. O. S. 178; Taylor v. Timson (1888), 20 Q. B. 11, 671; Claverley (Vicar, etc.) v. Claverley (Parishioners), Claverley (Churchwardens) v. Claverley (Vicar, etc.), Gatacre & Legh v. Claverley (Vicar, etc.), [1909] P. 195.

**1052.** —“Without payment.”—(1) The party has shown that there are pews occupied by persons not living in the parish, & that a particular individual has obtained a large portion of the church, & let his own pew to a non-resident person. There is one pew appurtenant to the house of A., who does not live in the parish, & who covenants with his tenant, that he shall not occupy it, in order that he may let it out to others. This is clearly illegal. If a pew is rightly appurtenant, the occupancy of it must pass with the house; & the individuals cannot, by contract between themselves defeat the general right of the parish. It appears that the house has been built only eighty years, which is not sufficient to establish a prescriptive right, because it might be presumed that evidence of the grant of a faculty was not extinct in that time; but even if there was a prescriptive right, it could not be exercised by transferring it to persons, not inhabitants of the house, or of the parish. Such possession cannot be maintained (SIR WILLIAM SCOTT).

(2) It seems that B. has kept a school some years, & applied to the churchwarden for an allotment of room in the gallery, which was given, she retaining her pew; & that she has since let out her pew to some ladies of another parish. The churchwardens of that time did wrong; for they ought, if the pew was really appurtenant, which does not appear, either to have granted additional space with the old pew, or to have insisted that it should be given up to some parishioner; but that she should take sufficient room for her accommodation elsewhere, & be allowed to let out her pew to persons not resident in the parish, is an abuse which cannot be main-

tained; for it is a wild conceit that there can be such use made of pews, as of villas or other common property (SIR WILLIAM SCOTT).

(3) It has been held, that a faculty to a man & his heirs would be bad, because his heirs may reside out of the parish, & it would be an unjust usurpation in the parishioner, to detain such a privilege for the use of others (SIR WILLIAM SCOTT).

(4) A. says, that his house has been built upwards of eighty years, & that the pew has been exclusively held by him, & that he has covenanted with his tenant that he shall not sit in it—which is an unjust attempt, & an illegal exercise of his exclusive right, if he ever possessed such (SIR WILLIAM SCOTT).

(5) Six years possession is not sufficient against a mere disturber, much less against the Ordinary (SIR WILLIAM SCOTT).

(6) A person, claiming a pew, must show either a faculty, or prescription, which will suppose a faculty. But mere presumption is not sufficient, without some evidence, on which a faculty may reasonably be presumed. The strongest evidence of that kind, is the building & repairing time out of mind; for mere repairing for 30 or 40 years will not exclude the Ordinary. In this case the person was offered a particular space; & if he had built on it, it would not be sufficient to supersede the authority of the Ordinary. The possession must be ancient, & going beyond memory; & though, on this subject, I do not mean the high legal memory, it must be larger than appears in the circumstances of this case (SIR WILLIAM SCOTT).

(7) It is alleged that the house has been built eighty years, but it is not said that the seat was built & maintained by the owner of the house. The time of sixty years has been held not sufficient against a wrongdoer. The law does not favour claims against the Ordinary & no ground is stated, here, on which such a right can be established against him. By A.'s own affidavit, it appears that, whatever his claim might be, it ceased when he went out of the parish, & has since been used improperly. I have no hesitation in saying that this is to be considered as a vacant pew, which the Ordinary has a right to confer, for present possession, on any inhabitant (SIR WILLIAM SCOTT).

(8) It is my duty, therefore, to decree a monition to issue to the churchwardens to seat C. in this pew. At the same time, as the parties have been acting under a mistake, which has been general in the parish, this must not be done with precipitation, but with all reasonable attention to the convenience of the parties. It is clearly the law that a parishioner has a right to a seat in the church without payment (SIR WILLIAM SCOTT).—WALTER v. GUNNER & DRURY (1798), 1 Hag. Con. 314; 161 E. R. 565.

*Annotations:—*As to (3) *Consid.*, *Re* St. Columb, Londonderry, Pews (1863), 8 L. T. 861; Gibbon v. Christchurch, High Harrogate, Sheepshanks intervening (1886), Trist. 229; *Reid*, Byerley v. Windus (1826), 5 B. & C. 1. As to (6) *Consid.*, Phillips v. Halliday, [1891] A. C. 228; Proud v. Price (1893), 62 L. J. Q. B. 490. As to (8) *Reid*, Taylor v. Timson (1888), 20 Q. B. D. 671; Claverley (Vicar, etc.) v. Claverley (Parishioners), Claverley (Churchwardens) v. Claverley (Vicar, etc.), Gatacre & Legh v. Claverley (Vicar, etc.), [1909] P. 195.

**1053. Bells—Right to ring.**—(1) The freehold of the church is in the incumbent, & the lawful custody of the key belongs to him.

(2) Unless the incumbent of the church consent, the parishioners cannot, except on the occasion of divine worship, procure the ringing of the church bells.

Some parishioners, in spite of the remonstrance of the incumbent of the church broke open the

belfry door & rang the bells:—*Held*: such conduct was illegal, & the parties guilty of it would be admonished & condemned in costs.—*REDHEAD v. WAIT* (1862), 6 L. T. 580.

(b) *Right of Churchway.*

**1054. Over churchyard.**—*WALTER v. MOUNTAGUE & LAMPRELL*, No. 431, *ante*.

**1055. — Interference with—What court has jurisdiction.**—*BATTEN v. GEDYE*, No. 465, *ante*.

**Over private lands.**—*See* CUSTOM & USAGES, Vol. XVII., pp. 5, 9, 16, 17, Nos. 17, 49, 155–159; *EASEMENTS*.

**1056. Interference with—Right of abatement.**—*ANON.* (1812), Y. B. 6 Edw. 2, fo. 108.

*Annotations*:—*Refd.* Goodday v. Michell (1595), Cro. Eliz. 441; Taylor v. Devey (1837), 7 Ad. & El. 409.

— *In churchyard.*—*See* No. 465, *ante*.

(c) *Appointment of Parish Officers.*

**Churchwardens.**—*See* Sub-sect. 6, D. (b) ii.

**Parish clerk.**—*See* Nos. 906, 927, *ante*.

**Sexton.**—*See* No. 981, *ante*.

(d) *As to Parish Books.*

**1057. Parish books—Right of inspection.**—Parishioners have right to view parish books.—*LOVE v. BENTLEY* (1707), 11 Mod. Rep. 134; 88 E. R. 947.

**1058. — Enforcement by mandamus—Form of order.**—Rule for an inhabitant of a parish to inspect the parish books may be absolute in the first instance.—*ANON.* (1814), 2 Chit. 290.

**1059. — Grounds for granting.**—*Ex p. BRIGGS*, No. 847, *ante*.

**Churchwardens' accounts—Right of inspection.**—*See* Nos. 846, 847, *ante*.

(e) *Right of Burial.*

**In church or churchyard.**—*See* BURIAL, Vol. VII., p. 527.

(f) *Other Rights.*

**1060. Control of church funds—Gifts for specified repairs.**—*RANSON & KNOTT v. CAMPKIN*, No. 443, *ante*.

**1061. Action against churchwardens—In respect of intended works in church.**—*WOODMAN v. ROBINSON*, No. 793, *ante*.

**Attendance at vestry.**—*See* Sub-sect. 4, A., *ante*.

D. *Consent to Application for Faculty.*

*See* Part IV., Sect. 11, sub-sect. 4, B., *post*.

PART III. SECT. 8.

**m. Position of Church.**—The Church of South Africa was constituted by articles which provide that such Church receives the same doctrine, sacraments, & discipline, & the same standards of faith & doctrine, as the Church of England, provided that, in the interpretation of the aforesaid standards of faith, such Church be not bound by decisions of faith or doctrine or discipline other than those of its own ecclesiastical tribunals:—*Held*: this proviso disconnected the Church

of South Africa from the Church of England.—*MERRIMAN (BP. OF GRAHAM'S TOWN) v. WILLIAMS* (1882), 51 L. J. P. C. 95.—S. AF.

**n. —**—As to all purely church matters an Act of an Assembly of the Church of England which does not alter & is not at variance with the authorised standards of faith & doctrine of that church is binding, & the ct. will not examine such an Act to find whether vested rights have been sufficiently respected, whether it is unjustly retrospective,

SECT. 8.—IN THE DOMINIONS, COLONIES, ETC.

*See, generally*, DEPENDENCIES, Vol. XVII., pp. 467 *et seq.*

**1062. Position of church—General rule.**—In the colonies the Anglican Church is purely a voluntary assocn.—*NATAL (BP.) v. GREEN* (1868), 18 L. T. 112.

**Clergy—Holding office in dominion.**—*See* No. 1806, *post*.

**1063. Channel Islands—Jersey—Ecclesiastical jurisdiction over.**—The parties, whose domicile of origin was in Jersey, married & cohabited there, & the husband committed adultery there. He deserted his wife in Jersey, & went to America, without every acquiring an English domicile. The wife came to England & commenced a suit for dissolution of her marriage:—*Held*: (1) though the wife had attained such a domicile in this country as enabled her to sue for a divorce, the husband had never in any way brought himself within the jurisdiction of the ct., & the petition, therefore, would be dismissed; (2) the Bishop of Winchester never had any original jurisdiction in matrimonial causes in Jersey, & the island, therefore, was not included within the jurisdiction of the ct. by Matrimonial Causes Act, 1857 (c. 85).—*LE SUEUR v. LE SUEUR* (1876), 1 P. D. 139; 4 L. J. P. 73; 24 W. R. 616; *sub nom.* *LE SNEUR v. LE SNEUR*, 34 L. T. 511; *on appeal, sub nom.* *LE SUEUR v. LE SUEUR* (1877), 2 P. D. 79, O. A. *Annotations*:—*As to* (1) *Consd.* Lord Advocate v. Jaffery, [1931] 1 A. C. 146. *Refd.* Niboyet v. Niboyet (1878), 3 P. D. 52.

**1064. Disestablished churches—Church of Wales—Compensation for right of patronage—Whether capital or income.**—The sum paid under Welsh Church Act, 1914 (c. 91), s. 16, by way of compensation for the extinction of the right of patronage of a benefice subject to a settlement does not belong to the tenant for life, as lay patron, under the settlement, but is payable to the trustees of the settlement as capital.—*Re PENNRYN'S (LORD) SETTLEMENT TRUSTS, PENNRYN v. ROBERTS*, [1923] 1 Ch. 143; 92 L. J. Ch. 145; 128 L. T. 442; 39 T. L. R. 116; 67 Sol. Jo. 169.

**Right of incumbents to participate in charity—Friend of the clergy.**—*See* CHARITIES, Vol. VIII., p. 317, No. 980.

**1065. Anglican bishopric abroad—Gift for—Whether good charitable gift.**—A gift towards the fund for the bishopric of Jerusalem agreed to be a good charitable legacy.—*HABERSHON v. VARDON* (1851), 4 De G. & Sm. 467; 20 L. J. Ch. 549; 17 L. T. O. S. 196; 15 Jur. 961; 64 E. R. 916.

whether it destroys the independence of the clergy or whether it deprives the bishop of administrative authority.—*GLADSTONE v. ARMSTRONG*, [1908] V. L. R. 454.—AUS.

**o. —**—The power of altering the constitution of the Assembly of the Church of England, given by Church of England Constitution Act, 1854, s. 13 entitled the Assembly to alter the qualification of the body of electors for the representatives of the laity, so as to include women.—*A.-G. v. CLARKE*, [1914] V. L. R. 71.—AUS.

## Part IV.—Ecclesiastical Courts.

### SECT. 1.—ARCHIDIACONAL COURTS.

**1066. Consistory court—Concurrent jurisdiction with.]**—ROBINSON v. GODSALVE, No. 273, *ante*.

**1067. — Appeal to.]**—STEWART v. BATEMAN, No. 274, *ante*.

### SECT. 2.—DIOCESAN COURTS.

**1068. Classification.]**—(1) A Bishop of the Anglican Church had undoubted jurisdiction prior to the Reformation to pronounce [reconciliation sentence] where a church had been polluted. (2) Prior to the Reformation the Bishop's ordinary ct. was his consistorial ct., presided over by his chancellor, & he was also entitled to hold what, for convenience, I will call three extraordinary cts. for special purposes on special occasions—namely, visitation cts., cts. for the consecration of churches & churchyards, & cts. for pronouncing a sentence of reconciliation. The consistory cts., visitation cts., & cts. for the consecration of churches & churchyards have been held continuously since the Reformation, not by virtue of any particular statute or canon, but as being part of the ecclesiastical system established in this country prior to the Reformation, & which was continued by the Reformed Church as part of its ecclesiastical system & so recognised in the civil cts. & incidentally by the statutes & canons of 1603. (Cts. for the purposes of pronouncing a sentence of reconciliation have probably been rarely held since the Reformation, & then only on exceptional occasions (Dr. TRISTRAM).—RECONCILIATION SENTENCE & SERVICE IN ST. PAUL'S (1891), 7 T. L. R. 276.

**1069. Nature—Superior court.]**—(1) Ecclesiastical Courts Act, 1813 (c. 127), s. 7, which gives power to a justice to enforce the payment of a sum under £10 due upon a church rate, where the validity of the rate has not been questioned, nor the liability of the party, takes away the jurisdiction of the Ecclesiastical Ct. in such cases. But, if the validity or liability be in question, the Ecclesiastical Cts. have jurisdiction, though the party has not been summoned before a justice. (2) *Semble*: the Consistory Ct. of the Bishop, the Ct. of Arches, & the Ct. of Delegates, are superior cts.

(3) There is no doubt that, in the case of prohibitions to be granted for the sake of trial, as distinguished from those which are to be granted upon account of a wrong trial or erroneous judgment, the rule is established, that a party neglecting to contest the jurisdiction in the first instance, & taking his chance of a favourable decree, shall not be allowed after sentence to allege the want of jurisdiction as a ground of prohibition, unless the defect appears on the face of the pleadings (LORD DENMAN, C.J.).—RICKETTS v. BODENHAM (1836), 4 Ad. & El. 433; 5 L. J. K. B. 102; 111 E. R. 850; *sub nom.* BODENHAM v. RICKETTS, 1 Har. & W. 753; 6 Nev. & M. K. B. 170, 537.

*Annotations*—As to (1) *Apld.* White & Jackson v. Beard (1839), 2 Curt. 480. *Consd.* *Re* Baines (1840), Cr. & Ph. 31; Richards v. Duke (1842), 3 Q. B. 256; R. v. Pedler (1865), 12 L. T. 17. *Refd.* Pease v. Chaytor (1863), 3 B. & S. 620. As to (2) *Refd.* Roberts v. Humby (1837), 3 M. & W. 120; James v. South Western Ry. (1872), L. R. 7 Exch. 287. As to (3) *Refd.* Farquharson v. Morgan, [1894] 1 Q. B. 552.

**1070. Rights of bishop—To sit as judge—Fees**

to chancellor.]—GIBBONS v. CLOYNE (Bp.) (1706), Holt, K. B. 599; 90 E. R. 1232; *sub nom.* CLOYNE (Bp.) v. GIBBONS, 11 Mod. Rep. 62.

*Annotation*—*Apprvd.* R. v. Tristram, [1902] 1 K. B. 816.

**1071. — To bring action—Pension.]**—LINCOLN (Bp.) v. SMITH (1668), 1 Vent. 3; 86 E. R. 3. *Annotations*—*Apprvd.* *Ex p.* Medwin (1853), 1 E. & R. 609. *Refd.* Jones v. Stone (1699), 2 Salk. 550; Lee v. Black, [1896] 1 P. 138.

**1072. — To veto Chancellor's judgment.]**—DAVEY v. HINDE, No. 2768, *post*.

Diocesan Chancellors, generally, *see* Part III., Sect. 5, sub-sect. 3, A., *ante*.

**1073. Jurisdiction—To award costs—Appeal—No prohibition of process.]**—A Consistory Ct. may award costs; & if the cause be removed to the Arches, the process for the costs shall not be prohibited, though the issue was triable at common law.—TRANSAM'S CASE (1590), Cro. Eliz. 178; 78 E. R. 434.

**1074. — London—Shared with Court of Arches.]**—(1) A prohibition will not lie for citing a man out of the diocese of London to the diocese of Canterbury. (2) A suit for matters accruing in London may be either in the Arches or in the Consistory Ct.; for the archbishops have remitted their courts to each other.—GOBBET'S CASE (1634), Cro. Car. 339; 70 E. R. 897. *Annotation*—*Mentd.* Smith v. Wood (1692), 2 Salk. 692.

**1075. — Resident in archdeaconry.]**—ROBINSON v. GODSALVE, No. 273, *ante*.

**1076. — Disposal of records.]**—On the petition of the Ambassador of the United States of America, the Chancellor of the Diocese of London directed that the manuscript known as "The Log of the *Mayflower*," & containing the history of the voyage of that vessel to America in 1620 & of the then new-founded Plymouth plantation, together with entries of the births, marriages, & deaths of many of the first settlers in New England & their immediate descendants, should, as a record of the greatest national interest & importance to the President & citizens of the United States be delivered out of the custody of the officials of the See of London to the Ambassador for the purpose of being transmitted to America, & there deposited under the official custody of the Governor of Massachusetts for the time being, on the conditions that a photographic facsimile reproduction of the manuscript, verified by affidavit, should be deposited in the registry of the Consistory Ct. of London, & that all proper facilities should be afforded by the future custodians of the original to persons desiring to make searches therein or of obtaining extracts therefrom, & that a certificate of the due delivery thereof, signed by the Governor of Massachusetts, of having received it, & testifying his acceptance of its custody on the conditions imposed, be transmitted to the registrar. The Ambassador of the United States having ceased to hold office since the decree was made, the ct. did not think fit to vary the decree; for in taking charge of the manuscript he was to act not as ambassador, but as the personal delegate of the ct.

At the time when the manuscript was transmitted to Fulham Palace, the Bishop of London's registry in Doctors' Commons was a legitimate place for depositing registers or certificates of marriages, baptisms, & death of persons resident in the Colonies as well as of persons resident in the London diocese in England (Dr. TRISTRAM).—

*Re MAYFLOWER (LOG OF THE)*, [1897] P. 208; 76 L. T. 295.

— **Faculties.**—*See* Sect. 11, *post*.

**1077. — To order proctor to refund money.**—If money is improperly in the hands of a proctor, the Consistory Ct. may order him to refund it.—*MORRIS v. GARDNER* (1833), 1 Dowl. 524.

— **Under Clergy Discipline Act, 1892 (c. 32).**—*See* Sect. 9, sub-sect. 3, *post*.

**1078. — Appeal from archdeacon.**—*STEWART v. BATEMAN*, No. 274, *ante*.

**1079. Appeal—To court of arches.**—*STEWART v. BATEMAN*, No. 274, *ante*.

**1080. — Effect.**—*WHITE v. STEELE*, No. 569, *ante*.

**1081. Seal-keeper—Ancient office.**—*R. v. MOTT*, No. 265, *ante*.

### SECT. 3.—PROVINCIAL AND GENERAL COURTS.

#### SUB-SECT. 1.—COURT OF ARCHES.

##### A. In General.

**1082. Nature—Superior court.**—*RICKETTS v. BODENHAM*, No. 1069, *ante*.

**1083. — No need to declare jurisdiction on documents.**—*DALE'S CASE*, *ENRAGHT'S CASE*, No. 1556, *post*.

**1084. — Purely ecclesiastical court.**—*HUDSON v. TOOTH*, No. 1719, *post*.

**1085. Archbishop—Power to sit as judge.**—The Archbishop of Canterbury may sit as judge in the Ct. of Arches, & therefore cannot sue there for books bequeathed to the library at Lambeth, although he is in such case only a trustee.—*SHEFFIELD v. CANTERBURY (ARCHB.)* (1680), 2 Show. 146; 89 E. R. 849.

**1086. — Trial of bishop—Ecclesiastical offence.**—*READ v. LINCOLN (BP.)*, No. 101, *ante*.

**1087. Registrar—Duty to swear deputy—Mandamus.**—*R. v. WARD*, No. 250, *ante*.

**1088. Proctors—Admission.**—In the Ct. of Arches, a special commission issues in every case, & the petition of the person to be admitted sets forth that he has served seven years to a proctor of the ct., & that he is a notary public (*SIR H. JENNER FUST*).—*TELL v. BOND* (1849), 13 L. T. O. S. 217.

**1089. Case before court by letters of request — From bishop's commissary.**—*BURGOYNE v. FREE* (1829), 2 Hag. Ecc. 456; 162 E. R. 921; *affd. sub nom. FREE v. BURGOYNE* (1830), 2 Hag. Ecc. 662.

*Annotations:—Mentd. Kitson v. Loftus* (1845), 4 Notes of Cases, 323; *Trower v. Hurst* (1845), 4 Notes of Cases, 52; *Davidson v. Davidson* (1856), Den. & Sw. 132; *Bonwell v. London, Bp.* (1861), 14 Moo. P. C. C. 395; *Martin v. Mackonochie* (1883), 8 P. D. 191.

**1090. — — —**—*Ex p. WILLIAMS*, No. 1295, *post*.

**1091. — Effect of letters of request.**—(1) One of two churchwardens has no right, without the other's consent, to use the latter's name as co-pltf. in a suit against a parishioner, for subtraction of church rate, & there is no implied authority in such circumstances, the proper remedy, if any, being the removal of the obstinate churchwarden for misconduct.

(2) Where a case comes before the Ct. of Arches by letters of request, the suit does not commence in the ct. below, but in the Ct. of Arches, the letters forming no part of the cause.—*FRY & GREATA v. TREASURE* (1865), 2 Moo. P. C. C. N. S. 539; 11 L. T. 753; 29 J. P. 117;

11 Jur. N. S. 205; 13 W. R. 476; 15 E. R. 1003; *sub nom. GREATA v. TREASURE*, 5 New Rep. 383, P. C.

*Annotations:—As to* (1) *Apld. Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113; *Fowke v. Berlington*, [1914] 2 Ch. 308.

**1092. — Form of letters of request—Motion to accept.**—(1) Money was advanced under Public Works Loans Act, 1824 (c. 36), by the Comrs. of Public Works for the repair of a church, to be repaid by instalments. Part was spent in repairing the chancel. A rate was made for the payment of the first instalment, which deft. refused to pay:—*Held*: the money was properly spent, the word "church" including "chancel"; & the rate was not vitiated.

*Semble*: (2) even if the money had been improperly spent, the rate would have been good, inasmuch as the Comrs. having advanced money on proper security, could not be deprived of that security by the after acts of the parish.

(3) Letters of request in a cause of subtraction of church-rates must state the date on which the rate was made, & the circumstances taking the rate out of Compulsory Church-rate Abolition Act, 1868 (c. 109). The acceptance of letters of request must in every case for the future be moved by counsel.—*RIPPIN v. BASTIN* (1869), L. R. 2 A. & E. 386; 38 L. J. Ecc. 22, 33; 20 L. T. 622; 33 J. P. 675.

*Annotations:—As to* (1) *Refd. Edney & Lunn v. Smallbones* (1869), 21 L. T. 506; *A.-G. v. Parr*, [1920] 1 Ch. 339.

**1093. — Pleading.**—On Mar. 29, 1869, a rate was made by the churchwardens & overseers of the parish of E., in the diocese of L., for the repayment of money borrowed from the Public Works Loan Comrs., under the provisions of Public Works Loans Act, 1824 (c. 36). Deft. occupied a messuage & premises in the parish, in respect of which he was assessed, for the purposes of the rate, at the sum of 10s. 9d.; he refused to pay this sum, & disputed the validity of the rate. Letters of request were granted by the chancellor of the Bishop of L., directed to the judge of the Ct. of Arches, requesting the judge to call deft. before him to answer in respect of the assessment. A decree by letters of request was issued on Apr. 29, 1870, & the suit proceeded in the Arches Ct. Deft. pleaded that the tithe rent-charge, the property of & received by the rector of the parish in commutation of certain tithes within the parish, was not assessed to the rate, & that a glebe house & lands within the parish, of which the rector was the owner & occupier, had been omitted from the assessment. Pltfs. filed a responsive allegation, in which it was alleged that, in Jan. 1871, a meeting was duly held to amend the rate & the assessment on which the rate was made; & at the meeting, the churchwardens of the parish, with the concurrence of the overseers, amended the assessment by adding to & including in such assessment the rectorial tithes, & glebe house & lands, & amended the rate by reducing the assessment on all the ratable property, & assessed the rector as owner of the tithes, & as owner & occupier of the glebe house & lands, & that the sum, in respect of which deft. was assessed in the amended rate & assessment, amounted to 9s. 5d. instead of 10s. 9d., & that pltfs. only claimed to recover the sum of 9s. 5d. Deft. opposed the admission of the responsive allegation:—*Held*: the responsive allegation was inadmissible, because the ct. had no jurisdiction to inquire concerning any other assessment than that mentioned in the letters of request.—*ASTERLEY v. ADAMS* (1871), L. R. 3 A. & E. 361.

*Sect. 3.—Provincial and general courts: Sub-sect. 1, A., B. & C.; sub-sect. 2.]*

**Letters of request generally.]—***See Sect. 9, sub-sect. 1, C. (b), post.*

**1094. Common law courts—Concurrent litigation—Election.]—**WALSH *v.* LINCOLN (Bp.), No. 2123, *post.*

**1095. — Deference to decisions of.]—**COMBE *v.* EDWARDS, No. 1607, *post.*

**1096. Evidence—Whether modified by Ecclesiastical Courts Act, 1855 (c. 41).]—**MARTIN *v.* MACKONCHIE (SECOND SUIT), No. 2815, *post.*

### *B. Original Jurisdiction.*

**1097. No usurpation of functions of synod—Repugnance to articles & formularies—Consideration.]—**SHEPPARD *v.* BENNETT (SECOND APPEAL), No. 2987, *post.*

**1098. Not enlarged by Public Worship Regulation Act, 1874 (c. 85).]—**HUDSON *v.* TOOTH, No. 1719, *post.*

**1099. London — Concurrent with consistory court.]—**GOBBET'S CASE, No. 1074, *ante.*

**1100. Deprivation—Presence of bishop unnecessary.]—**It was objected that the Dean of the Arches could not deprive without a bishop, but it was overruled by the whole ct. that the canon did not affect the Archbishop; besides, that it was the constant practice for the Dean of Arches to deprive.—PULLEN *v.* CLEWER (1881), 1 Hag. Rec. App. B. 2; 162 E. R. 760; *sub nom.* CLEWER *v.* PULLEN, Return of Appeals before the High Court of Delegates, No. 79 (Parliamentary Papers 190, April 3, 1868).

*Annotations:—*Consd. COMBE *v.* DE LA BERE (1881), 6 P. D. 157. *Refd.* COMBE *v.* EDWARDS (1878), 3 P. D. 103; MARTIN *v.* MACKONCHIE (1879), 4 Q. B. D. 697; MARTIN *v.* MACKONCHIE (1882), 7 P. D. 94.

**1101. — — — — —.]—**OLIVER & TOLL *v.* HOBART (1827), 1 Hag. Rec. 43; 162 E. R. 500.

*Annotation:—*Refd. BURGHOYE *v.* FREE (1829), 2 Hag. Rec. 456.

**1102. — — — — —.]—**(1) A commission was appointed by the Bishop of L., under Church Discipline Act, 1840 (c. 80), to inquire into a "certain scandal & evil report" against a clergyman in his diocese. The comrs. reported that there were sufficient *prima facie* grounds for instituting proceedings against him as to certain charges alleged, but not as to others:—*Held*: it was not necessary for the letters of request issued by the bishop in consequence of the return to the commission to refer to the charges not found by the comrs., as the office of letters of request is to present to the Ct. of Arches the subject of future proceedings, viz. that which is to form the matter of charge to be inquired into.

(2) Facts, occurring out of the diocese, & not charged against a clergyman by the report of the comrs., may be alleged in the arts. & proved in evidence at the hearing, for the purpose of explaining facts occurring within the diocese & charged against him by the comrs.

(3) The insertion of an objectionable item of charge in one of the arts. will not invalidate others that are well laid, if the judge has confined himself to the charges that are well laid.

(4) The dean of the Ct. of Arches has power by the practice of the ct. to pronounce sentence of deprivation, independently of the bishop or archbishop.

(5) In proceedings for the correction & reformation of manners, the ground of the sentence is the public scandal to the Church, & the nature & severity of the sentence will depend upon the gravity of the scandal.—BONWELL *v.* LONDON

(Bp.) (1861), 14 Moo. P. C. C. 395; Brod. & F. 200; 4 L. T. 813; 25 J. P. 563; 7 Jur. N. S. 100; 9 W. R. 874; 15 E. R. 354, P. C.; *affg.* S. C. *sub nom.* LONDON (Bp.) *v.* BONWELL (1860), 6 Jur. N. S. 709.

*Annotation:—*As to (2) Consd. SHEPPARD *v.* BENNETT (1869), 39 L. J. Eccl. 1.

**1103. — Adultery.]—**RICH *v.* GERARD & LODER (1690), 1 Hag. Eccl. App. B. 7; 162 E. R. 763.

**1104. — For what offences.]—**Deprivation is a sentence which the Ct. of Arches has an inherent power to pronounce in a great variety of offences by clerks, such as drunkenness, breach of the canons, dilapidations, obstinate disobedience to the ordinary. Such sentence was pronounced for incorrigible disobedience to the Arches Ct. & of the ordinary.—COMBE *v.* DE LA BERE (1881), 6 P. D. 157; 45 J. P. 342; *subsequent proceedings* (1882), 22 Ch. D. 316, C. A.

*Annotations:—*Appld. MARTIN *v.* MACKONCHIE (1883), 8 P. D. 191. *Consd.* HOYWOOD *v.* MANCHESTER, Bp. (1884), 12 Q. B. D. 404. *Refd.* BENEFICED CLERK *v.* LEE, [1897] A. C. 226; St. Albans, Bp. *v.* FILLINGHAM, [1906] P. 163.

**1105. — — — — —.]—**COMBE *v.* DE LA BERE, No. 1513, *post.*

— — — — — *see, also*, s. 10, sub-sect. 5, *post.*

**1106. Citation—General citation.]—**The Ct. of Arches has no jurisdiction to cite generally except in the cases specified in 23 Hen. 8, c. 9.—HUGHES *v.* HERBERT (1756), 2 Lee, 287; 161 E. R. 343.

**1107. — Out of diocese.]—**Where a suit for subtraction of church rate has been instituted in an inferior ct., it may be removed out of the diocese wherein it arose, into the Ct. of Arches, notwithstanding 23 Hen. 8, c. 9.—HAWES & VICAT *v.* PELLIATT (1840), 2 Curt. 473; 12 Ad. & EL 208, n.; 5 J. P. 66; 163 E. R. 478.

*Annotation:—*Refd. ASTERLEY *v.* ADAMS (1871), L. R. 3 A. & E. 361.

**1108. Order — Enforcement — Contempt.]—**HUDSON *v.* TOOTH, No. 1719, *post.*

**1109. — Effect—Same as before Public Worship Regulation Act, 1874 (c. 85).]—**DALE'S CASE, ENRAGHT'S CASE, No. 1556, *post.*

**1110. Over layman—For falsely swearing affidavit—For issue of marriage licence.]—**The Arches Ct. of Canterbury has no jurisdiction to entertain a suit by letters of request against a layman for falsely swearing before a surrogate to an affidavit to lead to the issue of a marriage licence.

A recurrence to the punishment of the laity for the good of their souls by ecclesiastical cts., would not be in harmony with modern ideas, or the position which ecclesiastical authority now occupies in the country. Nor do I think that the enforcement of such powers where they still exist, if they do exist, is likely to benefit the community. These considerations form no reason for rejecting the jurisdiction if it exists in law, but they ought to make the ct. careful in asserting such a jurisdiction if its existence is not plainly established (LORD PENZANCE).—PHILLIMORE *v.* MACHON (1876), 1 P. D. 481.

**1111. How terminated—Interlocutory order—Conditional sentence.]—**COMBE *v.* DE LA BERE, No. 1543, *post.*

### *C. Appellate Jurisdiction.*

**1112. When appeal lies—Informality in original proceedings—Existence of ground for appeal from decision.]—**It is the duty of the Ct. of Arches to correct the errors of cts. below. An appeal is not to be rejected on account of an informality in the proceedings of an inferior ct., where there is apparent ground for appeal from the decision.

A party summoned for church rates before magistrates, was dismissed because churchwardens produced no proof that he was duly assessed.—**KEED v. EVERARD & CRESSWELL** (1842), 6 Jur. 66.

**1113.** — From bishop as visitor.]—**BOYD v. PHILLPOTTS**, No. 199, *ante*.

— Under Church Discipline Act, 1840 (c. 86).]—*See* Sect. 9, sub-sect. 1, O. (c) vii., *post*.

**1114. Practice—Fresh evidence.**]—A grievance must be heard from the acts below; the process & the registrar's return are the proper evidence of what has been exhibited, & it would be very dangerous to admit the affidavit of a party to bring in papers which were not in the cause below, & to contradict the judge & registrar's return (**SIR GEORGE LEE**).—**FANSHAW v. VERDON** (1754), 1 Lee, 625; 161 E. R. 229.

**1115.** — **1903 Rules.**]—(1) A faculty was granted to remove out of a parish church as illegal church ornaments certain pictures known as Stations of the Cross, placed in the church without a faculty having been obtained for their introduction, & set up, not for purposes of decoration only, but intended to take a place & play a part in devotions to be paid to the Deity before them, & having been in fact used as intended.

(2) A confirmatory faculty was also granted for the retention in the same church of a small figure standing on a bracket under a canopy representing our Saviour as the Good Shepherd, the whole figure made of oak & uncoloured, & affixed about ten feet from the ground to the east wall of the church on the south side of the chancel arch, it being held to be a mere architectural decoration not liable to give occasion to superstitious reverence in any form.

(3) An application for a confirmatory faculty to authorise the retention in a parish church of church ornaments not illegal of themselves, but placed in the church without the authority of a faculty, cannot be regarded in any more favourable light than an application for a faculty for the first introduction into the church of the same church ornaments, & in all such cases the ordinary will refuse to grant the confirmatory faculty prayed for unless there is before him sufficient evidence of a general desire of the churchgoing parishioners for the retention in the church of the church ornaments in question.

Where, therefore, two isolated crucifixes had been placed over the pulpits in a parish church by the incumbent without the sanction of a faculty, the ordinary, without deciding either whether the crucifixes were illegal *per se* or whether on the evidence they were or were not liable to be abused by superstitious reverence, being of opinion that it had been sufficiently proved that no general desire on the part of the churchgoing parishioners existed for the retention in the church of such unusual adjuncts of the pulpits of the churches of the Church of England, refused to grant a confirmatory faculty authorising their remaining in the church, & decreed a faculty to issue for their removal.

(4) A bishop does not by consecrating or dedicating a church give any episcopal sanction, direct or indirect, for the retention in the church of church ornaments or decorations which may have been in the church at the time of its consecration or dedication.

(5) Practice where an appeal *apud acta* is asserted in a case to which the rules & regulations of the Arches Ct. issued Sept. 1903, are applicable.—**MARKHAM v. SHIREBROOK OVERSEERS**, [1906] P.

239; *sub nom. Re HOLY TRINITY, SHIREBROOK*, 22 T. L. R. 278.

*Annotations*:—As to (1) **Re St. Luke's, Southport** (1920), 36 T. L. R. 733. As to (2) **Re St. Luke's, Southport** (1920), 36 T. L. R. 733. As to (3) **Re St. Luke's, Southport** (1920), 36 T. L. R. 733.

**1116. Effect of appeal—Whether judgment of Court of Arches admissible in action.**]—Where a suit is removed by appeal from the Consistory Ct. to the Ct. of Arches, the judgment of the Ct. of Arches is not admissible in evidence without showing that ct. to be duly in possession of such suit by producing the process of appeal, viz., the transcript of the proceedings sent from the ct. below.—**LEAKE v. WESTMEATH (MARQUIS)** (1811), 2 Mood. & R. 304, N. P.

**1117.** — **Whether bar to prohibition.**]—**WHITE v. STEELE**, No. 500, *ante*.

#### SUB-SECT. 2.—PROVINCIAL COURT OF YORK.

*NOTE.*—Cases in respect of the Audience Court of York have been omitted as obsolete.

**1118. Chancery Court of York—Power to sit outside province.**]—A representation having been made against a clerk, rector of a parish within the County Palatine of Lancaster, in the province of York, under Public Worship Regulation Act, 1874 (c. 85), for offences against sect. 8 of that Act committed in the parish church, the bishop of the diocese sent the matter to the Archbishop of York, who sent a requisition to Lord Penzance—the judge appointed under the Act, who had since the passing of the Act become official principal of the Chancery Ct. of York—requiring him to hear & determine the matter of the representation at any place in London or Westminster, or within the province of York or diocese of Manchester, as he might deem fit. The judge heard it at Westminster, & there pronounced judgment, & issued a monition ordering the clerk to abstain from the practices complained of. The clerk having disobeyed the monition the judge, sitting at Westminster, issued an inhibition inhibiting the clerk for three months & thereafter until relaxation from performing any service of the church within the diocese, & on his persisting in his disobedience, pronounced him contumacious & issued a *significavit* under Ecclesiastical Courts Act, 1813 (c. 127), s. 1. The tenor of the *significavit* was sent by *millimus* from the Petty Bag Office to the Chancellor of the County Palatine of Lancaster. In accordance with an order made by the Vice-Chancellor of the County Palatine sitting at Lincoln's Inn, a writ *de contumace capiendo* was issued, under which the clerk was arrested by the sheriff of Lancashire & lodged in Lancaster Gaol. On a motion for a *habeas corpus*:—*Held*: (1) the matter so heard before the judge, as official principal of the Chancery Ct. of York, was a cause cognisable in an ecclesiastical ct. within the meaning of Ecclesiastical Courts Act, 1813 (c. 127), s. 1, & the judge had power to pronounce the contumacy & issue the *significavit* under that Act; (2) the County Palatine being one of the exempt jurisdictions mentioned in 5 Eliz. c. 23, s. 11, the procedure required by that sect. as to the *millimus* & the issue of the writ *de contumace capiendo* was applicable & was duly followed; (3) the *millimus* was not one of the writs referred to in R. S. C., Ord. 2, r. 8, & was properly tested as in the name of the Queen by the Master of the Rolls; (4) under Public Worship Regulation Act, 1874 (c. 85), s. 9, the judge had power not merely to "hear," but

*Sect. 3.—Provincial and general courts: Sub-sects. 2 & 3. Sect. 4: Sub-sects. 1 & 2.]*

also to hear & determine the matter, & to do all the acts which he did at Westminster; (5) all the proceedings were regular & there was no ground for a *habeas corpus*.—*GREEN v. PENZANCE* (LORD) (1881), 6 App. Cas. 657; 45 L. T. 353; 46 J. P. 115; 30 W. R. 218; *sub nom. Re GREEN*, 51 L. J. Q. B. 25, H. L.; *affg. S. C. sub nom. Ex p. GREEN*, 7 Q. B. D. 273, C. A.

*Annotations:—Generally, Rejd. Enraght v. Penzance* (1882), 7 App. Cas. 240; *Noble v. Ahler* (1886), 11 P. D. 158. *Mentd. The Tynwald*, [1895] P. 142; *Sweet v. Ely, Bp.* (1902), 86 L. T. 679.

**1119.** ————.]—(1) The judge of the Chancery Ct. of York has power under Church Discipline Act, 1840 (c. 86), to make a rule that the hearing of cases in that ct. shall take place without the local limits of the ct. (2) The Chancery Ct. of York has jurisdiction to hear a suit against a clergyman beneficed in the province of York in respect of offences alleged to have been committed by him without the limits of the province.—*NOBLE v. AHER* (1886), 11 P. D. 158.

**1120.** ————.]—Application for the suspension of a clergyman for disobedience to a monition having been made to the Chancery Ct. of York, the surrogate received the affidavits at that ct. & sent them up to the judge in London, who read them & wrote a judgment in London, which he sent down to the surrogate, with directions not to deliver it if the clergyman appeared. The clergyman did not appear, & the surrogate read the judgment which ordered the clergyman's suspension for six months:—*Held*: the judgment had been pronounced within the Province of York & there was no ground for issuing a prohibition.—*R. v. PENZANCE* (LORD) (1887), 3 T. L. R. 579, C. A.

**1121.** ———— *Power to hear suit in regard to offences committed outside province.*—*NOBLE v. AHER*, No. 1119, *ante*.

— *Jurisdiction to try whether clerk guilty of criminal offence.*—*See* No. 1489, *post*.

**1122.** ———— *Order Enforcement—Contempt.*—*GREEN v. PENZANCE* (LORD), No. 1118, *ante*.

SUB-SECT. 3.—COURT OF FACULTIES.  
See NOTARIES.

#### SECT. 4.—JUDICIAL COMMITTEE OF PRIVY COUNCIL.

SUB-SECT. 1.—IN GENERAL.

**1123. Judicial Committee is ecclesiastical court of appeal.**—(1) The Judicial Committee of the Privy Council is an ecclesiastical ct. of appeal, & the Ct. of Q. B. will not interfere by a prohibition to stop proceedings in it of which it has legal cognisance, on the supposition that it may come to an erroneous conclusion in point of law or of fact.

(2) A party who appeals to the Judicial Committee of the Privy Council against a decree of an inferior ecclesiastical ct., is not thereby prevented from applying to the ct., to prohibit the Judicial Committee from further proceeding in the suit.

(3) In a case where the question in dispute in the ecclesiastical ct. was the enforcement of the payment of a church rate; & the rate appeared to be, according to the rules of the common law, bad upon the face of it:—*Held*: that circumstance

would not justify the ct. in presuming that the Judicial Committee would wrongly decide the common law question, when sitting upon an appeal as the Supreme Ecclesiastical Ct. of the country: & a rule for a prohibition, obtained on that ground, was therefore discharged. (4) But, *Semble*: the prohibition would have been granted if it had appeared that the Judicial Committee was proceeding beyond its jurisdiction.—*CHESTERTON v. FARJAR* (1838), 7 Ad. & El. 713; 7 L. J. Q. B. 66; 112 E. R. 638; *sub nom. R. v. PRIVY COUNCIL JUDICIAL COMMITTEE*, 3 Nev. & P. K. B. 15; 2 Jur. 394; *sub nom. R. v. CHESTERTON*, 1 Will. Woll. & II. 19; 2 J. P. 21.

*Annotations:—As to* (1) & (3) *Distd. Wadsworth v. Spain* (Queen) (1851), 17 Q. B. 215. *Rejd. Jones v. Johnson* (1850), 5 Exch. 862. *As to* (4) *Rejd. Wadsworth v. Spain* (Queen) (1851), 17 Q. B. 215. *Generally, Mentd. It. v. Poole* (Corp.) (1838), 2 J. P. 84; *Hornchurch v. Pigott* (1842), 6 Jur. 608; *Tozer v. Child* (1856), 6 E. & B. 289.

**1124. Surrogates of Judicial Committee—Powers.—To order security for costs.**—On a motion for security for costs:—*Held*: the Ct. of Surrogates of the Judicial Committee of the Privy Council is not competent to direct security to be given for costs.

I cannot take upon myself to grant the motion; I must refer it to the Judicial Committee; it is more than a surrogate can take upon himself to do. I sit here to expedite proceedings, & I could not delay them on account of a collateral matter (*DR. BURNABY*).—*FIFE v. BLUNT* (1842), 1 Notes of Cases, 364; *subsequent proceedings* (1843), 2 L. T. O. S. 185, P. C.

**1125.** ———— *To amend monition.*—A monition to carry into execution a judgment of the Judicial Committee approved by H.M. in Council was issued against P. & E., the church or chapel-wardens of St. B., to remove certain ornaments & do other acts in the chapel of St. B., as therein directed. At the time the monition was served on P. & E. they had ceased to be chapel-wardens. Upon motion by the original promont, B., a new monition was directed to be issued addressed to & monishing the church or chapel-wardens, for the time being, of St. B. by their official designation only, to do the acts directed by the former monition. *Semble*: such an application ought not to be made to one of the surrogates of the Privy Council.

B., a parishioner, instituted proceedings against the incumbent & church or chapel-wardens of St. B. for removal of a structure of stone used as a Communion Table, & other of the church ornaments; upon which a monition issued monishing the church or chapel-wardens to remove such structure of stone, together with the cross on or near the same, & to provide instead thereof a flat, movable table of wood; & further to remove any cover used at the administration of the Lord's Supper, worked or embroidered with lace, or otherwise ornamented, & to provide a fair white linen cloth, without lace or embroidery, or other ornament, to cover the Communion Table, at the time of the administration of the Lord's Supper, & further to cause the ten commandments to be set up on or against the east side of the church, in compliance with Canon 82. The stone table & the ornaments were removed. B., afterwards, brought in an Act on petition to enforce the monition, alleging that it was in a great part uncomplied with: first, that the metal cross had been placed on the sill of the great eastern window of the church above the Communion Table; second, that the table which had been substituted for the stone altar was not a flat table, but had



an elevation, or super altar; third, that the ten commandments were not set up on or against the east end of the church over the Communion Table, but were set up against the walls on each side of the chancel screen. In the answer it was alleged that the monition had been obeyed; that the cross was disconnected with the Communion Table; that the table was flat, the elevation being a movable ledge of wood at the back of the table, on which the candlesticks were placed, & lastly, on account of the structure of the church the congregation would not be able to read the commandments if they were placed over the Communion Table:—*Held*: (1) the monition had been substantially complied with, as the metal cross was a legal ornament & was not attached to the Communion Table, & the wooden ledge on the Communion Table was not a superstitious ornament, or contrary to law, & the placing of the ten commandments against the walls on each side of the chancel screen was from the structure of the church a substantial compliance with the monition, & was not an evasion thereof; (2) B., when the monition was served, was a parishioner, but at the time he moved for the enforcement of the new monition had ceased to be so. In the circumstances, & by consent, B. was permitted to be heard upon the petition.—*LIDDLELL v. BEAL* (1860), 14 Moo. P. C. C. 1; 3 L. T. 218; 24 J. P. 788; 8 W. R. 569; 15 E. R. 206, P. C.

*Annotations*:—*As to* (1) *Consd.* *Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113; *Boyd v. Phillpotts* (1874), L. R. 4 A. & E. 297. *Expld. & Foll.* *Durst v. Masters* (1876), 1 P. D. 373. *Consd.* *Wimbledon* (Vicar & Churchwardens) *v. Eden, Re St. Mark's, Wimbledon*, (1908) P. 167. *Refd.* *Martin v. Mackonochie, Flanank v. Simpson* (1868), L. R. 2 A. & E. 116; *St. Giles's, Cripplegate* (1901), 17 T. L. R. 672; *St. Andrew's, Haverstock Hill* (1909), 25 T. L. R. 408. *As to* (2) *Consd.* *Lee v. Ridsdale* (1873), 37 J. P. 804; *Lee v. Fagg* (1874), L. R. 6 P. C. 38. *Refd.* *Elphinstone v. Purchas* (1870), L. R. 3 P. C. 245.

**1126. Appeal from interlocutory judgment.—Whether party bound to appeal.**—*JONES v. Gough*, No. 373, *ante*.

**1127. Effect of appealing.—On right of appellant to apply for prohibition to Judicial Committee.**—*CHESTERTON v. FARLAR*, No. 1123, *ante*.

#### SUB-SECT. 2.—JURISDICTION.

*NOTE.*—Cases in reference to the Court of Delegates have been included here, as that court was superseded by the Judicial Committee of the Privy Council under Privy Council Appeals Act, 1832 (c. 92).

**1128. When appeal lies.**—*HOLLINGWORTH'S CASE* (1597), 4 Co. Inst. 311.

*Annotation*:—*Refd.* *Exeter, Bp. v. Fust & Canterbury Archbp.* (1850), 14 Jur. 876.

**1129.**—*HAVER v. THOROL* (1628), Litt. 228; 124 E. R. 221.

*Annotation*:—*Consd.* *Re Gorham v. Exeter, Bp.* (1850), 5 Exch. 630.

**1130.**—*HAVERS v. LONDON (Bp.)* (1679), Return of appeal before the High Court of Delegates, p. 31, No. 69 (Parliamentary Papers, 199, April 3, 1868, cited 2 Q. B. at pp. 9, 27.

*Annotation*:—*Consd.* *Boyd v. Phillpotts* (1874), L. R. 4 A. & E. 297.

**1131. Matter touching Crown.**—*R. v. ELHOW* (1696), cited 10 C. B. at p. 113; 138 E. R. 60.

*Annotation*:—*Consd.* *Re Gorham v. Exeter, Bp., Ex p. Exeter, Bp.* (1850), 10 C. B. 102.

**1132.**—*By* 24 Hen. 8, c. 12, ss. 2, 5, 6, 7, 8, all causes within the spiritual jurisdiction,

relating to wills, to matrimony & divorce, & to tithes, oblations, & obventions, were to be determined in the King's cts.; & where, in such cases, the appeal used to be made to the see of Rome, it was thenceforward to be carried from the archdeacon's ct., if commenced therein, to the bishop's ct., & from the bishop's ct. to that of the archbishop, whose decision was to be final. By sect. 9, in case any such cause should touch the King, the appeal from any of the said cts. was to be made to the upper house of convocation for the province. By 25 Hen. 8, c. 19, ss. 3, 4, no appeal was to be made to Rome in any cause arising within this realm; but all appeals were to be made in the manner limited by 24 Hen. 8, c. 12, for causes of matrimony, tithes, oblations, etc. An ulterior appeal was given, for lack of justice in the Archbishop's cts., to the King in Chancery; & on such appeal, a commission under the great seal was to issue to such persons as the King should name, to hear such appeal. The Judicial Committee of the Privy Council was substituted for such commission, by Privy Council Appeals Act, 1832 (c. 92), s. 3, & Judicial Committee Act, 1833 (c. 41), s. 3:—*Held*: if the Crown presented a clerk to a vicarage in its gift, & the ordinary refused to admit him, on the ground that he maintained unsound doctrine, & on a *duplex querela* brought in the Archbishop's ct., the judge, for the same reason, pronounced sentence confirming such refusal to admit, the appeal lay to the Judicial Committee of the Privy Council, & not to the upper house of convocation.—*Re GORHAM v. EXETER (Bp.), Ex p. EXETER (Bp.)* (1850), 10 C. B. 102; 19 L. J. C. P. 200; 15 L. T. O. S. 250; 14 Jur. 522; 138 E. R. 41; *previous proceedings*, 15 Q. B. 52; *subsequent proceedings*, 5 Exch. 630.

*Annotation*:—*Refd.* *Re Barnard, Ex p. Wetherell* (1852), 20 L. T. O. S. 241.

**1133. Decision of Archbishop—Revocation of curate's licence.**—No appeal lies to Her Majesty in Council under 2 & 3 Will. IV., c. 92; & 3 & 4 Will. IV., c. 41, from a decision of the Archbishop of Canterbury, confirming the revocation of the licence of a stipendiary curate, under the provisions of 1 & 2 Vict., c. 106.

In an *ex parte* application by P. for leave to appeal to the Queen in Council, from a sentence of the Archbishop of Canterbury confirming the revocation by the Bishop of London of P.'s licence as an assistant stipendiary curate in a church in the Diocese of London, an appeal was admitted; but the question as to the competency of the appeal was reserved & upon protest by the Bishop, the right of appeal ultimately decided against.—*POOLE v. LONDON (Bp.)* (1861), 14 Moo. P. C. C. 262; *Brod. & F.* 176; 4 L. T. 224; 25 J. P. 388; 7 Jur. N. S. 347; 9 W. R. 485; 15 E. R. 304, P. C.; *previous proceedings* (1850), 5 Jur. N. S. 522.

*Annotations*:—*Mentd.* *R. v. Chichester, Bp.* (1859), 6 Jur. N. S. 129; *Davey v. Hinde*, [1901] P. 95.

**1134. Refusal to cite bishop for ecclesiastical offences.**—The Archbishop has jurisdiction to cite a bishop for ecclesiastical offences, & an appeal lies to Her Majesty in Council from his refusal to exercise such jurisdiction.—*Ex p. READ* (1888), 13 P. D. 221; 58 L. J. P. C. 32; *sub nom.* *READ v. CANTERBURY (ARCHBP.)*, 59 L. T. 909; 4 T. L. R. 741, P. C.

**1135. Power of judicial committee to judge whether departure from authorised form of service important or trivial.**—*MARTIN v. MACKONCHIE*, No. 2948, *post*.

*See, generally, COURTS*, Vol. XVI., pp. 131 *et seq.*

**Sect. 4.—Judicial committee of privy council: Sub-sect. 3.]**

**SUB-SECT. 3.—PRACTICE AND PROCEDURE.**

*See, generally,* COURTS, Vol. XVI., pp. 137 *et seq.*

**1136. Preparation of record—Addition of further articles—Pending appeal.]—**(1) After the institution of an appeal from the Arches Ct., in a suit against a clergyman, for adultery, fornication or incontinence, this ct. refused to receive additional arts. charging acts of adultery, alleged to have been committed subsequently to the close of the case in the Arches Ct., or to examine, *viva voce*, the witnesses examined in the ct. below, upon the allegation that they had been tampered with previous to their examination.

(2) We cannot in a criminal case draw a distinction between accusations not proved & accusations disproved, or suffer any prejudice to remain on our mind in examining the remaining charge from the recollection of those charges which we have on mature deliberation rejected; still less can we suffer any reference to those rejected charges to influence our belief of the rest (LORD BROUGHAM).—CRAIG v. FARNELL (1849), 6 Moo. P. C. C. 446; Brod. & F. 50; 6 Notes of Cases, 682; 14 L. T. O. S. 21; 13 Jur. 217; 13 E. R. 756.

*Annotation:—*Mentd. Berney v. Norwich, Bp. (1867), 36 L. J. Eccl. 10.

**1137. —Appeal from order directing reformation of articles—Actual reformation required to appear on face of order.]—**SHEPPARD v. BENNETT (SECOND APPEAL), No. 2987, *post*.

**1138. Parties—Death of party pending appeal—Substitution of party & order of revivor.]—**In a suit instituted under Church Discipline Act, 1840 (c. 86), against a clerk in holy orders, a minister of a chapel without a district, by Letters of Request, the promotor being a parishioner of the parish within which the chapel was situated, for offences against the laws ecclesiastical by the use of certain rites & ceremonies set forth in the Articles exhibited; sentence was pronounced by the Arches Ct. against him upon some, but not on all, of the Articles. The promotor of the suit appealed from such sentence to the Queen in Council, but, after inhibition & citation had issued, died. On a motion for the substitution of another parishioner as promotor of the appeal, who was not authorised by the ordinary, or connected with the original promotor, & had no personal or pecuniary interest in the subject-matter of the suit:—*Held*: though the suit, as a criminal suit, had determined by the death of the original promotor, yet, having regard to the ancient practice of the Ct. of Delegates in such cases, & the peculiar circumstances of the suit, it was the duty of the Ct. of Appeal not to permit its abatement, but to allow a proper person to be substituted in the place of deceased applt. & to revive the appeal.

*Scmble*: it is not necessary, in such circumstances, that the proposed substituted promotor should be clothed with the character of one executing the office of judge at the instance of the bishop, whose permission cannot be demanded *ex debito justitiæ*.

*Qu.*: whether it is requisite, on a motion for the appointment of a new promotor in an appeal under sect. 16 of the above Act, that an archbishop, or bishop, being a Privy Councillor, should be present to render the Judicial Committee competent to entertain the motion.—ELPHINSTONE v. PURCHAS (1870), L. R. 3 P. C. 245; 7 Moo. P. C. C. N. S. 17; 39 L. J. Eccl. 124; 23 L. T.

285; 34 J. P. 820; 17 E. R. 7; *sub nom. Ex p. HEBBERT, ELPHINSTONE v. PURCHAS*, 18 W. R. 1073; *sub nom. HEBBERT v. PURCHAS*, Bro. Ecc. Rep. 200; *subsequent proceedings, sub nom. HEBBERT v. PURCHAS* (1871), L. R. 3 P. C. 605. P. C.

*Annotations:—*Consd. R. v. Oxford, Bp. (1879), 4 Q. B. D. 525. *Refd. Ex p. Edwards* (1873), 29 L. T. 629.

**1139. Hearing—What evidence admissible—Viva voce examination of witnesses examined in lower court—Allegation that witnesses tampered with.]—**CRAIG v. FARNELL, No. 1136, *ante*.

**1140. —Re-trial.]—**(1) On leave to appeal being granted to a deft. a retrial before the Judicial Committee was ordered, upon the ground that an important & damaging piece of documentary evidence was produced only while deft.'s counsel was making his final address to the ct., so that no opportunity was given to deft. or his advisers to consider the effect of the document or to examine it critically.

(2) Under Clergy Discipline Act, 1892 (c. 32), s. 2 (c), the assessors occupy a position in deciding questions of fact which is not that ordinarily held by assessors & is more closely analogous to that ordinarily occupied by a full member of the ct., or, in some respects, by a jury (LORD BIRKENHEAD, C.).—WAKEFORD v. LINCOLN (Bp.), [1921] 1 A. C. 813; 90 L. J. P. C. 174; 125 L. T. 513; 65 Sol. Jo. 532. P. C.

**1141. —Powers of court—To retain suit.]—**HEAD v. SANDERS, No. 1512, *post*.

**1142. —**—VOYSEY v. NOBLE, NOBLE v. VOYSEY, No. 2688, *post*.

**1143. —**—MARTIN v. MAC-KONCHIE, No. 1587, *post*.

**1144. —To consider interlocutory judgment—No appeal from judgment.]—**WILLIAMS v. SALISBURY (Bp.), No. 1392, *post*.

**—Proceedings in regard to offences in respect of doctrine.]—***See* Part V., Sect. 13, sub-sect. 1, *post*.

**1145. Judgment—Whether binding—On Judicial Committee.]—**(1) Although the judgment of the Judicial Committee on appeal from the Arches Ct. is final *inter partes*, yet the proceedings being penal in their consequences, their lordships will in some circumstances entertain an appeal *inter alios* involving questions already decided.

(2) *Scmble*: in proceedings under Public Worship Regulation Act, 1874 (c. 85), where the only objection to an ornament in a church is, that it has been set up without a faculty, the ct. will, before pronouncing judgment, give the person charged an opportunity of applying for a faculty.

(3) Applt. was declared by an order of the judge of the Arches Ct. of Canterbury to have offended against the laws ecclesiastical, in respect of the four following matters: First, the wearing during the service of the Holy Communion of vestments known as an alb & a chasuble; secondly, the saying the prayer of consecration in the service of the Holy Communion while standing at the middle of the west side of the Communion Table, in such wise that the people could not see applt. break the bread or take the cup into his hand; thirdly, the use in the service of the Holy Communion of wafer bread or wafers, to wit, bread or flour made in the form of circular wafers instead of bread such as is usual to be eaten; fourthly, the placing & unlawfully retaining a crucifix on the top of the screen separating the chancel of the church from the body or nave. Upon appeal to the Judicial Committee:—*Held*: with regard to the first charge, the judgment of the ct. below must be affirmed.

(4) Act of Supremacy, 1558 (c. 2), s. 25, must be read together with the order made thereunder by the Advertisements of the Queen in 1566, & the law so understood acted upon & enforced from 1566 to 1662, excepting a brief interval, cannot be repealed without a distinct & repealing enactment or an enactment inconsistent & irreconcilable therewith. The Rubric Note of 1662 could not & did not purport to repeal the law & all that had been done under it, while Act of Uniformity, 1662 (c. 4), s. 24, expressly confirms the Act of Supremacy, 1558 (c. 2); nor is the rubric inconsistent with sect. 25 of the latter Act read as if the order made thereunder had been inserted therein:—*Held*: (5) with regard to the second charge, a penal charge was not established against applt. merely by proof that he stood while saying the prayer of consecration at the west side of the communion table, without further evidence that the people could not see him break the bread or take the cup into his hand.

(6) The minister during the prayer of consecration should so stand that he may in good faith enable the communicants present, or the bulk of them, being properly placed, to see if they wish it the breaking of the bread & the performance of other manual acts mentioned in the rubric.

*Held*: (7) with regard to the third charge, if it had been averred & proved that the wafer, properly so-called, had been used by applt., it would have been illegal; but upon averment & proof to the effect that "bread made in the form of circular wafers instead of bread such as is usual to be eaten," affecting the shape & not the composition of the substance employed, applt. was entitled to the benefit of the ambiguity in the form of the charge.

*Held*: (8) with regard to the fourth charge, in the absence of a proper faculty the crucifix was unlawfully set up & retained. No such faculty ought to be granted & the crucifix was ordered to be removed.—*RIDSDALE v. CLIFTON* (1877), 2 P. D. 276; 46 L. J. P. C. 27; 36 L. T. 865; 42 J. P. 148, P. C.; *varying* S. C. *sub nom.* *CLIFTON v. RIDSDALE* (1876), 1 P. D. 316.

*Annotations*:—*As to* (1) *Appl. Tooth v. Power*, [1891] A. C. 284. *Fold*. *Read v. Lincoln*, Bp., [1892] A. C. 614. *As to* (3) *Consd.* *Re Robinson*, *Wright v. Tugwell*, [1897] 1 Ch. 85. *Reid*. *Hoywood v. Manchester*, Bp. (1884), 12 Q. B. D. 404; *Re St. Paul's*, *Carlisle*, [1919] P. 134; *Gore-Booth v. Manchester*, Bp., [1920] 2 K. B. 412. *As to* (5) *Consd.* *It. v. Lincoln*, Bp., [1892] A. C. 614. *As to* (6) *Fold*. *Sarjeant v. Dale* (1879), 43 J. P. 220. *As to* (7) *Fold*. *Sarjeant v. Dale* (1879), 43 J. P. 220. *As to* (8) *Distd.* *Combe v. Edwards* (1877), 2 P. D. 354; *Hughes v. Edwards* (1877), 2 P. D. 361. *Appl.* *Re St. Lawrence*, *Pittington* (1880), 5 P. D. 131. *Fold*. *St. John the Baptist*, *Timberhill* (Vicar, etc.) v. *Rectors, etc., of Same*, [1895] P. 71. *Distd.* *Barsham*, *Suffolk* (Rector, etc.) v. *Parishioners of Same*, [1896] P. 256. *Distd.* *Great Bardfield* (Vicar) v. *All Having Interest*, [1897] P. 185. *Fold*. *Richmond* (Vicar) & *St. Matthias*, *Richmond* (Chapelwardens) v. *All Persons Having Interest, etc.*, [1897] P. 70; *Re St. Anselm*, *Pinney*, [1901] P. 202; *Paignton* (Vicar) v. *All Having Interest*, [1905] P. 111; *St. John the Evangelist*, *Cleveland* (Vicar & Churchwardens) v. *All Having Interest*, [1909] P. 6; *St. Paul*, *Bow Common* (Vicar & Churchwardens) v. *Inhabitants of Same*, [1909] P. 245; *Re Tenbury Parish Church* (1919), 36 T. L. R. 188. *Consd.* *Re St. Luke's*, *Southport* (1920), 36 T. L. R. 733. *Reid*. *Allcroft v. London*, Bp. & *St. Paul's* (Dean & Chapter), *Lighton v. London*, Bp. & *St. Paul's* (Dean & Chapter) (1891), 61 L. J. Q. B. 62; *St. John*, *Pondlebury* (Vicar, etc.) v. *Parishioners of Same*, [1895] P. 178; *St. Paul*, *Bow Common* (1912), 28 T. L. R. 584. *Generally*, *Reid*. *Hudson v. Tooth* (1877), 2 P. D. 125; *Re St. Mark's*, *Marylebone Rd.*, *St. Mark's* (Vicar) v. *St. Mark's* Parishioners, [1898] P. 114; *Davey v. Hinde*, [1901] P. 95; *Davey v. Hinde*, [1903] P. 221; *Markham v. Shirebrook Overseers*, [1906] P. 239; *Re Christ Church*, *Ealing*, [1906] P. 289. *Mentd.* *Howard v. Bodington* (1877), 2 P. D. 203; *Combe v. De La Bere* (1881), 6 P. D. 157; *The Vera Cruz* (No. 2) (1884), 9 P. D. 96; *Fowke v. Berington*, [1914] 2 Ch. 308.

1146. — — — — —.]—(1) Where it is im-

portant to ascertain ancient facts of a public nature, the law permits historical works to be referred to as evidence thereof.

(2) The rule of finality applicable to decisions of the Privy Council in relation to rights of property is not equally binding as regards decisions which relate to ritual & ecclesiastical practice & depend to some extent upon the accuracy of historical investigation.

(3) Although the mixing of wine with water in & as part of the Communion service is against the law of the Church, yet the use of a cup mixed beforehand did not constitute an ecclesiastical offence.

(4) The choir's singing of the hymn "*Agnus Dei*" before & during the reception of the elements was not illegal.

(5) The priest's standing at the northern end of the west side of the table during the whole of that part of the Communion service which intervenes between its commencement & the ordering of the bread & wine before the Prayer of Consecration was not illegal.

(6) The act of washing out the sacred vessels used at the celebration of the Holy Communion with water, & of drinking such water in church after the benediction is pronounced, is not an additional & unlawful ceremony.

(7) It being admitted that two candles, not required for the purpose of giving light, were alight throughout the celebration on the Holy Table without objection on the part of resp., who was officiating as bishop, but there being no evidence either of a ceremonial use of the lights, or that resp. had introduced them as unlawful ornaments:—*Held*: resp. was not responsible therefor, & his making no objection thereto was not an ecclesiastical offence.

(8) Where promoters had established the commission of an ecclesiastical offence, they were not entitled as of right to a monition; but the archbishop was entitled, on being satisfied that the offence would not be repeated, to accept the assurance of future submission.—*READ v. LINCOLN* (Bp.), [1892] A. C. 644; 62 L. J. P. C. 1; 67 L. T. 128; 56 J. P. 725; 8 T. L. R. 763, P. C.

*Annotations*:—*As to* (1) *Consd.* *Fowke v. Berington*, [1914] 2 Ch. 308. *Reid*. *Assheton-Smith v. Owen* (1905), 94 L. T. 42; *Commonwealth Shipping Representative v. Peninsular & Oriental Branch Service*, [1923] A. C. 191. *As to* (5) *Reid*. *Wimbledon* (Vicar & Churchwardens) v. *Eden*, *Re St. Mark's*, *Wimbledon*, [1908] P. 167; *Hendon Parish Church* (1912), 28 T. L. R. 438. *As to* (7) *Consd.* *St. Paul*, *Camden Square* (1897), 14 T. L. R. 156. *Reid*. *Wimbledon* (Vicar & Churchwardens) v. *Eden*, *Re St. Mark's*, *Wimbledon*, [1908] P. 167; *Gore-Booth v. Manchester*, Bp., [1920] 2 K. B. 412.

1147. — — — — — On courts of common law.]—The patron of a benefice presented a clerk to the bishop for institution. The bishop having been informed that the clerk in his former church habitually practised the reservation of the sacrament, the ceremonial use of incense, the use of candles on & above the communion table not required for light, & the wearing of certain eucharistic vestments, inquired of him whether that was the fact, & on his admitting that it was required him to undertake to discontinue those practices. The clerk, who denied the illegality of the practices, declined to give that undertaking, but expressed his willingness to subscribe the declaration of assent set out in Clerical Subscription Act, 1865 (c. 122). The bishop refused to institute him. In an action of *quare impedit*:—*Held*: (1) the bishop was entitled to interrogate the clerk as to his practices & to require him to discontinue them if they were illegal; (2) the ct. had jurisdiction to determine the legality of those

**Sect. 4.—Judicial committee of privy council: Sub-sect. 3. Sects. 5 & 6: Sub-sects. 1 & 2, A.]**

practices, & it was not necessary to send the matter to the Archbishop for trial & certificate; (3) the first three of these practices were illegal; (4) the clerk having refused to discontinue them was not a fit person & the bishop was consequently justified in his refusal to institute him.

(5) It is established law that a presentation need not be by deed; a letter fulfilling the requisites will suffice (LORD COLERIDGE, J.).

(6) Apart from the question whether in a suit of *quare impedit* this ct. of common law is irrevocably bound by those decisions of the Privy Council, which, although of course great weight should be attached to them, I am not prepared to concede, the fact that the Judicial Committee does not think itself bound by its own decisions is an argument to show that neither am I bound by them, although, as I have said, great weight must attach to its authority (LORD COLERIDGE, J.). —GORE-BOOTH v. MANCHESTER (Bp.), [1920] 2 K. B. 412; 89 L. J. K. B. 1123; 123 L. T. 301; 36 T. L. R. 404; *on appeal*, 80 L. J. K. B. 1128, C. A.

—[See, generally, JUDGMENTS.]

**1148. Re-hearing—Whether ordered—By mandamus.**—(1) Where a cause has been brought before the Judicial Committee of the Privy Council on appeal from the Ct. of Arches, & the Judicial Committee has decided in favour of the appeal, at the same time retaining the principal cause, & ordering the unsuccessful party to appear absolutely, subject to the approbation of the King in Council, which approbation has been afterwards given, this ct. cannot, on a suggestion of error in the decision, issue a *mandamus* to the Privy Council to receive a petition for a rehearing of the appeal.

(2) The only instances in which the temporal cts. can interfere to prohibit any particular proceeding in an ecclesiastical suit are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the ct.—*Ex p. SMYTH* (1835), 3 Ad. & El. 719; 1 Har. & W. 128, 417; 4 Nev. & M. K. B. 582; 5 Nev. & M. K. B. 145; 111 E. R. 587.

**Annotations:—***As to* (1) *Reid*, R. v. Canterbury, Archbp. (1848), 11 Q. B. 483. *As to* (2) *Appl.*, *Ex p. Story* (1852), 8 Exch. 195. *Consd.*, *Combe v. Edwards* (1878), 3 P. D. 103. *Reid*, *Backham v. Bluck* (1846), 11 Jur. 325; *Martin v. Mackonochie* (1879), 4 Q. B. D. 697; *St. Magnus*, etc. Parochial Church Council v. London Diocese Chancellor, [1923] P. 38. *Generally*, *Mentz*, *Howard v. Gosset* (1845), 10 Q. B. 359; *Re London Scottish Permanent Bldg. Soc.* (1893), 63 L. J. Q. B. 112.

**1149.** —[See, generally, JUDGMENTS.]—After judgment had been delivered by the Judicial Committee in *Hebbert v. Purchas*, No. 1138, *ante*, but before their report & recommendation had been presented, or any order made thereon by Her Majesty in Council, resp. presented two petitions addressed to Her Majesty in Council, stating that the appeal had been made *ex parte* by reason of his want of pecuniary means to employ counsel, & his own inability to argue the case; & that, as he alleged, the judgment of the Judicial Committee in the appeal was at variance with former decisions of the Judicial Committee; he prayed for a rehearing of the appeal, & that no report or recommendation might be made thereon to Her Majesty until such re-hearing had been had. Both petitions having been specially referred by Her Majesty to the Judicial Committee, their lordships, after hearing counsel, declined to entertain the matter of the petitions, or to allow any doubt to be thrown on the finality of the decisions of the

Judicial Committee; & dismissed the petitions with costs.—*HEBBERT v. PURCHAS* (1871), L. R. 3 P. C. 664; 7 Moo. P. C. C. N. S. 551; Bro. Ecc. Rep. 162; 40 L. J. Ecc. 55; 17 E. R. 208, P. C.; *subsequent proceedings*, *HEBBERT v. PURCHAS* (1872), L. R. 4 P. C. 301, P. C.

**Annotations:—***Reid*, *Venkata Narasimha Appa Row v. Court of Wards, Venkata Ramalakshmi Garu v. Gopala Appa Row, Ex p. Gopala Appa Row* (1886), 11 App. Cas. 660; L. C. C. v. Dundas, [1904] P. 1.

**SECT. 5.—COURT UNDER BENEFICES ACT, 1898.**

**1150. Functions of judge & Archbishop.**—(1) In an appeal under Benefices Act, 1898 (c. 48), against the inhibition by the bishop of the diocese of an incumbent of a parish in the diocese as to whom the majority of a commission under the Pluralities Acts & the above Act has reported that the ecclesiastical duties of the benefice had been inadequately performed owing to the negligence of the incumbent & against the appointment by the bishop of a curate to perform the duties of the benefice, applt. begins.

(2) The incumbent of a parish church was inhibited by the bishop of the diocese, in which the parish church was situate, from performing until further notice any of the ecclesiastical duties of the benefice after the majority of the comrs. appointed on a commission issued under the Pluralities Acts & Benefices Act, 1898 (c. 48), had reported that the ecclesiastical duties of the benefice had been inadequately performed, & that that was due to the negligence of the incumbent. The bishop further appointed a curate to perform the duties of the benefice. Against the inhibition & against the order of the bishop so appointing a curate applt. appealed to this ct. The appeal was heard before the Archbishop of Canterbury, within whose province was the diocese of the bishop by whom the inhibition had been issued, & LORD COLERIDGE, J., the judge appointed to be judge of the ct. constituted under the Benefices Act, 1898 (c. 48); & after witnesses had been examined orally on behalf of applt. & of resp., the bishop of the diocese, the judge, after observing that he was the sole judge of law & fact, & in discharging the function laid upon him had to find whether & in what respect applt. had been negligent by causing the ecclesiastical duties of the benefice to be inadequately performed, whilst the Archbishop had to determine whether or not, having regard to the findings of the judge, applt. should be inhibited & whether a curate should or should not have been appointed, decided that applt. had been negligent in the performance of the ecclesiastical duties of the benefice, comprising in those words the observance of the promises as to conduct which applt. had solemnly made at his ordination in the following matters: i.e. that he had grossly abused the legitimate use of the pulpit by, in his sermons, denouncing persons by name & holding them up to the ridicule, contempt & opprobrium of the congregation; had habitually used foul language in the parish; had been proved in several instances to have so conducted himself with intemperate language & violent & threatening gestures as calculated to undermine the whole influence which any person in Holy Orders should wield; & had been convicted of an assault. Thereupon the Archbishop in his discretion pronounced that the appointment of the curate had been rightly made & that applt. should be inhibited from the performance until further notice of all the ecclesiastical duties of the benefice.

(3) It is not necessary to render a report of the majority of the comrs. on a commission under Pluralities Acts & Benefices Act, 1898 (c. 48), valid that the draft report should have been submitted to those comrs. in the minority who dissent from the conclusion come to by the majority of the comrs. Any objection founded on the draft report not having been sent to all the comrs. is a formal objection within Benefices Rules, 1899, r. 43, & is therefore bad.

(4) Observations as to the proper course to be taken where a minority of the comrs. on a commission under Pluralities Act, 1838 (c. 106), dissents from the majority of the comrs.—*RICE v. OXFORD* (Bp.), [1917] P. 181; 117 L. T. 383; 33 T. L. R. 421.

**1151. Practice & procedure—Who begins.]—***RICE v. OXFORD* (Bp.), No. 1150, *ante*.

**1152. — Evidence—Oral evidence.]—***RICE v. OXFORD* (Bp.), No. 1150, *ante*.

**1153. — Objection that report not sent to dissenting commissioner—Formal objection—Benefices Rules, 1899, r. 43.]—***RICE v. OXFORD* (Bp.), No. 1150, *ante*.

## SECT. 6.—JURISDICTION.

### SUB-SECT. 1.—IN GENERAL.

**1154. How controlled by courts of law.]—***ST. BALAUNCE'S PARISH CASE* (1619), *Palm.* 50; 81 E. R. 973.

*Annotation:—**Reid. Ex p. Titchmarsh* (1845), 9 Jur. 159.

**1155. —.]—***Qu.*: whether Ecclesiastical Courts Act, 1813 (c. 127), s. 7, which gives power to justices to enforce the payment of a sum not exceeding £10 due upon a church rate, where neither the validity of the rate nor the liability of the party has been questioned, takes away the jurisdiction of the ecclesiastical ct. in such cases.

But, assuming that it does, it seems that it is still competent to institute a suit in that ct. for payment of a sum under £10 due upon a church rate, because, until deft. has appeared in such a suit, there may be no means of knowing whether the validity or liability is in dispute or not. Therefore, where a *significavit*, as recited in the return to a writ of *habeas corpus*, stated that prisoner had been pronounced guilty of contumacy, for non-payment of a sum of £2 5s. to certain churchwardens, with their costs of suit, pursuant to a monition duly issued in a certain cause of subtraction of church rate, the proceedings wherein were carried on in pain of the contumacy of prisoner, who, though duly cited with the usual intimation, had not appeared, an objection, that the cause was not sufficiently described, for want of an averment that the validity of the rate or the liability of the party was in dispute, was overruled.

The object of the control which this ct. has over the ecclesiastical cts. by means of the writ of *habeas corpus* is to keep those cts. within the jurisdiction which the law has assigned to them, & not to correct any error into which they may fall in the exercise of it; & therefore, objections taken to a *significavit* upon the ground that it did not sufficiently show that deft. had been regularly cited, & upon the further ground, that the ecclesiastical ct. was not, according to its own practice, authorised to proceed to judgment, upon the merits, against a party who had never appeared, were overruled.—*Re BAINES* (1810), *Cr. & Ph.* 31; 10 L. J. Ch. 108; 4 Jur. 1104; 41 E. R. 400, L. C.

*Annotations:—**Reid. Richards v. Dyke* (1842), 3 Q. B. 256. *Mentd.* *Dale's Case*, *Knaght's Case* (1881), 6 Q. B. D. 376; *Dean v. Green* (1882), 8 P. D. 79; *Ex p. Cox* (1887), 19 Q. B. D. 307.

**1156. Ouster—By statute—Giving remedy at common law—Alteration of offence & punishment.]**

—(1) A statute simply giving remedy at common law for a thing before recoverable in the spiritual ct. only, does not take away the jurisdiction of the spiritual ct. A statute altering the nature of the offence & inflicting a new penalty does.

(2) A commitment under 27 Hen. 8, c. 20, for a contempt in a suit in the spiritual ct. of ecclesiastical dues, must specify the kind of dues for which the party was sued.—*R. v. SANCHEZ* (1698), 1 Ld. Raym. 323; 12 Mod. Rep. 105; Holt, K. B. 657; 91 E. R. 1111.

*Annotations:—**Generally, Mentd.* *R. v. Fowler* (1700), 1 Ld. Raym. 586; *R. v. Owen* (or *Dovaston*) (1767), 4 Burr. 2095.

### SUB-SECT. 2.—EXTENT OF.

#### A. In General.

**1157. General rule.]—***WELCH v. LAKE* (1666), 1 Sid. 281; 82 E. R. 1106.

**1158. —.]—**A judge of an ecclesiastical ct. having acted *ad instantiam partis*, & not *ex mero motu*, cannot be cited to answer to an appeal.

(2) A plurality of persons joined in one citation is irregular; but an objection thereto after issue joined is not fatal; if taken before, it would probably be sustained.

(3) Judges of Ecclesiastical Cts. have no original jurisdiction, all they have is derivative, the extent of their authority is specified in their patents, they are bound to act in accordance with the power therein given them; if they exceed that authority, there must be a mode of correcting the undue exercise, they must be responsible to a superior ct. (*SIR HERBERT JENNER FUST*).

(4) When there has been an absolute appearance, & no objection taken till after issue joined, the libel given in, & witnesses examined, such a citation has not been pronounced a nullity (*SIR HERBERT JENNER FUST*).—*FELL v. LAW* (1848), 1 Rob. Eccl. 726; 6 Notes of Cases, 209; 11 L. T. O. S. 313; 12 Jur. 608; 163 E. R. 1193; *subsequent proceedings, sub nom.* *FELL v. BOND* (1849), 1 Rob. Eccl. 740.

**1159. How ascertained—Determination by common law court.]** (1) The construction of Act of Supremacy, 1558 (c. 1), & of the letters patent of high commission in ecclesiastical causes, founded upon that Act, belongs to the judges of the common law.

(2) When there is any question concerning what power or jurisdiction belongs to ecclesiastical judges, in any particular case, the determination of such question belongs to the judges of the common law.

(3) If a counsellor at law, in his argument, scandals the King or his govt. temporal, or ecclesiastical, it is a misdemeanour & contempt; but he is not punishable in ct.-christian: but if he publish any heresy, schism or erroneous opinion in religion, he may be convicted for it before the ecclesiastical judges.—*FULLER'S CASE* (1607), 12 Co. Rep. 41; Noy. 127; 77 E. R. 1322.

*Annotation:—**Generally, Mentd.* *Townsend v. Hughes* (1677), 2 Mod. Rep. 150.

**1160. Matter not taking place during Divine Service.]—***PARLOR v. BUTLER* (1596), *Moore*, K. B. 400; 72 E. R. 694.

*Annotation:—**Fold.* *Martin v. Mucknochie* (1878), 3 Q. B. D. 730.

**1161. Pension—Suit by parson—Pension ordained by ordinary as judge.]—**A pension ordained by the ordinary as judge, or commencing by his grant, may be sued for in the spiritual ct.—

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**COLLIER'S CASE** (1599), Cro. Eliz. 675; 78 E. R. 912.

**1162.** ——— Not granted or confirmed by ordinary.]—**PARKER v. CLERK**, No. 946, *ante*.

——— Pension by prescription.]—*See Nos.* 1256, 1257, *post*.

**1163.** ——— Payment out of rectory impropriate.]—The high comrs. have not authority or commission to order the payment of a pension out of a rectory impropriate, & Act of Supremacy, 1558 (c. 1), does not extend to such a case.—**ROPER'S CASE** (1607), 12 Co. Rep. 45; cited in Vaugh. 154; 77 E. R. 1326.

*Annotations:—Mentd.* Bushell's Case (1670), 6 State Tr. 999; Wood's Case (1771), 3 Wils. 172.

*Compare No.* 1257, *post*.

**1164. Assault—On clerk.]**—If a clerk libel in the spiritual ct. for a common assault, a prohibition shall go.—**LOVE v. PRIN** (1600), Cro. Eliz. 753; 78 E. R. 985.

**1165. Damages—Power to award.]**—The spiritual ct. may award costs, but not damages.—**LARGE v. ALTON** (1618), Cro. Jac. 462; 79 E. R. 395.

*Annotation:—Refd.* Wilson v. Greaves (1757), 1 Burr. 240.

**1166. Costs—Power to award.]**—**LARGE v. ALTON**, No. 1165, *ante*.

**1167. ——— Discretion—Subject to appeal.]**—(1) Ordinaries at the present day are bound not to issue faculties appropriating pews to individuals but under special circumstances.

(2) A possessory right to a pew is only co-extensive in duration with actual possession, which last, if abandoned, the right itself wholly ceases & determines.

(3) Reparation from time to time is necessary to be pleaded & proved, in order to make a prescriptive title to a pew.

(4) A pew can only be annexed by prescription to a house; it cannot be to lands. Where so annexed to a house, the occupier of the house, for the time being, is entitled to the use of the pew; not the owner of the estate.

(5) A faculty is good & valid, if once issued, even against the ordinary himself (**SIR JOHN NICHOLL**).

(6) Faculties, generally, are matters so much within the discretion of the local judge that I should scruple to reverse his sentence so far, for I should be unwilling to disturb the judgment of any local ordinary in a matter of this nature, unless it could be clearly shown, that it either involved the plain violation of some private right, or would give rise, actually or probably, to some considerable degree of general inconvenience (**SIR JOHN NICHOLL**).

(7) Costs, too, are pretty much within the discretion of the ct. that awards them; so that also I see no ground for reversing that part of sentence appealed from (**SIR JOHN NICHOLL**).—**WOOLLOCOMBE v. OULDRIDGE** (1825), 3 Add. 1; 162 E. R. 381.

*Annotations:—As to (1) Refd.* Eld. v. Perry (1865), 29 J. P. 627. *As to (2) Refd.* Horsfall v. Holland & Woolley (1859), 6 Jur. N. S. 278. *As to (4) Refd.* Horsfall v. Holland & Woolley (1859), 6 Jur. N. S. 278.

**1168. Trust—Whether examinable.]**—A trust is not examinable in the spiritual ct.—**MILLER'S CASE** (1674), 1 Freem. K. B. 283; 80 E. R. 204; *sub nom.* **MILLER & MILLER v. POTTER**, 3 Keb. 358.

**1169. Endowment.]**—**R. v. REEVES** (1734), Kel. W. 196; 25 E. R. 566.

**1170. Simony.]**—The ecclesiastical cts. have jurisdiction to try questions of simony.—**DOBIE v. MASTERS** (1820), 3 Phillim. 171; 161 E. R. 1291.

**1171. Validity of order made by ecclesiastical commissioners—Power of question.]**—Under Church Buildings Acts, 1819 (c. 134), s. 25, & 1822 (c. 72), s. 26, if a parish wishes for an extension to be made to its churchyard, it is directed to express its desire to the Ecclesiastical Comrs., who may, upon the same being notified to them, authorise the parish to purchase the land by means of rates to defray the expenses, etc.:—*Held*: a resolution passed at a vestry meeting convened for the purpose, but which resolution had been passed by a majority of the meeting, when a poll, which had been demanded by a dissentient minority, was refused, did not legally express the desire of the parish; & the order of the comrs. founded thereon, & all that had been done under that order, including a church rate which had been laid in pursuance of it, were illegal & void.

The learned judges seem to have thought that the Ecclesiastical Ct. could not look behind the order of the comrs., & were, therefore, bound to regard it as effectual. But the plain words of Church Building Act, 1822 (c. 72), s. 26, empowers the comrs. to act only in cases where the parish is desirous that they should act. The desire of the parish legally expressed, appears to us a condition precedent, without which any order or authority of the comrs. is devoid of any legal force (**WILLES, J.**).—**WHITE v. STEELE** (1862), 12 C. B. N. S. 383; 31 L. J. C. P. 265; 6 L. T. 686; 8 Jur. N. S. 1177; 142 E. R. 1191.

*Annotations:—Distd.* Ripplin v. Bastin (1869), L. R. 2 A. & E. 386. *Mentd.* R. v. How (1863), 33 L. J. M. C. 53; London Corp'n. v. Cox (1867), L. R. 2 H. L. 239.

**Vestry meetings.]**—*See Nos.* 513–520, *ante*

### B. Over What Persons.

**1172. Clergy—Failure to perform Divine Service.]**—No action on the case lies against a parson bound to celebrate Divine Service, etc., in a chapel, within a manor to the lord, *hominibus, tenentibus, & servientibus suis*, for a breach of his duty. The proper remedy is to sue in the spiritual ct.; but if the chapel had been private only for the lord, his servants & his family, within the manor, there the lord & the lord only might have an action on the case.—**WILLIAMS'S CASE** (1502), 5 Co. Rep. 72 b; 77 E. R. 163.

*Annotations:—Consd.* Jones v. Stone (1700), 1 Ld. Raym. 578. *Mentd.* Marys' Case (1612), 9 Co. Rep. 111 b; Fowler v. Sanders (1617), Cro. Jac. 446; Dewell v. Sanders (1618), Cro. Jac. 490; Jevesson v. Moor (1699), 12 Mod. Rep. 262; Ashby v. White (1703), 2 Ld. Raym. 938; Kendall v. John (1708), Fortes. Rep. 104.

**1173. ——— In chapel.]**—**JONES v. STONE**, No. 1236, *post*.

**1174. ——— Ministration without licence.]**—*Qu.*: whether the spiritual ct. can proceed against a clergyman for performing divine service & preaching without a licence from the bishop.—**WESTMINSTER (DEAN & CHAPTER) v. HERBERT** (1720), 11 Mod. Rep. 315; 88 E. R. 1062; *sub nom.* **HERBERT v. WESTMINSTER (DEAN & CHAPTER)**, Fortes. Rep. 345.

**1175. ———.]**—**KEATE v. LONDON (BP.)**

**PART IV. SECT. 6, SUB-SECT. 2.—B.**  
p. *Ecommunication of lay attendant—Injunction to restrain.*—An attendant at an Episcopal church, &

one of the lay members of the synod therefrom, filed a bill against the incumbent of the church praying, amongst other things that deft. might be restrained from refusing to allow

pltf. to partake of the Lord's Supper, & from suspending or excommunicating pltf. as a member of that congregation or church:—*Held*: although the facts were as alleged by the bill—though

(Prior to 1808), 1 Burn's Eccl. Law 9th ed., p. 306 a.

*Annotation*.—*Reid. Barnes v. Shore* (1846), 8 Q. B. 640.

**1176.** — *Illegal marriage.*—Prohibition to a suit in spiritual ct. for marrying without banns or licence.—*CAMPBELL v. ALDRICH* (1757), 2 Wils. 79; 95 E. R. 697.

*Annotation*.—*Consd. Wynn v. Davies & Weaver* (1835), 1 Curt. 69.

**1177.** — ———.] — *WYNN v. DAVIES & WEEVER*, No. 2725, *post*.

**1178.** — *Conduct creating scandal.*—The Ecclesiastical Ct. of Jersey has jurisdiction, under Canons 17 & 40, to entertain a suit against a clergyman, charging him with certain acts of conduct, "which created a scandal against morality & religion, & especially against the established church of which he is a minister," though the alleged acts, if proved, would constitute a criminal offence, over which the ecclesiastical ct. has no jurisdiction; the gravamen of the charge being, the scandal induced by the reports of the acts in question, for which a clergyman is amenable to his ordinary, & not their criminality, for which he is liable to the criminal tribunal of the island.—*JERSEY (DEAN) v. — (RECTOR)* (1840), 3 Moo. P. C. C. 229; 13 E. R. 97, P. C.

*Annotations*.—*Consd. Burder v. Hodgson* (1814), 3 L. T. O. S. 242. *Reid. Pusey v. Jowett* (1863), 1 New Rep. 488; *Elphinstone v. Purchas* (1870), L. R. 3 P. C. 245.

— *Under Church Discipline Act, 1840 (c. 86), & Clergy Discipline Act, 1892 (c. 32).*—*See Sect. 9, sub-sects. 1 & 3, post.*

**1179.** *Diocesan chancellors—Right to hold office.*—*ROBOTHAM v. TREVOR*, No. 215, *ante*.

**1180.** — ———.] — *SUTTON'S CASE*, No. 213, *ante*.

— ———.] — *See, further, Part III., Sect. 5, sub-sect. 3, A., ante.*

**1181.** *Lalty—Failure to attend church.*—Persons committed for absenting themselves from church admitted to bail after the indictment found.—*LEE'S CASE* (1640), Cro. Car. 593; 79 E. R. 1109.

**1182.** — ———.] — *ANON.* (1674), Freem. K. B. 286; 80 E. R. 206.

**1183.** — ———.] — *Failure to receive sacrament.*—*BRITTON v. STANDISH*, No. 1033, *ante*.

**1184.** — *Benefice obtained under forged letters of ordination.*—*SLATER v. SMALEBROOK* (1664), 1 Sid. 217; 82 E. R. 1066; *sub nom. SLADER v. SMALEBROOKE*, 1 Lev. 138; *sub nom. SMALLBROOK v. SLAUGHTER*, 1 Keb. 721, 762.

*Annotations*.—*Consd. Free v. Burgoyne* (1828), 2 Bl. N. S. 65. *Reid. St. Davids, Bp. v. Lucy* (1698), 1 Ld. Raym. 447; *Townsend v. Thorpe* (1727), 2 Ld. Raym. 1507; *Burder v. —* (1844), 3 Curt. 822; *R. v. Hodgson* (1856), 7 Cox, C. C. 122.

— *For falsely swearing affidavit—For issue of marriage licence.*—*See No. 1110, ante.*

— *Lay rector—Non-repair of chancel.*—*See Nos. 473, 474, ante.*

— *Churchwardens.*—*See Part III., Sect. 7, sub-sect. 6, ante.*

— *Parish clerks.*—*See Part III., Sect. 7, sub-sect. 8, A., ante.*

**1185.** *Party not appearing.*—(1) A writ *de contumace capiendo*, under Ecclesiastical Courts Act, 1813 (c. 127), s. 1, for disobeying the monition of the Arches Ct. may issue on a *significavit* from the official principal. (2) If the writ purport to have issued against deft. for not paying a sum of money & costs according to the monition of the Arches

Ct., the proceedings being carried on in pain of the contumacy of deft. duly cited to appear in the cause, etc., with the usual intimation, but not appearing this ct. will not discharge him on *habeas corpus*. For a practice of the ecclesiastical ct. to give judgment against a party on such non-appearance may be legal; & if no such practice exists the party should appeal. (3) The writ shows sufficiently that the ecclesiastical ct. had jurisdiction, if it state that deft. was contumacious in not paying the churchwardens of St. M. the sum of £2 5s. "rated & assessed" upon him, & costs, pursuant to a monition, etc., "in a certain cause or business of subtraction of church rate" depending, etc. (4) The form of a writ *de contumace capiendo*, given by sched. B. of the above Act, addressed "To the sheriff of —," describes the contumacious party as "— of —, in your county of —."

Upon motion for discharge on *habeas corpus*:—*Held*: the alleged variance could not be taken advantage of on a return setting out the writ, though the motion was supported by an affidavit verifying a copy of the writ; for that the proper course was to move that the writ itself might be set aside for irregularity. *Qu.*: whether a writ describing deft. as "W. B. of the Market Place, in the borough of Leicester, hatter, a parishioner & inhabitant of the parish of St. M., in the said borough of L., in the county of Leicester," sufficiently complies with the statute. (5) It is no objection to the writ that it purports to have been delivered of record to the sheriff in the Ct. of Q. B. but does not appear to have been "opened" at that time, pursuant to 5 Eliz. c. 23, s. 2.—*R. v. BAINES* (1840), 12 Ad. & Ml. 210; Arn. & H. 110; 4 Per. & Dav. 302; 5 J. P. 94; 113 E. R. 792; *sub nom. RE BAINES*, 10 L. J. Q. B. 34; 5 Jur. 337; *subsequent proceedings, sub nom. RE BAINES*, Cr. & Ph. 31, L. C.

*Annotations*.—*As to (1) Consd. Ke v. Dale, R. v. Ponzeance* (1880), 45 J. P. 125. *Reid. Martin v. Mucknochie* (1878), 3 Q. B. D. 730. *As to (3) Reid. Richards v. Dyke* (1842), 3 Q. B. 256. *Generally, Reid. L. C. v. Dundas*, [1904] P. 1. *Mentd. Carus Wilson's Case* (1845), 7 Q. B. 984; *Re Mayo Petn.* (1852), 20 L. T. O. S. 157.

*C. As regards Church Property.*

**1186.** *Church repairs.*—*JEFFREY'S CASE*, No. 1007, *ante*.

**1187.** — *Liability of parishioners—Enforcement.*—*STEWART v. FRANCIS*, No. 1028, *ante*.

**1188.** — ———.] — *FRANCIS v. STEWART*, No. 1029, *ante*.

**1189.** — ———.] — *VELEY v. BURDER*, No. 1016, *ante*.

— *Chancel—Liability of lay rector.*—*See Nos. 473, 474, ante.*

**1190.** *Parishes—Determination of boundaries.*—If the spiritual ct. attempt to try the boundaries of parishes, a prohibition lies.—*STRANSHAM v. COLLINGTON* (1591), Cro. Eliz. 228; 78 E. R. 484. *Annotation*.—*Mentd. Chatfield v. Fryer* (1815), 1 Price, 253.

**1191.** — ———.] — *Bounds of villis are triable by the ecclesiastical ct. but not of parishes.*—*PETLER v. YALEMAN* (1662), 1 Lev. 78; 83 E. R. 300; *sub nom. BUTLER v. YATEMAN*, 1 Keb. 360; 1 Sid. 89.

*Annotation*.—*Consd. Rutland v. Bagshaw* (1850), 14 Q. B. 869.

**1192.** — *Existence.*—A declaration in prohibition stated that before & at the time of exhibiting the libel after mentioned, plff. was not

denied by the answer—this ct. had not any jurisdiction to enforce the claim of plff., as no civil right of plff. had been invaded, the office of lay representative giving only an ecclesiastical, not a civil status.—*DUNNET v. FORNERI* (1877),

25 Gr. 199; *consd. JOHNSON v. GLEN*, 26 Gr. 162.—*CAN.*

**PART IV. SECT. 6, SUB-SECT. 2.—C.**  
*q. Churchyard—Erection of school-house.*—Application by a parishioner

for an injunction to restrain a rector from encroaching upon the churchyard & parish burial-ground, without any faculty or license from the ordinary for that purpose, by building a school-house thereon, refused; it appearing



*Sect. 6.—Jurisdiction: Sub-sect. 2, C. & D.]*

impropriator or proprietor of the tithes of T., that T. was not a parish, & that the chancel did not belong to the impropriate rectory in the libel mentioned, nor was plff. in possession of the chancel:—*Held*: the question whether T. was or was not a parish was not properly triable in the spiritual ct., & the allegation to that effect in the declaration was material, & if admitted, would entitle plff. to judgment.—*RUTLAND (DUKE) v. BAGSHAW* (1850), 14 Q. B. 869; 19 L. J. Q. B. 234; 15 L. T. O. S. 297; 14 J. P. 480; 14 Jur. 715; 117 E. R. 334.

*Annotation*:—*Refd.* London Corpn. v. Cox (1867), L. R. 2 H. L. 239.

**1193. Waste—Cutting down trees.]—SALISBURY'S (BP.) CASE** (1614), Godb. 259; 78 E. R. 151; *sub nom.* STOCKMAN v. WHITHER, 1 Roll. Rep. 86; *sub nom.* ANON., 2 Bulst. 279, n.

*Annotations*:—*Refd.* Jefferson v. Durham, Bp. (1797), 1 Bos. & P. 105; ROSS v. Adcock (1868), L. R. 3 C. P. 655; COMBE v. De la Bere (1881), 6 P. D. 157.

**1194. Pew—Right to.]—HARRIS v. WISEMAN** (1621), Win. 19; 124 E. R. 16.

**1195. ———.]—LANGLEY v. CHUTE** (1678), T. Raym. 246; 83 E. R. 126.

**1196. ——— Faculty.]—**A prohibition lies to the spiritual ct. to stay proceedings for a faculty for a seat in a church.—*SWETNAM v. ARCHER* (1724), 8 Mod. Rep. 338; 88 E. R. 241; *sub nom.* ARCHER v. SWETNAM, Portes. Rep. 346.

*Annotations*:—*Refd.* Knapp v. St. Mary's, Willesden (1851), 2 Rob. Eccl. 358; Bathurst v. Cheneester Parish, [1921] P. 381.

**1197. ——— Repair by churchwardens.]—COLEBACH v. BALDWIN** (1692), 2 Lut. 1032; 125 E. R. 574.

**1198. ——— Allotment—Place other than legally consecrated building.]—**(1) Where an old parish church is pulled down & rebuilt on the same site, the new building does not become a parish church without consecration & the Ecclesiastical Ct. has no jurisdiction to entertain a suit with respect to the pews or seats in such a building. (2) *Semble*: dedication, which includes consecration, consists, first, in a gift of property to the service of God; secondly, in the acceptance of that gift by means of the bishop; thirdly, in a declaratory sentence that the property is accepted & set apart for God's service.—*BATTISCOMBE v. EVE* (1863), 1 New Rep. 296; 7 L. T. 697; 27 J. P. 232; 9 Jur. N. S. 210. *Annotation*:—*As to* (1) *Refd.* Parker v. Leach (1866), L. R. 1 P. C. 312.

**1199. Bells—Restriction of ringing.]—**ST. JUDE'S, SOUTH KENSINGTON (VICAR & CHURCHWARDENS) v. ST. JUDE'S, SOUTH KENSINGTON (PARISHIONERS), TOPHAM INTERVENING, No. 1732, *post*.

**1200. Churchyard—Nuisance in.]—QUILTER v. NEWTON** (1690), Carth. 151; Holt, K. B. 592; 90 E. R. 693.

*Annotations*:—*Consd.* Marriott v. Tarpley (1838), 9 Sim. 279. *Refd.* Pawson v. Scott (1755), Say. 176; St. Stephen, Walbrook (Rector & Churchwardens) & Grocers Co. v. Sun Fire Office Trustees (1883), Trist. 103; Batten v. Gedye (1889), 41 Ch. D. 507; Leo v. Hawtrey, [1893] P. 63.

**1201. ——— Determination of boundaries.]—**Bounds of the churchyard not triable in the spiritual ct.—*PEW v. CRESWELL* (1735), 2 Stra. 1013; 93 E. R. 1002.

**1202. ——— Erection of tombs without authority.]—**Proceedings against a person for erecting tombs

in the churchyard without due authority, sustained.—*BARDIN v. CALCOTT* (1789), 1 Hag. Con. 14; 161 E. R. 459; *sub nom.* BURTON & EDWARDS v. CALCOTT, cited 3 Phillim. at p. 90.

*Annotations*:—*Consd.* Sanders v. Head (1843), 3 Curt. 565. *Refd.* Wilson v. M'Math (1819), 3 B. & Ald. 244, n.; Kellett v. All of St. John's, Burscough Bridge (1916), 32 T. L. R. 571. *Refd.* McGough v. Lancaster Burial Board (1888), 36 W. R. 822.

**Application to secular purposes.]—**See BURIAL, Vol. VII., pp. 534, 556, Nos. 144–149, 329.

**1203. Tithes—Dispute between rector & vicar.]—**Where the question is, whether the rector or vicar be intitled to tithes, no prohibition lies.—*DRAKE v. TAYLOR* (1718), 1 Stra. 87; 93 E. R. 401.

*Annotation*:—*Fold.* Cheeseman v. Hoby (1757), Willes, 680.

**1204. ——— Right to tithes admitted.]—**Where the right to tithes is admitted, & a question arises between the rector & vicar to whom they are payable, that question is triable in the spiritual ct.; & consequently the common law cts. will not grant a prohibition.—*CHEESEMAM v. HOBV* (1757), Willes, 680; 125 E. R. 1382.

**1205. Title deeds to advowson—Abstraction from church.]—**Prohibition to stay a suit in the spiritual ct. for breaking open a chest in the church, & taking away the title deeds to the advowson.—*GARDNER v. PARKER* (1791), 4 Term Rep. 351; 100 E. R. 1059.

**1206. Churchway—Interference.]—**BATTEN v. GEDYE, No. 465, *ante*.

*D. Matter Cognisable in Court of Law.*

**1207. General rule—Matters cognisable at law incidental.]—**Spiritual ct. may proceed upon an Act, or other temporal matter incident, as long as they proceed according to the rules of common law.—*JUXON v. BYRON (LORD)* (1672), 2 Lev. 64; 83 E. R. 451.

*Annotations*:—*Fold.* Full v. Hutchins (1776), 2 Cowp. 422. *Consd.* Gould v. Gapper (1804), 5 East, 345. *Refd.* Home v. Camden (1795), 2 Hy. Bl. 533.

— — — — — *See, also*, No. 1220, *post*.

**1208. ———.]—**Where there is remedy at law the spiritual ct. ought not to proceed, & this case depends upon a contract & retainer, which is triable at law (*per cur.*).—*DAVIES v. WILLIAMS* (1724), Bunb. 170; 145 E. R. 636.

**1209. ———.]—**If the ct. can see, upon the face of the proceedings in the ecclesiastical ct., that matters of purely temporal cognisance, as parochiality, & the existence of a custom, are put in issue, prohibition will be granted.

The question is purely of temporal cognisance, & to be decided according to the rules of common law (LORD DENMAN, C.J.).—*DOLBY v. REMINGTON* (1846), 9 Q. B. 179; 15 L. J. Q. B. 326; 7 L. T. O. S. 252; 10 J. P. 406; 10 Jur. 920; 115 E. R. 1242.

*Annotation*:—*Refd.* Rutland v. Bagshaw (1850), 14 Q. B. 869.

**1210. Alteration of record of ecclesiastical court.]—**Altering a record of the Spiritual Ct. is an offence of temporal cognisance, for which an action on the case will lie.—*KENTON v. WALLINGER* (1601), Cro. Eliz. 838; 78 E. R. 1064.

**1211. Institution—After induction.]—**A bishop sued in the Ct. of Audience for the cancellation of an institution, after induction had. Prohibition granted, for after induction the institution is not examinable in the Ct. Christian, but by a *quare impedit*.—*HUTTON'S CASE* (1615), Hob. 15; Lat.

that although no faculty had been formally obtained, the bishop was, in fact, a consenting party; & that from the condition of the proposed site, no

irreparable injury could be done; the Ecclesiastical Ct. having the proper authority, *ratione loci*, to have the building removed, if unlawfully erected,

& to punish the person guilty of erecting it.—*FITZWILLIAM (EARL) v. MOORE* (1841), 31 Eq. R. 615; Fl. & K. 287.—*IR.*

116; 80 E. R. 106; *sub nom.* ROWTH v. CHESTER (Bp.), Moore, K. B. 861.

*Annotations* :—*Consd.* Martin v. Mackonochie (1878), 3 Q. B. D. 730. *Refd.* Clerk v. Andrews (1839), 1 Show. 9. *Mentd.* Wrighton v. Browne (1885), 3 Lev. 211; Thornby v. Fleetwood (1720), 1 Stra. 318.

1212. ———.]—MIDDLETON v. LAWTE (1617), Moore, K. B. 879; 72 E. R. 970.

1213. ———.]—OLIVER v. HUSSEY (1621), Lat. 205; 82 E. R. 348.

1214. *Lease—Validity.*—TIRRELLS' CASE (1623), Benl. 141; 73 E. R. 997.

1215. ——— *Obligation to renew.*—The Bishop of W. being lord of the manor of A. in 1695 granted, under an Act for that purpose, a lease for three lives at a certain rent. Since then a renewal had taken place at three different times, the last in 1807. In 1830 one life only remained to continue this last lease. Application was then made to the present bishop to renew, & upon a question as to whether the Act was obligatory to renew upon every bishop *in perpetuum* :—*Held* : such a question was a purely legal one, & cognisable only in a ct. of law.—BATTERSHILL v. WINCHESTER (Bp.) (1845), 5 L. T. O. S. 283.

1216. *Interpretation of statutes.*—WEEKES v. TRUSSELL (1664), 1 Sid. 181; 82 E. R. 1044.

1217. ——— *Concerning spiritual matters.*—The Archbishop of C. cited one dwelling in Essex, for subtraction of tithes growing in Essex, to the Arches Ct., which ct. is held in London, & is the ct. of a peculiar jurisdiction of the Archbishop of C. called a deanery, & exempted from the authority of the Bishop of London :—*Held* : (1) all Acts of Parliament are parcel of the laws of England, & shall be expounded by the judges of the laws of England, & not by the civilians & canonists, although the Acts concern ecclesiastical & spiritual jurisdiction. (2) The Archbishop of C. is restrained by 23 Hen. 8, c. 9, from citing any one out of his own diocese, or his peculiar jurisdiction, although he holds his Ct. of Arches within London. (3) Prohibition lies against judges who proceed in cases where they are prohibited by Act of Parliament. Prohibition granted.—PORTER & ROCHESTER'S CASE (1608), 13 Co. Rep. 4; 77 E. R. 1416.

*Annotations* :—*As to* (3) *Refd.* Selby's Case (1679), 1 Freem. Ch. 299; *Read* v. Lincoln, Bp. (1889), 14 P. D. 88. *Generally, Mentd.* It. v. Oxenden (1691), 1 Show. 217.

1218. ———.]—ANON. (1641), March, 90, pl. 148; 82 E. R. 425.

1219. ——— *Arising incidentally.*—Where the spiritual ct. incidentally determines any matter of common law cognisance, such as the construction of an Act of Parliament, otherwise than the common law requires, prohibition lies after sentence; although the objection do not appear upon the face of the libel, but is collected from the whole of the proceedings below.—GOULD v. GAPPER (1804), 5 East, 345; 1 Smith, K. B. 528; 102 E. R. 1102.

*Annotations* :—*Obtd.* Blunt v. Harwood (1838), 8 Ad. & El. 610. *Consd. & Exptd.* Veley v. Burder (1841), 12 Ad. & El. 265. *Consd.* Mackonochie v. Penzance (1881), 6 App. Cas. 424. *Refd.* Hall v. Maule (1838), 7 Ad. & El. 721; Gorham v. Exeter, Bp. (1850), 15 Q. B. 52; West Peckham (Vicar & Churchwardens), Dalison Intervening v. Geary (1889), Trist, 189; It. v. Chester, Bp. (1901), 17 T. L. R. 533; R. v. Tristram, (1902) 1 K. B. 816. *Mentd. It.* Bowen (1851), 21 L. J. Q. B. 10.

1220. ———.]—The spiritual cts. have power to construe a statute, the effect of which comes incidentally before them in the course of a proceeding where they have jurisdiction. Therefore, where, on objection taken to a declaration in prohibition, on general demurrer, it appeared only that, in a proceeding to enforce a church rate, the spiritual ct. would have to determine the

effect of an Act of Parliament, this ct. gave judgment for deff. in prohibition, on the ground that the spiritual ct. did not appear to have done anything as yet, & it was not to be presumed that they would construe the statute erroneously; & under such circumstances, this ct. would not give leave to amend for the purpose of raising the question here on the effect of the statute.—HALL v. MAULE (1838), 7 Ad. & El. 721; 3 Nev. & P. K. B. 459; 1 Will. Woll. & H. 309; 7 L. J. Q. B. 210; 2 Jur. 887; 112 E. R. 641.

*Annotation* :—*Refd.* R. v. Chester, Bp. (1901), 17 T. L. R. 533.

1221. *Recovery of fees.*—Suit for fees in the ecclesiastical cts. prohibited.—GIFFORD'S CASE (1702), 1 Salk. 333; 91 E. R. 293.

1222. ——— *By proctor.*—A proctor libelled for fees in a spiritual ct. & for expenses of journey, etc., a prohibition was granted *quoad* all but the fees.—HAUGHTON v. WILSON (1673), 1 Freem. K. B. 129; 80 E. R. 94.

1223. ———.]—A proctor cannot sue in the spiritual court for his fees.—JOHNSON v. OXENDON (1694), 4 Mod. Rep. 254; 87 E. R. 380.

1224. ———.]—DAVIES v. WILLIAMS (1724), Bunb. 170; 145 E. R. 636.

1225. ——— *By apparitor.*—An apparitor cannot sue in the spiritual court for his fees.—PEARSON v. CAMPION (1781), 2 Doug. K. B. 629; 90 E. R. 399.

— *By registrar.*—*See* No. 211, *ante*.

— *By parish clerk.*—*See* Nos. 909, 921, *ante*.

1226. *Freehold—Right to.*—SHARROCK v. BOURCHIER (1663), T. Raym. 88; 83 E. R. 48; *sub nom.* SHEROCK v. BOUCHIER, 1 Lev. 125.

*Annotation* :—*Consd.* Mirehouse v. Rennell (1833), 7 Bl. N. S. 241.

1227. ———.]—The spiritual court has no jurisdiction where the right to freehold comes in question.—HILLIARD v. JEFFERSON (1697), 1 Ld. Raym. 212; 91 E. R. 1038.

1228. ———.]—The ecclesiastical ct. has no jurisdiction to try a suit directly in respect of title to freehold.

If deffs. give notice of their intention to apply for a prohibition, & move for one within a reasonable time, the ct., in accordance with the practice of the Consistory Ct. of London, will suspend making any decree until the result of such application is communicated to it.

He [the Chancellor] may by a faculty grant leave to a parishioner to erect a pew on a certain space in the chancel . . . but faculty pews have for many years rarely been granted, & then only in return for a valuable consideration, such as in exchange for the chief pew in the chancel, when the site of it is required for the choir, or in exchange for a freehold chapel, aisle, or pew, the use of which the owner has consented to give to the parish, or to a parishioner who has enlarged the church at his own expense (DR. TRISTRAM).—WEST PECKHAM (VICAR & CHURCHWARDENS) v. GEARY, DALISON INTERVENING (1889), Trist. 189.

1229. *Vicarage—Existence of.*—The spiritual ct. cannot try the existence of a vicarage. A prohibition cannot be granted upon a suggestion which is false.—SMITH v. WALLIS (1700), 1 Ld. Raym. 587; 91 E. R. 1293.

1230. *Criminal offence.*—Certainly this [Ecclesiastical] ct. cannot inquire into a felony directly, even where a clergyman is sued for the purpose of deprivation. . . .

But it is very frequent, & has so occurred in the course of practice, to admit a fact in itself criminal to be pleaded as a necessary fact of the evidence in a civil suit (SIR WILLIAM SCOTT).—

*Sect. 8.—Jurisdiction: Sub-sect. 2, D., E. & F.; sub-sect. 3, A. & B. (a) i. & ii.]*

*NASH v. NASH* (1790), 1 Hag. Con. 140; 161 E. R. 503.

*Annotation:—Folld. Burder v. —* (1844), 3 Curt. 822.

**1231.** ———.]—*BROMLEY v. BROMLEY* (1794), 1 Hag. Con. 141, n.; 161 E. R. 504.

———.]—*See, also, Nos. 1488–1490, post.*

*E. Existence of Custom in Issue.*

**1232. General rule.]—***LUCH'S CASE* (1618), Hob. 247; 80 E. R. 393.

*Annotations:—Mentd. Colebrook v. Diggs* (1723), 8 Mod. Rep. 79; *Beard v. Webb* (1800), 2 Bos. & P. 93.

**1233.** ———.]—*ANON.* (1624), 1st. 48; 82 E. R. 268.

**1234.** ———.]—The spiritual ct. cannot try the existence of a custom.—*MARKET BOSWORTH (CHURCHWARDENS) v. MARKET BOSWORTH (RECTOR)* (1699), 1 Ld. Raym. 435; 91 E. R. 1189. *Annotations:—Consd. Full v. Hutchins* (1776), 2 Cowp. 422. *Folld. Rhodes v. Oliver* (1836), 2 Har. & W. 38. *Mentd. Paxton v. Knight* (1757), 1 Burr. 314; *Gould v. Gapper* (1804), 5 East, 345.

**1235.** ———.]—A custom cannot be tried in the spiritual ct.—*POLLARD v. AWKER* (1699), 12 Mod. Rep. 260; 88 E. R. 1307.

**1236.** ———.]—(1) A prohibition cannot be granted to a spiritual ct. merely because it has no power to try one of the facts stated in the pleadings, unless such fact is denied. (2) The spiritual ct. cannot try the existence of a custom. (3) A man may be sued in the spiritual ct. for not saying Divine Service in a chapel.—*JONES v. STONE* (1700), 1 Ld. Raym. 578; *Holt, K. B.* 590; 2 Salk. 550; 91 E. R. 1286.

*Annotations:—Generally, Mentd. Townsend v. Thorpe* (1727), 2 Stra. 776; *Still & Bunn v. Palfrey* (1841), 5 Jur. 1162.

**1237.** ———.]—*R. v. REEVES* (1734), Kel. W. 196; 25 E. R. 560.

**1238.** ———.]—A prohibition lies to an ecclesiastical ct. where the question of custom or no custom is distinctly raised on the face of the libel & answer.—*RHODES v. OLIVER* (1836), 2 Har. & W. 38.

**1239.** ———.]—*DOLBY v. REMINGTON*, No. 1209, ante.

**1240. Tithes—Action by vicar against parson.]—**If a vicar be endowed of small tithes, he shall not pay small tithes to the parson, though the endowment be of the small tithes of the whole parish; & the patentee of a parsonage discharged at the time of endowment, & afterwards at the dissolution by Henry VIII. shall hold it discharged.—*BLINCO v. BARKSDALE* (1597), Cro. Eliz. 578; 78 E. R. 821; *sub nom. BLINCO v. MARSTON*, Cro. Eliz. 479; *sub nom. BLINCOE'S CASE*, Moore, K. B. 457, 910.

*Annotation:—Mentd. St. Paul's Warden v. The Dean* (1817), 4 Price, 65.

**Burial fees.]—See BURIAL**, Vol. VII., p. 536, Nos. 105–170.

**1241. Parish clerk—Appointment.]—***YOUNG v. ENGLEFIELD* (1623), Palm. 378; Cro. Jac. 670; 81 E. R. 1132.

*Annotation:—Mentd. Peak v. Bourne* (1732), 2 Stra. 942.

**1242. Churchwardens—Election.]—***CARPENTER'S CASE* (1681), T. Raym. 439; 83 E. R. 230.

**Right to mortuary.]—See BURIAL**, Vol. VII., pp. 538, 539, Nos. 188–193.

**1243. Easter offerings.]—**A prohibition lies to the spiritual ct. to stay a suit for Easter offerings, on a suggestion of a custom to pay them, although sentence was given against deft. by default.—*BOWS v. JURAT* (1719), 10 Mod. Rep. 440; 88 E. R. 800.

**1244. Church rates.]—***DUNN v. COATES* (1734),

2 Eq. Cas. Abr. 629; 1 Atk. 288; *West temp. Hard.* 526; 22 E. R. 528.

*Annotations:—Mentd. British Empire Shipping Co. v. Somes* (1857), 8 K. & J. 433; *Harvey v. Lovekin* (otherwise *Harvey*) (1884), 10 P. D. 122; *Redfern v. Redfern*, [1891] P. 139.

*F. Claim based on Prescription.*

**1245. General rule.]—***ANDREWS v. SYMSON* (1675), 3 Keb. 527; 84 E. R. 859.

**1246.** ———.]—*R. v. REEVES* (1734), Kel. W. 196; 25 E. R. 566.

**1247. Pew—Right to.]—***ANON.* (1608), Noy, 129; 74 E. R. 1093.

**1248.** ———.]—*CARLETON v. HUTTON* (1626), Palm. 424; Noy, 78; 81 E. R. 1153.

*Annotation:—Mentd. Buxton v. Bateman* (1662), 1 Keb. 370.

**1249.** ———.]—(1) A prohibition shall not be granted to a ct. because it has no power to try one of the facts stated in the pleadings, unless such fact is denied.

(2) A man may libel in the spiritual ct. for disturbance in a pew he claims in a church by prescription. Or of which he has a bare possession only, if the party against whom the suit is instituted has no title to the seat.

(3) The ordinary has, of common right the disposal of seats in a church.

(4) In this present case the prescription upon which deft. libelled is not denied by plff., & therefore the spiritual ct. may well proceed upon it (*HOLT, C.J.*).

(5) It had been a good prescription to say, "that time out of mind the corp. did repair such an aisle of the church, *ratione cuius* the mayor & aldermen sat there" for though the right be in the whole body the enjoyment may be in & enure to a select number (*per CUR.*).—*JACOB v. DALLO* (1702), 2 Ld. Raym. 755; 6 Mod. Rep. 230; 7 Mod. Rep. 8; 12 Mod. Rep. 233; 2 Salk. 551; 92 E. R. 4.

*Annotations:—As to (1) Refd. Hinds v. Thompson* (1738), Andr. 209; *Buggin v. Bennett* (1767), 4 Burr. 2035; *Scammell v. Wilkinson* (1802), 2 East, 552. *As to (3) Refd. Chester's, Bp. Case* (1698), 5 Mod. Rep. 433. *As to (4) Apud. Byerley v. Windus* (1826), 5 B. & C. 1. *Generally, Mentd. Sandon v. Jervis* (1858), 27 L. J. Q. B. 279.

**1250.** ———.]—*BYERLEY v. WINDUS*, No. 3124, *post*.

**1251.** ———.]—*PROUD v. PRICE*, No. 3131, *post*.

**1252. —Faculty to remove.]—***R. v. TRISTRAM* (1909), *Times*, June 17.

**1253. Church repairs—Churchyard & wall.]—***VANACRE v. SPLEEN* (1675), 3 Keb. 575; *Carth.* 33; 84 E. R. 887.

*Annotations:—Refd. Reed v. Doltery* (1733), 2 Barn. K. B. 392. *Mentd. Chichester v. Donagel* (1821), 6 Madd. 305.

**1254. —Chancel.]—***ANON.* (1681), 1 Freem. K. B. 300; 89 E. R. 217.

**1255.** ———.]—*WILLIAMS v. BOND* (1690), 2 Vent. 238; 86 E. R. 415.

*Annotation:—Mentd. Morley v. Leacroft*, [1896] P. 92.

**1256. Pension—Suit by parson.]—**A parson may sue for a pension by prescription, either in the spiritual ct. or at common law.—*BARRY v. TREBESWYCKE* (1676), 1 Mod. Rep. 218; 86 E. R. 840.

**1257. —Pension out of rectory inappropriate.]—**If a pension be by prescription out of a rectory inappropriate, though the rectory come into lay hands, yet it may be sued in the spiritual ct., because it might have commenced by a spiritual Act; & if such a prescription be denied, it shall be tried there; but if a *modus decimandi* be pleaded, it shall be tried at common law; & if it be not found, a consultation shall go (*HOLT, C.J.*).

—ANON. (1700), 12 Mod. Rep. 397; 88 E. R. 1405.

*Compare* No. 1163, *ante*.

**1258. Appointment of curate of chapel by vicar.]**

*Qu.*: whether the spiritual ct. may try a prescription for the vicar to find a curate for a chapel of ease, in consideration whereof the parishioners are to pay him so much yearly?—STONE v. JONES (1700), 12 Mod. Rep. 404; Holt, K. B. 595; 88 E. R. 1410.

#### SUB-SECT. 3.—HOW OBJECTED TO.

##### A. In General.

**Appearance under protest.]**—See Sect. 7, sub-sect. 4, *post*.

**Habeas corpus.]**—See No. 1155, *ante*.

**1259. Mandamus.]**—ST. BALAUNCE'S PARISH CASE (1619), Palm. 50; 81 E. R. 973.

*Annotation*:—*Reid*. *Ex p. Titchmarsh* (1845), 9 Jur. 159.

**Prohibition.]**—See Sub-sect. 3, B., *post*.

**1260. Time for objecting.]**—(1) According to the practice of the Ecclesiastical Cts. an objection to the jurisdiction might be taken at any time, though it was more usual that it should be taken at the commencement of the proceedings.

(2) The proper course, for a resp. who intends to object to the jurisdiction is to appear under protest, & if he wishes for time to plead to the jurisdiction to apply expressly for time to do so.—ZYCKLINSKI v. ZYCKLINSKI (1861), 2 Sw. & Tr. 420; 31 L. J. P. M. & A. 37; 5 L. T. 690.

*Annotation*:—*Generally*, *Reid*. *Wilson v. Wilson* (1871), L. R. 2 P. & D. 341.

##### B. Prohibition.

##### (a) Grounds for Granting or Refusing.

##### i. In General.

**1261. Encroachment on common law courts.—To prevent conflict.]**—VELEY v. BURDER, No. 1016, *ante*.

—See, also, Nos. 1220–1231, *ante*.

**1262. Encroachment on another ecclesiastical court.]**—Prohibition where one ecclesiastical ct. intrudes upon another.—JAMES'S CASE (1621), Hob. 17; 80 E. R. 168.

**1263. Consultation not duly granted.]**—DORWOOD v. BRIKINDEN (1610), 2 Brownl. 26; 123 E. R. 795.

**1264. Quare Impedit.—Suit brought after induction.]**—OLIVER v. HUSSEY (1624), 1 Lat. 205; 82 E. R. 348.

**1265. Invalid presentment.]**—TOMSON'S CASE (1627), 1 Att. 60; 124 E. R. 136.

**1266. No proceeding by way of suit.]**—ANON. (1639), March, 22; 82 E. R. 394.

**1267. Grounds of judgment doubtful.]**—R. v. REEVES (1734), Kel. W. 196; 25 E. R. 566.

**1268. No suggestion.]**—Prohibition not to go to the spiritual ct. without suggestion.—BLAXTON v. HONORE (1700), 12 Mod. Rep. 435; 88 E. R. 1432.

**1269. Ground not pleaded.]**—Prohibition shall not go for a *modus* or other foreign matter, unless it be pleaded below.—ANON. (1701), 2 Saik. 551; 91 E. R. 467.

*Annotations*:—*Consd.* *London Corpn. v. Cox* (1867), L. R. 2 H. L. 239. *Reid*. *Hinds v. Thompson* (1738), Andr. 299; *Buggin v. Bennett* (1767), 4 Burr. 2035; *Scammell v. Wilkinson* (1802), 2 East, 552.

**1270. Proceeding contrary to canon law.]**—A prohibition does not lie to the Spiritual Ct. for proceeding contrary to the canon law.—ST. DAVID'S (BP.) v. LUCY (1699), as reported in 1

Ld. Raym. 539; 91 E. R. 1200; *sub nom.* LUCY v. ST. DAVID'S (BP.), Brod. & F. 332.

*Annotations*:—*Reid*. *Itc York (Dean)* (1841), 2 Q. B. 1; *Combe v. De la Bere* (1881), 6 P. D. 157; *Read v. Lincoln, Bp.* (1880), 14 P. D. 88. *Mentd.* *Mayo & Parson's Case* (1720), 1 Stra. 391; *St. John's Chapel of Ease within the Parish of St. Andrew's, Holborn Case* (1730), Fitz. G. 158; *Middleton v. Crofts* (1736), 2 Atk. 650; *R. v. Canterbury, Archbp.* (1848), 11 Q. B. 483; *Marsden v. Wardle* (1854), 2 W. R. 455; *Shepherd v. Payne* (1863), 9 Jur. N. S. 354; *Blanc v. Geraghty* (1866), 15 W. R. 133; *McGeath v. Geraghty* (1866), 15 W. R. 137; *Boyd v. Phillpotts* (1874), L. R. 4 A. & E. 297; *Read v. Canterbury, Archbp.* (1888), 4 T. L. R. 741; *R. v. Trilstrain*, [1902] 1 K. B. 816; *Re Haigh with Aspall, New Parish*, [1919] P. 143.

**1271. Cause between persons in ecclesiastical capacity.]**—The question in the cause being between persons in their ecclesiastical capacity, this ct. would not interfere, but left it to the ecclesiastical ct., as being the proper ct. to determine it.—CLARE HALL v. ORWIN (1772), 2 Dick. 457; 21 E. R. 347.

**1272. Anticipated wrong decision.]**—CHESTER-TON v. FARLAR, No. 1123, *ante*.

##### ii. Excess or Absence of Jurisdiction.

**1273. General rule.]**—A *premunire* lies against an ecclesiastical judge.

Where a cause originally belongs to the cognisance of the ecclesiastical ct., although all circumstances being disclosed the cognisance belongs to the King's temporal Court; yet, if the suit is prosecuted there in the same nature as the cognisance belongs to them, no *premunire* lies, but a prohibition. But if in such case plff. sue in the nature of a suit which doth not belong to the ecclesiastical ct., but to the common law, a *premunire* lieth.

When the case originally belongs to the cognisance of the common law, & not to the ecclesiastical court, a *premunire* lies, although it may be libelled for according to the course of the ecclesiastical law.—PREMUNIRE (1608), 12 Co. Rep. 37; 77 E. R. 1310.

*Annotation*:—*Mentd.* *Townsend v. Hughes* (1677), 2 Mod. Rep. 150.

**1274. —.**—The common pleas may award a prohibition, although no suit be there pending.

If the ecclesiastical judges encroach upon the jurisdiction of the common pleas to hold plea of any thing against the common law of the land, or of any thing triable by the law, this principal ct. of common law shall grant a prohibition.

There are several writs of express prohibitions; & express prohibitions are in two manners, the one founded upon suggestion, the other upon record.—LANGDALE'S CASE (1608), 12 Co. Rep. 58; 77 E. R. 1338.

*Annotations*:—*Reid*. *Heyward & Whitbroke's Case* (1610), 13 Co. Rep. 64; *Manby v. Scot* (1663), 1 Keb. 80.

**1275. —.**—Whether, if where a parson or a vicar of a parish sues one of his parish for tithes in kind, or lay fee, & deft. alleges a custom or prescription *de modo decimandi*, such custom & prescription shall be tried & determined before the ecclesiastical judge where the suit began; or whether a prohibition lies, in order that the same may be tried by the common law.—DE MODO DETMANDI CASE (1610), 13 Co. Rep. 37; 77 E. R. 1448.

*Annotations*:—*Consd.* *Combe v. Edwards* (1878), 3 P. D. 103. *Mentd.* *Wynniatt v. Lindon* (1839), 8 L. J. Ch. 121.

**1276. —.**—TEY v. COX (1613), 2 Brownl. 35; 123 E. R. 800.

**1277. —.**—COUCH v. TOLL (1641), March, 98; 82 E. R. 420.

*Annotation*:—*Reid*. *Martin v. Mackonochie* (1879), 4 Q. B. D. 697.

*Sect. 6.—Jurisdiction: Sub-sect. 3, B. (a) ii., iii., iv., v. & vi.]*

**1278.** —]—Spiritual cts. may determine matters of temporal cognisance which come collaterally before them.—*CHAMBERLAYNE v. HEWERTSON* (1690), 1 Ld. Raym. 73; *Holt, K. B.* 99; 12 Mod. Rep. 89; 1 Salk. 115; Return of Appeals before the High Court of Delegates, p. 47, No. 100 (Parliamentary Papers, 199, April 3, 1868); 91 E. R. 945.

*Annotations:—Reid. Combe v. Edwards* (1878), 42 J. P. 820; *Martin v. Mackonochie* (1879), 4 Q. B. D. 697.

**1279.** —]—*R. v. TRISTRAM*, No. 224, *ante*.

**1280.** —]—*Semble*: the Ct. of Exch. has jurisdiction to issue a prohibition to the Judicial Committee, if they exceed their jurisdiction.—*Ex p. SMYTH* (1835), 2 Cr. M. & R. 748; 1 Gale, 274; Tyr. & Gr. 222; 150 E. R. 317.

*Annotation:—Consd. Combe v. Edwards* (1878), 3 P. D. 103.

*See, further, CROWN PRACTICE*, Vol. XVI., p. 388, Nos. 2304–2306.

**1281. No affidavit verifying defence.**—Prohibition to a consistory ct. may be granted, though deft. have not verified his plea by affidavit, where the matter is one that the spiritual ct. cannot try.—*GULLEHRAND v. HADDOCK* (1734), *Cunn.* 38; 94 E. R. 1048.

**1282. Miscarriage of justice.**—*Ex p. SMYTH*, No. 1148, *ante*.

**1283.** —]—Prohibition to the spiritual ct. lies only where that ct. is proceeding in a matter which is clearly out of its jurisdiction, or in a manner that is manifestly contrary to the general principles of justice. A. was cited to appear, & did appear, in the consistorial ct., in a suit promoted against him by his wife, for restitution of conjugal rights. In the course of that suit, two orders were made, decreeing restitution, & alimony *pendente lite*, for disobedience of which A. was about to be pronounced in contempt:—*Held*: inasmuch as A. had once appeared, this ct. could not pronounce the giving of judgment against him in his absence, & without previous notice thereof to him, a proceeding without jurisdiction, or contrary to justice.—*Ex p. STOKY* (1852), 12 C. B. 767; 22 L. J. C. P. 75; 20 L. T. O. S. 97; 1 W. R. 38; 138 E. R. 1106; *subsequent proceedings*, 8 Exch. 195.

**1284. Anticipated excess of jurisdiction.**—*Re SINYANKI*, No. 161, *ante*.

**1285. Part of matter outside jurisdiction.—General rule.**—*LUSH v. WEBB* (1605), 1 Sid. 251; 82 E. R. 1088.

*Annotation:—Reid. S. E. Ry. v. Railway Comrs.* (1881), 6 Q. B. D. 586.

**1286.** —]—*BETSWORTH & BETSWORTH* (1647), *Sty.* 10; 82 E. R. 490.

**1287.** —]—*Principal cause within jurisdiction.*—*ANON.* (1605), No. 877, *ante*.

**1288.** —]—*Original matter within jurisdiction.*—*BUTLER v. YATEMAN* (1662), 1 Keb. 369; 1 Sid. 89; 82 E. R. 988; *sub nom. PFTLER v. YALEMAN*, 1 Lev. 78.

*Annotation:—Reid. Rutland v. Bagshaw* (1850), 14 Q. B. 869.

**1289.** —]—*PENSE v. PROUSE*, No. 420, *ante*.

**1290.** —]—*CHESTER'S (Br.) CASE*, No. 99, *ante*.

**1291.** —]—*No denial of allegations.*—*JONES v. STONE*, No. 1236, *ante*.

**1292.** —]—*JACOB v. DALLO*, No. 1249, *ante*.

**1293.** —]—In a suit in the Arches Ct. of Canterbury, a faculty conferring certain privileges

in a parish church was prayed for, petitioner against, & answer & reply put in & admitted by the ct.; the suit was at issue, & the ct. had ordered it to be proceeded with. On declaration in prohibition & demurrer:—*Held*: prohibitor did not lie, several distinct things being comprised in the faculty, some of which might be granted consistently with the common law, though others might not; & no question having yet been raised in the ecclesiastical ct. as to its jurisdiction to grant any in particular, nor any intimation given by the ct. of its intention to grant or refuse any. *Qu.*: whether prohibition lies in any case against the granting of a faculty, before it be granted.—*HALLACK v. CAMBRIDGE UNIVERSITY* (1841), Q. B. 593; 9 Dowl. 583; 1 Gal. & Dav. 100; 10 L. J. Q. B. 206; 6 Jur. 10; 113 E. R. 1258.

*Annotation:—Folld. R. v. Twiss* (1869), L. R. 4 Q. B. 407.

**1294.** —]—*Applicant having no special interest.*—A prohibition will not be granted to restrain a petition in the ecclesiastical ct. where it is within the jurisdiction of such ct. to grant some of the privileges prayed for, especially where the applicant has no special interest in the proceedings.

The guardians of a parish having presented a petition to the ecclesiastical ct., praying for a faculty to enable them to desecrate ground duly consecrated for the burial of the dead by erecting on part of it the parish workhouse & upon the rest a chapel for the inmates of the workhouse, a person, not being a ratepayer or in any way interested in the burial ground, applied for a prohibition to restrain the ecclesiastical ct. from proceeding with the petition. It appeared that the burial ground had been disused for many years, & that the workhouse had recently at a great expense been erected on a part of it where no corpses had been buried:—*Held*: the prohibitor must be refused on two grounds: (1) although ground once duly consecrated for the burial of the dead can only be applied to secular purposes by Act of Parliament, yet so much of the petition as prayed leave to erect the chapel was within the jurisdiction of the ct., & it could not be presumed that the ct. would entertain the residue of it; (2) because the erection of the workhouse appeared to have been *bonâ fide*, & the appct. had no interest in the proceedings greater than what was common to the public at large.—*R. v. TWISS* (1869), L. R. 4 Q. B. 407; 10 B. & S. 298; 38 L. J. Q. B. 228; 20 L. T. 522; 33 J. P. 516; 17 W. R. 765.

*Annotations:—As to (1) Consd. Re Plumstead Burial Ground*, [1895] P. 225; *St. Nicholas, Leicester (Vicar) v. Langton*, [1899] P. 19; *Re Bideford Parish, Ex p. Bideford (Rector, etc.)*, [1900] P. 314; *Sutton v. Bowden*, [1913] 1 Ch. 618. *Reid. Re St. George-in-the-East* (1876), 1 P. D. 311; *Fowke v. Berington*, [1914] 2 Ch. 308. *As to (2) Reid. Re Plumstead Burial Ground*, [1895] P. 225; *Re Bideford Parish, Ex p. Bideford (Rector, etc.)*, [1900] P. 314. *Generally, Mend. Re St. Nicholas Cole Abbey, Re St. Benet Fink, Churchyard*, [1893] P. 58.

**1295. Pleading issuable plea.—Effect.**—(1) Where the offence of brawling is prosecuted before the bishop's commissary, the suit may be committed to the Arches Ct. by letters of request.

(2) If a spiritual ct. has no jurisdiction over a suit, the pleading an issuable plea does not preclude the award of a prohibition.—*Ex p. WILLIAMS* (1825), 4 B. & C. 313; 6 Dow. & Ry. K. B. 373; 3 L. J. O. S. K. B. 221; 107 E. R. 1076.

*Annotations:—As to (1) Apld. Hawes & Vicar v. Pellatt* (1840), 2 Curt. 473. *Generally, Mend. Millar & Simcs v. Palmer & Killby* (1837), 1 Curt. 550.

**Prohibition granted after sentence.**—*See Sub-sect. 3, B. (a) vi., post.*

iii. *Defective Proceedings.*

- 1296. General rule.]**—DE MODO DECIMANDI CASE (1610), 13 Co. Rep. 37; 77 E. R. 1448.  
*Annotations:*—**Consd.** Combe v. Edwards (1878), 3 P. D. 103. **Mentd.** Wynniatt v. Lindon (1839), 8 L. J. Ch. 121.  
**1297.** —.]—ANON. (1640), March, 92, pl. 152; 82 E. R. 426.  
**1298.** —.]—COUCH v. TOLL (1641), March, 98; 82 E. R. 429.  
*Annotation:*—**Consd.** Martin v. Mackonochie (1879), 4 Q. B. D. 697.  
**1299.** —.]—COMBE v. EDWARDS, No. 1607, *post*.  
**1300. Defective pleading.]**—GOUCH v. LONDON (BP.) (1730), 1 Barn. K. B. 391; 94 E. R. 263; *sub nom.* GOOCHE v. LONDON (BP.), 2 Stra. 879.  
*Annotation:*—**Refd.** Still & Bunn v. Palfrey (1841), 2 Curt. 902.  
**1301.** — **Error in practice.]**—RACKHAM v. BLUCK, No. 1478, *post*.  
**1302 Evidence—Refusal to accept.]**—SHOTTER v. FRIEND, No. 1339, *post*.  
**1303.** — **Mode of giving.]**—JOLLY v. BAINES, No. 1341, *post*.

iv. *Submission to Jurisdiction.*

- 1304. General rule.]**—(1) A prohibition refused because the party applying had submitted to the jurisdiction of the spiritual ct.  
 (2) If prohibition be granted without notice, the ct. will grant a consultation.—SMITH v. POYNDRILL'S EXECUTORS (1627), Cro. Car. 97; 70 E. R. 686.  
*Annotation:*—**Generally, Mentd.** Woodward v. Makepeace (1688), 1 Salk. 164.  
**1305. Answer without protest.]**—SOMERSET v. MARKHAM (1597), Cro. Eliz. 595; 78 E. R. 838.  
**1306. Matter triable at common law.]**—BANISTER v. HOPTON (1710), 10 Mod. Rep. 12; 88 E. R. 602.  
*Annotation:*—**Consd.** Full v. Hutchins (1776), 2 Cowp. 422.  
**1307. Matter raised by defence—Waiver.]**—Prohibition denied after sentence, where deft. below had set up several customs respecting tithes, but had submitted to trial.  
 The distinction in respect of cases where a prohibition does or does not lie after sentence is this: if it appears on the face of the libel, that the ecclesiastical ct. has no jurisdiction of the cause a prohibition shall go; because there, *interest reipublice* that they should not encroach upon the jurisdiction of the temporal cts.; & in such case, their sentence is a nullity (*per* (T.R.)).—FULL v. HUTCHINS (1776), 2 Cowp. 422; 98 E. R. 1165.  
*Annotations:*—**Consd.** Home v. Camden (1795), 2 Hy. Bl. 533. **Foll.** Gould v. Gapper (1804), 5 East, 315. **Consd.** Burder v. Veley (1840), 12 Ad. & El. 233; Evans v. Gwyn (1844), 5 Q. B. 844. **Refd.** Heyworth v. London Corp'n. & Rhodes (1884), Cab. & El. 312.  
**1308.** —.]—In a suit in the ecclesiastical ct., if deft. pleads a plea which raises a question beyond the jurisdiction of the ct., but afterwards waives it, the ct. will not grant a prohibition at that stage of the proceedings.—CARDEW v. CORTEY (1839), 7 Dowl. 606; 2 Will. Woll. & H. 110; 3 Jur. 952.

v. *Refusal of Plea.*

- 1309. Plea good at common law.]**—If the spiritual ct. refuse a plea good at common law, a prohibition shall go.—GREEN v. PENILDEN (1591), Cro. Eliz. 228; 78 E. R. 484.  
**1310.** —.]—KELLY v. WALKER, No. 1316, *post*.  
**1311.** — **Release.]**—GORE v. STARK (1608), Noy, 129; 74 E. R. 1093.  
**1312.** —.]—If the spiritual ct. refuse a plea good at the common law, its proceedings shall be prohibited.—WEBB v. COOK (1621), Cro. Jac. 626;

79 E. R. 538; *previous proceedings* (1619), Cro. Jac. 535.  
*Annotation:*—**Mentd.** Helsham v. Blackwood (1851), 11 C. B. 111.

**1313. Plea proper to the jurisdiction.]**—A prohibition does not lie to the spiritual ct. for refusing a plea proper to the jurisdiction.—ANON. (1714), 11 Mod. Rep. 412; 88 E. R. 1121.

**1314. Denial of custom.]**—Upon a suit in the spiritual ct. for a mortuary by custom, if deft. plead "no such custom," & the ct. refuse the plea, a prohibition shall go.—HINDE v. CHESTER (BP.) (1631), Cro. Car. 237; 70 E. R. 808.  
*Annotation:*—**Distd.** Johnson v. Ryson (1700), 12 Mod. Rep. 416.

**Necessity for affidavit of truth of plea.]**—See No. 1346, *post*.

vi. *After Sentence.*

*Sec. generally, CROWN PRACTICE, Vol. XVI., pp. 384, 385.*

**1315. Plea wrongfully disallowed.]**—ANON. (1598), Gouldsb. 114; 75 E. R. 103.

**1316.** —.]—A declaration in prohibition that the spiritual ct. refused to receive a plea triable at common law, is not traversable; & the ct. will grant a prohibition after sentence pronounced.—KELLY v. WALKER (1599), Cro. Eliz. 655; 78 E. R. 894.

**1317. Excess or absence of jurisdiction.]**—ANON. (1605), No. 877, *ante*.

**1318.** —.]—Prohibition granted without notice upon suggestion of a modus. No prohibition after sentence, where the spiritual ct. has jurisdiction of the libel: *aliter* where it has no jurisdiction.—ANON. (1673), Freem. K. B. 78; 89 E. R. 58.

**1319.** —.]—Prohibition may be after sentence, if it appear on the proceedings that they have not jurisdiction.—CHICKHAM v. DICKSON (1697), 12 Mod. Rep. 132; Comb. 448; 88 E. R. 1215.

**1320.** —.]—If it do not appear on the proceedings that the spiritual ct. has not jurisdiction, no prohibition shall go after sentence.—POOL v. GARDNER (1698), 12 Mod. Rep. 206; Carth. 463; 88 E. R. 1266.

**1321.** —.]—Prohibition may be granted after sentence where cause is not of spiritual cognisance; otherwise for citing out of the diocese.—GARDNER v. BOOTH (1698), 2 Salk. 548; 12 Mod. Rep. 190; 91 E. R. 464.

*Annotations:*—**Consd.** Pawson v. Scott (1755), Bay. 176. **Foll.** Full v. Hutchins (1776), 2 Cowp. 422. **Appl.** Burder v. Veley (1840), 12 Ad. & El. 233. **Apprvd.** London Corp'n. v. Cox (1867), L. R. 2 H. L. 239.

**1322. — Part of matter outside jurisdiction.]**—If a person be libelled in the spiritual ct. for two causes, one within, the other without its jurisdiction, a prohibition shall not go after sentence.—ANON. (1698), 12 Mod. Rep. 236; 88 E. R. 1280.

**1323.** —.]—The Consistory Ct. of H., upon arts. exhibited against a beneficed clerk, pronounced sentence, declaring that the arts. were for the most part sufficiently & fully proved, & suspended him for three years. After sentence, a rule for a prohibition was obtained, on the suggestion that some of the arts. contained charges cognisable in cts. of common law; but it was not denied that others were of ecclesiastical cognisance:—**Held:** after this sentence, it must be presumed that the ecclesiastical ct. had proceeded upon such matters as were within its cognisance; & the rule was discharged.—HART v. MARSH (1836), 5 Ad. & El. 591; 5 Dowl. 424; 2 Har. & W. 341; 1 Nev. & P. K. B. 62; 6 L. J. K. B. 9; 111 E. R. 1289.

*Annotations:*—**Distd.** *Ex p.* Evans (1843), 7 Jur. 420. **Consd.** Evans v. Gwyn (1844), 5 Q. B. 844.

*Sect. 6.—Jurisdiction: Sub-sect. 3, B. (a) vi. & (b); sub-sect. 4. Sect. 7: Sub-sects. 1 & 2.]*

**1324.** —[—]—Prohibition lies after sentence if want of jurisdiction appear.—ANON. (1702), 7 Mod. Rep. 8; 87 E. R. 1060.

**1325.** —[—]—A prohibition may issue at any time.

You never are too late for a prohibition after sentence in any case but one, & that is, where the suit is out of the diocese, upon 23 Hen. 8, c. 9, because by pleading you own their jurisdiction (HOLT, C.J.).—ANON. (1703), 7 Mod. Rep. 137; 87 E. R. 1147.

**1326.** —[—]—Before sentence in ecclesiastical or admty. ct., a prohibition may be granted upon a suggestion of a matter of fact not appearing on the face of the proceedings below, but after sentence it will not be granted upon the bare averment of a fact; yet the want of jurisdiction appearing upon the face of the libel, or of any part of their proceedings, is a sufficient ground for a prohibition after sentence.—SMITH v. LANGLEY (1736), Lee temp. Hard. 317; 95 E. R. 200.

**1327.** —[—]—Prohibition granted, after sentence to compel present churchwardens to make a rate to reimburse the late churchwardens. No affidavit required.

As to the want of an affidavit in this case, it is not necessary, because the want of a jurisdiction appears upon the face of the proceedings below (PROBYN, J.).—DAWSON v. WILKINSON (1737), Lee temp. Hard. 381; Andr. 11; 94 E. R. 247.

*Annotation:—Mentd.* Chesterlon & Hutchins v. Farlar (1830), 1 Curt. 345.

**1328.** —[—]—A prohibition to the spiritual ct., in a cause not within their jurisdiction, is demandable of right after sentence against plff. therein, & at his instance.—PAXTON v. WRIGHT (1757), 2 Keny. 14; 96 E. R. 1001; *sub nom.* PAXTON v. KNIGHT, 1 Burr. 314.

*Annotations:—Consd.* Full v. Hutchins (1776), 2 Cowp. 422; Burder v. Voley (1840), 12 Ad. & El. 233.

**1329.** —[—]—SYMES v. SYMES (1759), 2 Burr. 813; 97 E. R. 576; *sub nom.* SIMS v. SIMS, 2 Keny. 538.

*Annotation:—Consd.* Lemman v. Goulty (1789), 3 Term Rep. 3.

**1330.** —[—]—FULL v. HUTCHINS, No. 1307, *ante*.

**1331.** —[—] By appellate court.]—Where a modus is pleaded in an ecclesiastical ct., a prohibition may be granted at any time before final sentence. A prohibition will be granted to a ct. of appeal, where it appears that they have no jurisdiction over the subject matter, even after they have remitted the suit to the ct. below, & awarded costs against the applt., & though the party applying for a prohibition appealed to that ct.—DARBY v. COSENS (1787), 1 Term Rep. 552; 99 E. R. 1247.

*Annotations:—Consd.* Re Poe (1833), 5 B. & Ad. 681. *Reid.* Byerley v. Windus (1826), 5 B. & C. 1; Bodenham v. Ricketts (1836), 5 Dowl. 120; R. v. Electricity Commrs., Ex p. London Electricity Joint Committee (1923), 39 T. L. R. 715.

**1332.** —[—] Interpretation of statute.]—GOULD v. GAPPER, No. 1219, *ante*.

**1333.** —[—]—RICKETTS v. BODENHAM, No. 1069, *ante*.

**1334.** —[—]—Re YORK (DEAN), No. 113, *ante*.

**1335.** —[—]—SERJEANT v. DALE, No. 106, *ante*.

**1336. Sentence for contumacy.]**—No prohibition lies after the writ *de excommunicato capiendo*.

What remedy a party wrongfully excommunicated has.

(1) Where deft., in a cause of defamation for calling plff. a whore, is cited before the Dean &

Arches out of the proper diocese against 23 Hen. 8, c. 9, & after sentence a writ of *excommunicato capiendo* is granted, no prohibition lies upon that statute.

(2) Where it appears to the ct., that the matter of the libel is not within the jurisdiction of the ecclesiastical ct., a prohibition lies with clause to deliver the party.—PROHIBITION CASE (1611), 12 Co. Rep. 76; 77 E. R. 1354.

*Annotation:—Mentd.* Philips v. Bury (1694), Comb. 265.

**1337.** —[—]—After sentence given for contumacy in the spiritual ct., this ct. will not grant a prohibition, but leave the party to his appeal.—SIMS v. SIMS (1759), 2 Keny. 538; 96 E. R. 1271; *sub nom.* SYMES v. SYMES, 2 Burr. 813.

*Annotation:—Reid.* Lemman v. Goulty (1789), 3 Term Rep. 3.

**1338. Citation out of diocese.]**—Where a party is cited out of his diocese, no prohibition lies after sentence.—NEWMAN v. MOORE (1680), Freem. K. B. 299; Freem. Ch. 299; 89 E. R. 217.

**1339. Defective proceedings.]**—A prohibition lies to the spiritual ct. after sentence, & although the libel be for a matter within their jurisdiction, if a temporal matter become incidental, & they refuse such proof as the temporal cts. allow, as if they refuse proof of payment of a legacy by a single witness.—SHOTTER v. FRIEND (1690), 3 Mod. Rep. 283; Carth. 142; 2 Salk. 547; 87 E. R. 188; *sub nom.* SHATTER v. FRIEND, 1 Show. 158, 172; Holt, K. B. 751; *sub nom.* SHORTER v. FRIEND, Comb. 160.

*Annotations:—Foll.* Anon. (1729), Fitz-G. 82. *Reid.* Chamberlaine v. Hewson (1694), 5 Mod. Rep. 69; Breedon v. Gill (1696), 1 Ld. Raym. 219; Home v. Camden (1795), 2 Hy. Bl. 533; Gould v. Gapper (1804), 5 East, 345; Combe v. Edwards (1878), 3 L. D. 103; Martin v. Macconochie (1879), 4 Q. B. D. 697; West Peckham (Vicar & Churchwardens), Dallson Intervening v. Geary (1889), Trist. 189; R. v. Tristram, [1902] 1 K. B. 816. *Mentd.* Blackborough v. Davis (1701), 1 P. Wms. 41; Marriot v. Marriot (1725), 1 Stra. 666; Evans v. Evans (1844), 1 Rob. Eccl. 165.

**1340.** —[—]—FULL v. HUTCHINS, No. 1307, *ante*.

**1341.** —[—]—It is no ground for a prohibition to the Ct. of Arches, in a case in which it has jurisdiction, & after it has pronounced sentence, that some irregularities in the practice of the ct. have occurred in the course of the suit, even though deft. has refused to appear at all during the proceedings.

It was objected that the depositions were improperly taken with reference to sect. 9, of Ecclesiastical Courts Act, 1829 (c. 53). To this objection the answer is, that even if it were so, that is a matter of irregularity in practice only, & is no ground for this ct. to interfere by writ of prohibition (DENMAN, C. J.).—JOLLY v. BAINES (1840), 12 Ad. & El. 201; 4 Per. & Dav. 224; 9 L. J. Q. B. 349; 5 Jur. 22; 113 E. R. 787.

**1342. Sentence by default.]**—There can be no prohibition after sentence though it be not on the merits . . . there is no difference between sentence by default, & sentence after a hearing (*per CUR.*).—OWEN v. HUGHES (1721), Fortes. Rep. 199; 92 E. R. 817.

**1343. Enforcement of sentence not contemplated.]**—The ct. will not grant a prohibition to an ecclesiastical ct. after sentence pronounced, where it does not appear, either by direct evidence or presumption of law, that any steps are taken or contemplated to enforce it.—BODENHAM v. RICKETTS (1836), 5 Dowl. 120; 2 Har. & W. 132.

#### (b) Practice and Procedure.

*See, generally,* CROWN PRACTICE, Vol. XVI., pp. 390 *et seq.*

**1344. To what court application made—Court**



of Chancery.]—When the common law cts. are not sitting, the ct. of Ch. will upon an *ex p.* application grant a writ of prohibition to restrain an ecclesiastical ct. from trying a question of prescription. The order in such a case is made absolute in the first instance.—*Re BATEMAN* (1870), L. R. 9 Eq. 660; *sub nom. Ex p. BATEMAN*, 39 L. J. Ch. 383; 22 L. T. 60; *sub nom. Re JENKINS v. LLANTRISSANT (MINISTER & PARISHIONERS)*, *Ex p. BATEMAN*, 18 W. R. 425.

*Annotation*:—*Distd. Ex p. Edwards* (1873), 29 L. T. 529.

**1345. Mode of application.**—The sentence of the ecclesiastical ct. cannot be reversed in a summary way, but by appeal only to proper judges; nor can a prohibition to that ct. be granted upon a petition; by motion & a proper suggestion it may.—*HILL v. TURNER* (1737), 1 Atk. 515; *West temp. Hard*, 195; 26 E. R. 326.

*Annotations*:—*Reid. Duncombe v. Greenacre* (1860), 2 De G. F. & J. 509; *Hunt v. Hunt* (1862), 4 De G. F. & J. 221; *Marshall v. Marshall* (1879), 5 P. D. 19.

**1346. Affidavits in support—Prohibition for refusal of plea.**—Necessity for affidavit of truth of plea.]—On moving for a prohibition to the spiritual ct. for refusing a plea, the party ought to offer an affidavit of the truth of the facts in the plea.—*BURDETT v. NEWELL* (1705), 2 Ld. Raym. 1211; 92 E. R. 299.

**1347. Pleadings—Right to declaration from applicant for writ.**—Where a prohibition is applied for, the ct. will always, on the demand of the party against whom the application is made, put the party applying to declare in prohibition.—*REMINGTON v. DOLBY* (1844), 9 Q. B. 176; 115 E. R. 1241; *sub nom. REMINGTON v. DOLBY*, 14 L. J. Q. B. 5; 8 J. P. Jo. 787; *sub nom. R. v. LANCOLN (Bp.)*, *REMINGTON v. DALBY*, 8 Jur. 1135; *subsequent proceedings, sub nom. DOLBY v. REMINGTON* (1846), 9 Q. B. 179; *subsequent proceedings, sub nom. DOLBY v. REMINGTON* (1847), 11 J. P. Jo. 86.

*Annotation*:—*Reid. Worthington v. Jeffries* (1875), L. R. 10 C. P. 379.

**1348. Costs.**—1 Will. 4, c. 21, does not enable the ct. of K. B., where a party has declared in prohibition & succeeded, to grant him his costs incurred in the ecclesiastical ct.—*TESSIMOND v. YARDLEY* (1833), 5 B. & Ad. 458; 110 E. R. 860.  
*Annotation*:—*Consd. White v. Steele* (1862), 13 C. B. N. S. 231.

#### SUB-SECT. 4.—OF PARTICULAR COURTS.

**Archidiaconal courts.**—*See Sect. 1, ante.*

**Diocesan courts.**—*See Sect. 2, ante.*

**Provincial & general courts.**—*See Sect. 3, ante.*

**Judicial Committee of Privy Council.**—*See Sect. 4, ante.*

**Court under Benefice's Act, 1898 (c. 48).**—*See Sect. 5, ante.*

### SECT. 7.—GENERAL PROCEDURE.

#### SUB-SECT. 1.—IN GENERAL.

**1349. Whether criminal or civil suit proper remedy—Erection of monument without faculty.**—The ordinary may order a monument to be taken down, if it is inconveniently placed in a church; if it does not interfere, the parson's authority to erect it, sufficient. The suit in this case was

instituted in a wrong form; it ought to have been by articles.—*HOPPER v. DAVIS* (1751), 1 Lee, 640.

*Annotation*:—*Reid. Lee v. Fagg* (1874), L. R. 6 P. C. 38.

**1350. Neglect to repair church.**—*MILLAR & SIMES v. PALMER & KILLBY*, No. 708, *ante.*

**1351. Retaining alms.**—*LIDDELL v. HAINSFORD*, No. 1493, *post.*

**1352. Removal of illegal church ornaments.**—*DAVEY v. HINDE*, No. 2708, *post.*

**1353. Whether affected by rules & analogies drawn from common law.**—*WINCHESTER (Bp.) v. WIX*, No. 1360, *post.*

**1354. Whether process must be in King's name.**—*BASTWICK'S CASE* (1637), 3 State Tr. 711.

*Annotation*:—*Mentd. Faulkner v. Litchfield & Stearn* (1845), 1 Rob. Eccl. 184.

**1355. How practice of ecclesiastical courts proved.**—*BEAURAIN v. SCOTT*, No. 1054, *post.*

#### SUB-SECT. 2.—PROMOTION OF SUIT.

**1356. Criminal suit—Who may promote.**—

(1) The churchwardens are usually promoters of the office of judge in cases where the charges impute an ecclesiastical offence, but where their evidence is highly important for the establishment of the charges, the bishop is justified in directing proceedings to be instituted.

(2) No one can doubt that, if sufficiently established, the charges [of drunkenness against a clergyman] constitute an ecclesiastical offence of a serious nature, for habitual drunkenness, or even frequent drunkenness, in a clergyman, who is pastor of a parish, & whose duty it is to set an example of sobriety & moral conduct to his parishioners, is a highly penal offence, involving very serious consequences on the person who is guilty of it. The offence is greatly increased when such habits are indulged in at the time the person is actually engaged in the performance of divine worship (*SIR H. JENNET*).—*BURDER v. SPIER* (1841), 1 Notes of Cases, 30.

*Annotations*:—*As to (2) Reid. Lincoln, Bp. v. Day* (1845), 4 Notes of Cases 299; *Burder v. Pugh* (1855), 1 Jur. N. S. 1178; *Rochester, Bp. v. Harris* (1893) P. 137. *Generally, Mentd. Burder v. Langley* (1842), 1 Notes of Cases 542.

**1357. Communicate.**—*TITCHMARSH v. CHAPMAN*, No. 1480, *post.*

**1358. Motives of promoter—Inquiry into.**—In criminal suits the ct. [Consistory Ct. of London], will sometimes inquire into the motives of the promoter but it will presume proper motives unless there be strong proof to the contrary.—*JARMAN v. WISE* (1830), 3 Hag. Eccl. 360; 162 E. R. 1180.

**1359. When allowed—From nature of suit.**—*CARR v. MARSH*, No. 446, *ante.*

**1360. Promotion by bishop—Effect of resignation from bishopric.**—A cause having been sent to the Arches Ct. by letters of request, from the Bishop of W. in the first instance, the letters of request were accepted by the judge of the Arches Ct. A decree by letters of request issued, calling upon deft. to appear, & deft. appeared. Afterwards the Bishop of W., who was the promoter of the cause, resigned his see:—*Held*: the cause had not abated, & it might be continued at the suit of the same promoter in his individual capacity on the title of the cause being amended. Ecclesiastical cts. are not governed by rules

#### PART IV. SECT. 7. SUB-SECT. 1.

**r. Application of principles of equity.**—The principles of equity are not excluded from the proceedings in the Surrogate Ct. in the settlement of estates.—*Re FORD, PRICE v. FORD* (1877), 1 P. & B. 551.—*CAN.*

**Sect. 7.—General procedure: Sub-sects. 2 & 3.]**

or analogies drawn from common law.—**WINCHESTER (Bp.) v. Wix** (1869), L. R. 3 A. & E. 19; 39 L. J. Eccl. 22; 21 L. T. 439.

*Annotation*:—**Reid**, *Elphinstone v. Purchas* (1870), L. R. 3 P. C. 245.

**1361. Civil suit—Necessity for interest in suit—Lay rector—Impeachment of licence to preach.]**

(1) It is generally true that a bishop licensing a person to preach within a parish must hear the incumbent first, & that the consent of the incumbent to the erection & use of a chapel is requisite.

(2) A lay rector has not cure of souls, in fact or in presumption of law.

(3) There were two sorts of appropriation: (a) where the interests in the benefice, spiritual & temporal, were annexed to a religious house, & (b) where temporal interests only were conveyed; but the cure of souls resided in an endowed perpetual vicar.

(4) Stipendiary curacies originated where the impropriator is bound to provide divine service, but may do it by a curate, not instituted but only licensed by the bishop.

(5) Licence to preach in a chapel is not allowed to be impeached by proceedings on the part of the impropriator in a civil suit, he not showing an interest that would entitle him to maintain such a suit.

Where there are other interests in which every man partakes, & which entitle anyone to institute proceedings, such proceedings must be *ad publicam vindictam*, & by criminal articles exhibited in due form. The question is reduced to one point only—the right of the party who is the object of such proceedings; whereas in civil suits a previous question may arise of equal difficulty on the right & title of the person instituting the suit (**SIR WILLIAM SCOTT**).—**PORTLAND (DUKE) v. BINGHAM** (1792), 1 Hag. Con. 157; 161 E. R. 509; *subsequent proceedings*, 1 Hag. Con. 209, n.

*Annotations*:—As to (1) **Reid**, *Re St. George's, Albemarle Street Chapel Ptn.* (1890), Trist. 131. As to (2) **Reid**, *Hine v. Reynolds* (1840), 2 Man. & G. 71. As to (3) **Reid**, *Mason v. Lambert* (1848), 12 Q. B. 795. As to (4) **Reid**, *Spry v. Flood* (1840), 2 Curt. 353. As to (5) **Apld.**, *Lee v. Fagg* (1874), L. R. 6 P. C. 38; *Gordon v. Hayward* (1905), 21 T. L. R. 298. **Reid**, *Richards v. Fletcher* (1873), L. R. 4 A. & E. 107; *Davey v. Hinde*, [1901] P. 95. *Generally*, **Mentd.**, *Williams v. Brown* (1835), 1 Curt. 53; *MacAllister v. Rochester, Bp.* (1880), 5 C. P. D. 194; *It. v. St. Marylebone, Vestry*, [1895] 1 Q. B. 771.

**1362. — Interest need not appear on monition—How objection to interest raised.]**

A monition issued out of the ct. at the petition of A., which, after reciting that it had been alleged by the promotor that there were affixed to the walls of St. P.'s Church, F., certain representations of stations of the Cross & Passion of our Lord, such as are used in Roman Catholic chapels, but not in churches of the Church of England; that such stations had been introduced into the church since its consecration & without the authority of a faculty, & that their use & exhibition was contrary to the law of the Church, monished the incumbent of the parish & the churchwardens to remove such stations without delay, or to appear & show cause in the ct. why an order should not issue for their removal:—**Held**: it was not necessary to the validity of the monition that it should show on the face of it the interest, official or private, of A., in the matter complained of; & as the object of the monition was to enforce obedience to the law, & everyone has an interest in preserving public order & is entitled to institute proceedings for that purpose, the monition, therefore, on the face of it, assuming the doctrine of interest to be applicable

to the case, showed that A. had an interest to sustain it.

To sustain a civil suit a pltf. should show an interest; but the correct mode of raising an objection to his interest is either by the party cited appearing under protest, or praying the ct. to order pltf. to propound his interest, or by raising it on the admission of the libel, or by or on the subsequent pleadings.—**LEE v. RIDSDALE** (1873), 42 L. J. Eccl. 1; 37 J. P. 804.

**1363. — — —**—Where a monition issued by the Commissary-General of the diocese of Canterbury to an incumbent & churchwardens, ordering them to remove certain ornaments from their church unless they should show cause to the contrary, did not disclose on the face of it any interest in the suit on the part of promovent, & such defect was insisted upon by the churchwardens in showing cause against the same:—**Held**: the Judge of the Ct. of Arches was right in directing that the suit should be dismissed, with costs as against the churchwardens; such a suit was a civil suit, & was not open to every one, even with the consent of the ordinary, but only to those who had an interest in it.—**LEE v. FAGG** (1874), L. R. 6 P. C. 38; 43 L. J. Eccl. 17; 30 L. T. 800; 38 J. P. 506; 22 W. R. 902, P. C.; *affg.* S. C. *sub nom.* **FAGG v. LEE** (1873), L. R. 4 A. & E. 135.

*Annotations*:—**Fold**, *Davey v. Hinde*, [1901] P. 95; *Davey v. Hinde*, [1903] P. 221; *Noble v. Reast*, [1904] P. 34. **Reid**, *Hansard v. St. Mathew, Bethnal Green* (1878), 4 P. D. 46; *Gordon v. Hayward* (1905), 21 T. L. R. 298.

**1364. — — —**—The churchwardens of a parish in the diocese of York, the incumbency of which was vacant by the resignation of the last incumbent thereof, were cited to show cause why a monition should not be issued calling upon them to remove out of the parish church certain ornaments introduced there without the authority of a faculty. The promotor in the suit was not a parishioner of the parish, but was described in the citation as "T. S. Noble, of the city of York, solr., secretary to His Grace the Archbishop of York & Ordinary of the Diocese of York." It further appeared though it was not disclosed on the face of the citation, that the promotor had been appointed & was at the time when the citation issued sequestrator of the living during the vacancy:—**Held**: the suit must be dismissed, as the promotor had not the interest required by law to entitle him to promote the suit.—**NOBLE v. REAST**, [1904] P. 34.

**1365. Delay in prosecution—Effect.]**—On appeal in a criminal suit, an extension of the term probatory being prayed by the promotor, a delay of nine months without making substantial progress in the cause, or examining a single witness, after the suit had been already depending in the Ct. of Appeal, two years, is a sufficient ground to dismiss deft., & condemn the promotor in payment of a sum *nomine expensarum*.—**JENKINS v. BARRETT** (1827), 1 Hag. Eccl. 12; 162 E. R. 489.

**1366. — — — Proceedings against clerk for incontinence.]**—Statute 27, Geo. 3, c. 44, applies only to proceedings against fornicators, etc., whether laymen or clergymen, *pro salute animae*; but a proceeding in the Ecclesiastical Ct. on the ground of fornication, against a clergyman, for the purpose of deprivation, is not prohibited by the statute.—**FREE v. BURGONNE** (1828), 2 Bli. N. S. 65; 1 Dow. & Cl. 115; 4 E. R. 1055, H. L.; *affg.* (1820), 5 B. & C. 400.

*Annotations*:—**Apld.** *Oliver & Toll v. Hobart* (1827), 1 Hag. Eccl. 43; *Burder v. Hodgson* (1844), 3 L. T. O. S. 242. **Mentd.** *Ferguson v. Kinnoull* (1842), 9 Cl. & Fin. 251; *Barnes v. Shore* (1846), 8 Q. B. 840; *Doe d. Hudson v. Roe* (1852), 18 Q. B. 806; *Re Walsh* (1853), 1 E. & B.

383; *Willmot v. Rose* (1854), 3 E. & B. 563; *Mackonochie v. Penzance* (1881), 6 App. Cas. 424.

**1367.** ———.]—(1) Length of time, though it may not amount to a bar to a criminal suit, will induce the ct. to admit general explanation instead of requiring a direct contradiction or explanation of each specific fact.

(2) In a criminal suit, the ct. is strictly confined to the offences charged in the articles.

(3) As to the charge of digging up graves: instead of digging up the graves & disturbing the bodies, he merely levelled the little mounds on the top of the graves which were inconvenient for hearses, & after levelling these he laid down again the same turf. This operation could not possibly disturb any of the bodies buried in these graves (*SIR JOHN NICHOLL*).—*BENNETT v. BONAHER* (1830), 3 Hag. Ecc. 17; 162 E. R. 1066.

*Annotation:—Generally, Mentd.* *Sheppard v. Bennett* (1870), 18 W. R. 650.

**1368.** ——— **Continuing offence.**]—*ST. DAVID (BP.) v. DE RUTZEN*, No. 1045, *ante*.

#### SUB-SECT. 3.—CITATION AND MONITION.

**1369. Whether proceedings should be begun by citation or monition.**]—*BARTLETT v. KIRWOOD*, No. 2001, *post*.

**1370. Citation—Out of diocese of residence—Suit not maintainable in such diocese.**]—A man may be cited out of the diocese in which he lives in causes which could not have been maintained against him in that diocese.—*MACHIN v. MOLTON* (1700), 1 Ld. Raym. 452, 534; 2 Lut. 1057; 5 Mod. Rep. 450; 12 Mod. Rep. 251; 2 Salk. 549; 3 Salk. 90; Carth. 476; 91 E. R. 1201, 1256.

—**Refusal to issue—Appeal.**]—*See* Nos. 1447, 1448, *post*.

**1371. ——— Service—On Sunday—Validity.**]—A citation issued by the chancellor of a diocese against a person for incontinency may be served on a Sunday, notwithstanding Sunday Observance Act, 1677 (c. 7).

The [above] statute did not forbid the execution of such process as could not be but on Sunday; & so it is in the case of a summons in real actions; & if by the ecclesiastical laws process is to be served on a Sunday the general words of the statute will not take it away (*per CUR.*).—*BROOKBANK v. ALLENSON* (1699), 12 Mod. Rep. 275; 88 E. R. 1318; *sub nom.* *ALANSON v. BROOKBANK*, 5 Mod. Rep. 449; Carth. 505; *sub nom.* *ALLEN v. BROOKBANK*, 2 Salk. 625.

**1372. ——— Out of jurisdiction—Validity.**]—(1) A citation issued from this ct. addressed to a party then residing & being within the diocese. The party quitted England before service was affected. The citation was personally served on him in parts abroad. Protest to appearing was overruled.

(2) A proctor taking out a citation for a party, had not a formal proxy from his client at the time it issued. Protest to appearing was overruled.—*COLLETT v. COLLETT* (1843), 3 Curt. 726; 2 Notes of Cases, 504; 7 Jur. 1164; 163 E. R. 881.

*Annotations:—As to (1) Refd.* *Yelverton v. Yelverton* (1859), Sea. & Sm. 49; *Graham v. Graham*, [1923] P. 31.

**1373. ——— Service by apparitor.**]—*JONES v. JONES* (1847), 5 Notes of Cases, 131.

**1374. ———**]—A citation had, in a suit for separation by reason of cruelty & adultery, been served at the last known residence of deft., & also on the door of the parish church; afterwards a citation was personally served on him in the West Indies:—*Held*: a sufficient service

to enable the party proceeding to go on *in poenam*.—*DASENT v. DASENT* (1849), 1 Rob. Ecc. 800; 7 Notes of Cases, 126; 14 L. T. O. S. 48; 13 Jur. 832; 163 E. R. 1218.

*Annotations:—Refd.* *Yelverton v. Yelverton* (1859), Sea. & Sm. 49; *Burton v. Burton* (1873), 21 W. R. 648; L. C. C. v. Dundas, [1904] P. 1; *Graham v. Graham*, [1923] P. 31.

**1375. ——— Joinder of parties—Validity.**]—*COXE v. CHAPMAN* (1730), cited in 1 Rob. Ecc. at p. 736; 11 L. T. O. S. at p. 314; 12 Jur. at p. 612; 163 E. R. at p. 1196.

*Annotations:—Consd.* *Fell v. Law* (1848), 1 Rob. Ecc. 726. *Refd.* *Robins v. Harding* (1737), cited in 6 Notes of Cases, 217.

**1376. ——— No objection taken.**]—*FELL v. LAW*, No. 1158, *ante*.

**1377. ——— Wrong description—Name of party—Identity clear.**]—In a testamentary suit, the citation of a party by an erroneous Christian name, there being no doubt as to the identity of the person:—*Held*: sufficient.—*POWELL v. BURRI* (1758), 2 Lee, 517; 161 E. R. 424.

**1378. ——— Delay in objection.**]—It is now alleged that the true name is Austin; but whoever alleges a misnomer is bound to assign the true name by which he means to abide.

When a person appears, it may morally justify the presumption that he is the party intended; the law, however, allows the benefit of the exception, as to the validity of the citation, but under the condition before mentioned. The material question is, how the mistake originated. Upon that question the ct. must presume that the proctor would not make that averment without authority; it must therefore be considered to be the act of the party. It may be true, that a proctor may introduce new matter on his protest, but not such as is inconsistent with a former allegation. I think, therefore, that the attempt, which has been made to delay these proceedings, on this last objection, is improper, & that the protest must be overruled (*SIR WILLIAM SCOTT*).—*PRITCHARD v. DALBY* (1792), 1 Hag. Con. 186; 161 E. R. 520.

**1379. ——— Parish of party—Cured by appearance.**]—A protest as to the effect of a citation, describing the party in a wrong parish, but cured by appearance, was overruled.—*BARHAM v. BARHAM* (1789), 1 Hag. Con. 5; 1 Phillim. 181, n.; 161 E. R. 455.

*Annotations:—Mentd.* *Lovelin v. Edwards* (1810), 1 Phillim. 179; *Mordaunt v. Moncreiffe* (1814), L. R. 2 Sc. & Div. 374.

**1380. ——— In criminal suit—Statement of charges—Sufficiency.**]—*STEWART v. FRANCIS*, No. 1028, *ante*.

**1381. ———**]—*FRANCIS v. STEWARD*, No. 1029, *ante*.

**1382. ——— Necessity for—To give bishop jurisdiction to pass sentence of suspension.**]—

By the letters patent erecting the See of Jamaica, the bishop is empowered to exercise spiritual & ecclesiastical jurisdiction, & among other things, to punish rectors, etc., according to the laws & canons of the Church of England. The rector of a parish within the diocese of Jamaica, having, in the opinion of the bishop, transgressed the provisions of the Clergy Act of Jamaica, in declining to enter a marriage on the registry of his parish, solemnised in a place which was supposed not to be within the parish, was cited by the bishop, & being required, made an entry of the marriage, whereupon the bishop, without having exhibited articles or a libel, passed sentence of suspension for such previous refusal, & directed the same to be published:—*Held*: such proceedings were wholly irregular & the sentence reversed with costs.

*Sect. 7.—General procedure: Sub-sects. 3, 4 & 5, A. (a).]*

*Qu.*: whether on appeal from an ecclesiastical sentence of the Bishop of Jamaica, applt. ought not to pray a reference to the Judicial Committee, instead of a Commission of Delegates.—*BOWERBANK v. JAMAICA (Bp.)* (1839), 2 Moo. P. C. C. 449; 12 E. R. 1077, P. C.

— *Proceedings under Church Discipline Act, 1840 (c. 86).—See No. 1505, post.*

#### SUB-SECT. 4.—APPEARANCE.

**1383. Under protest—Grievance on face of inhibition.**—(1) A party may appear under protest to the issue of an inhibition, where grievance appears on the face of it.

(2) *Qu.*: whether a party in unpurged contempt may appeal.—*HARRISON v. SPARROW* (1842), 3 Curt. 1; 103 E. R. 633; *sub nom. HARRISON v. HARRISON*, 1 Notes of Cases, 294; 6 Jur. 110; *affg. sub nom. HARRISON v. HARRISON*, 4 Moo. P. C. C. 96, P. C.

*Annotations*:—*As to* (2) *Refd. Handley v. Edwards* (1844), 4 Moo. P. C. C. 407. *Generally, Mentd. N*—*r* (falsely called *M*—*c*) *v. M*—*c* (1853), 2 Rob. Eccl. 625.

**1384. — Objection to jurisdiction.**—*ZYCKLINSKI v. ZYCKLINSKI*, No. 1260, *ante*.

**1385. In person or by proctor.**—A deft. in a suit in the Arches Ct. of Canterbury cannot enter an appearance otherwise than in person or by a proctor.—*BURCH v. REID* (1873), L. R. 4 A. & E. 112.

**1386. Effect of—Whether waiver—Objection to regularity of proceedings.**—Appearance waives any objection so far as respects the formalities of the proceedings.—*FRANKARD v. DEACLE* (1828), 1 Hag. Eccl. 160; 162 E. R. 545.

*Annotations*:—*Mentd. Bubbars v. Harby* (1842), 1 Notes of Cases, 306; *Lee v. Hildsley* (1873), 37 J. P. 804.

**1387. — Objection to jurisdiction.**—If, in an ecclesiastical ct., a party is cited as resident within the jurisdiction, & appears & pleads without objection, he cannot afterwards put that fact in issue. In such a case, an intervener is not at liberty to raise an objection to the jurisdiction on that ground.—*CHICHESTER v. DONEGAL* (1821), 6 Madd. 375; 50 E. R. 1134; *sub nom. DONEGAL v. DONEGAL*, 3 Phillim. 597; 1 Hag. Con. 6, n.

*Annotations*:—*Consd. & Distd. Parkes v. Parkes* (1852), 2 Rob. Eccl. 518. *Mentd. Whitcomb v. Whitcomb* (1840), 2 Curt. 351; *Graham v. Graham*, [1923] P. 31.

**1388. Non-appearance—Effect of.**—(1) Two persons, against whom a cause was carried on *in personam*, did not appear to a citation:—*Held*: they were parties in that cause, & their evidence could not be received, till they were dismissed from the cause.

(2) 6 & 7 Vict. c. 85, probably applies to the Ecclesiastical Cts.—*SANDERS v. WIGSTON* (1846), 1 Rob. Eccl. 400; 5 Notes of Cases, 78; 8 L. T. O. S. 255; 10 J. P. 808; 10 Jur. 1040.

*Annotations*:—*As to* (1) *Distd. Cullum v. Seymour* (1849), 7 Notes of Cases, 114. *As to* (2) *Refd. Cullum v. Seymour* (1849), 7 Notes of Cases, 114.

#### SUB-SECT. 5.—PLEADINGS.

##### A. In Criminal Suits.

###### (a) Articles.

**1389. Necessity for bringing in—Where defendant confesses.**—A clergyman having read prayers & preached, etc., in an unconsecrated building without the consent of the incumbent of the

parish, after receiving notice from the latter, & having challenged interference, the incumbent promoted a criminal suit against him in the Arches Ct. Deft. admitted he had offended:—*Held*: the articles must nevertheless be brought into ct. to know what sentence to pass; & as deft., by his conduct, had caused the suit to be commenced, he was liable in costs.—*JONES v. JELF* (1863), 8 L. T. 399; 27 J. P. 483.

*Annotation*:—*Refd. Kitson v. Drury* (1865), 29 J. P. 643.

**1390. Contents—General rules—Whole charge must be specifically set out.**—(1) The admissibility of these articles has been attacked, generally, if I understand, upon the broad principle of additional articles being, universally, inadmissible in criminal suits. I am aware, however, of no such rule as this. Additional articles may be offered, even in criminal suits. At the same time, they are not admissible as a matter of course, or indeed at all, without special ground for their admission, such, for instance, as this suit presents, in the circumstance of the articles having been admitted, in the first instance, most hastily & unadvisedly, in a ct. not, it may be conjectured, much in the habit of dealing with cases of this description. Even where admissible at all, additional articles must be such as to occasion, taken in conjunction with the original articles, no substantial breach of the rules of criminal pleading, in order to make good their claim to be actually admitted (*SIR JOHN NICHOLL*).

(2) It is matter of perfect notoriety, that in proceedings by articles, the articles must be brought in on the court-day immediately subsequent to that on which deft. has appeared; & that, being so brought in, they must contain the charge, & the whole charge (*SIR JOHN NICHOLL*).

(3) It is true that the articles, when brought in, may be reformed & amended under the direction of the ct., prior to their actual admission; but when they are once admitted, & issue is joined, either party, I apprehend, is bound by them. In particular promovent is not at liberty to drop in with charges, one after another, with perhaps the single exception, that offences *ejusdem generis*, subsequently committed, may be pleaded in subsequent articles. But further articles, as matter of course, containing new criminal charges, or even advancing collateral facts & circumstances in proof of such articles of the original set as are, in themselves & directly criminatory, ought not to be admitted (*SIR JOHN NICHOLL*).—*SCHULTES v. HODGSON* (1822), 1 Add. 318; 162 E. R. 111.

*Annotations*:—*Refd. Swift v. Swift* (1832), 4 Hag. Eccl. 139; *Wynn v. Davies & Weaver* (1835), 1 Curt. 69; *King v. King* (1850), 2 Rob. Eccl. 153.

**1391. — — — — —**—*BENNETT v. BONAKER*, No. 1367, *ante*.

**1392. — — — — —**—(1) Proceedings against a Clerk in Holy Orders under Church Discipline Act, 1840 (c. 86), for publishing heretical doctrines in contravention & violation of the Articles of Religion & Formularies of the Church of England, are of a criminal nature, & it is necessary that the accusation should be stated with precision & distinctness in the pleadings.

(2) The Articles of charge must distinctly state the opinions which the clerk has advisedly maintained & must set forth the passages of the work in which those opinions are stated, & such Articles must specify the doctrines of the Church which the opinions of the clerk are alleged to contravene & the particular Articles of Religion & the Formularies which contain such doctrines.

(3) In the eleventh Article of Religion it is laid down that "We are accounted righteous before

God only for the merits of our Lord & Saviour Jesus Christ by faith & not for our own works & deservings":—*Held*: as the Article was wholly silent as to the merits of Jesus Christ being transferred to us, & asserts only that we are justified for the merits of Jesus our Saviour by faith, & by faith alone, it was not penal in a clergyman to speak of merit by transfer as a "fiction," however unseemly that word may be when used in connection with such a subject.

(4) In an Article against a clergyman it was charged that it was a contradiction of the Church of England, as laid down in Articles of Religion VI., & XX., the Nicene Creed, & in the ordination service of priests, to affirm that any part of the canonical books of the Old or New Testament, upon any subject whatever, however unconnected with religious faith or moral duty was not written under the inspiration of the Holy Spirit:—*Held*: the charge that every part of the scriptures was not written under the inspiration of the Holy Spirit was not established as it was not to be found either in Articles VI., or XX., the Formularies, the Service for the Ordering of Priests, or the Nicene Creed.

(5) It is not competent to a clergyman of the Church of England to teach or suggest that a hope may be entertained of a state of things contrary to which the Church expressly teaches or declares will be the case.

(6) It is not penal for a clergyman to express a hope of the ultimate pardon of the wicked.

(7) No appeal was interposed from an interlocutory judgment of the Archdeacon admitting articles of charge against a clergyman proceeded against under Church Discipline Act, 1840 (c. 86):—*Held*: applt. was not concluded by the admission of the Articles & it was competent to him upon appeal from the final sentence, to open the finding of the interlocutory judgment upon the articles.—*WILLIAMS v. SALISBURY* (Bp.) (1864), 2 Moo. P. C. C. N. S. 375; 15 E. R. 913; *sub nom. WILLIAMS v. SALISBURY* (Bp.), *WILSON v. FENDALL*, 3 New Rep. 494; Brod. & F. 247; 9 L. T. 787; 10 Jur. N. S. 406; 12 W. R. 445, P. C. *Annotations*:—As to (1) *Appl.* Sheppard v. Bennett (1st Appeal) (1870), 9 Moo. P. C. C. N. S. 120; Sheppard v. Bennett (2nd Appeal) (1872), 9 Moo. P. C. C. N. S. 149. As to (2) *Appl.* Voysey v. Noble, Noble v. Voysey (1871), 7 Moo. P. C. C. N. S. 167. *Generally, Conad.* Voysey v. Noble, Noble v. Voysey (1871), 7 Moo. P. C. C. N. S. 167. *Refd.* Pusey v. Jowett (1863), 1 New Rep. 488; Combe v. Edwards (1878), 3 P. D. 103; Mackonochie v. Penzance (1881), 6 App. Cas. 424; Merriman v. Williams (1882), 7 App. Cas. 484. *Mentd.* Jenkins v. Cook (1875), 1 P. D. 80.

**1393.** ——— Articles must be so specific as to afford fair opportunity to defence.—In criminal suits articles must be so specific as to afford a fair opportunity of defence.—*OLIVER & TOLL v. HOBART* (1827), 1 Hag. Ecc. 43; 102 E. R. 500. *Annotation*:—*Refd.* Burgoyne v. Free (1829), 2 Hag. Ecc. 456.

**1394.** ——— Whole transaction must be fairly stated.—*LEE v. MATTHEWS*, No. 410, *ante*.

**1395.** ——— In criminal suits the articles should state the whole transaction, in order that deft. may give an affirmative issue.—*TAYLOR v. MORLEY* (1837), 1 Curt. 470.

*Annotations*:—*Refd.* Zychlinski v. Zychlinski (1861), 31 L. J. P. M. & A. 37; Wilson v. Wilson (1871), L. R. 2 P. & D. 341; Martin v. Mackonochie (1873), 4 Q. B. D. 697; Read v. Lincoln, Bp. (1889), 14 P. D. 88; Girt v. Fillingham, [1901] P. 176. *Mentd.* Parkes v. Parkes (1852), 2 Rob. Eccl. 518.

**1396.** ——— Necessity for precision of charge.—*HEATH v. BURDER*, No. 2085, *post*.

**1397.** ——— Particular laws infringed must be stated *seriatim*.—*MARSON v. UNMACK*, No. 411, *ante*.

**1398.** ——— Necessity for accurate description of office of judge.—If the office of the judge is wrongly described in a copy of the articles in the pleading in a criminal suit, it is fatal.—*WILLIAMS v. BOTT* (1789), 1 Hag. Con. 1; 161 E. R. 454.

*Annotations*:—*Refd.* Prankard v. Deacle (1828), 1 Hag. Ecc. 169; Fagg v. Lee (1873), L. R. 4 A. & E. 135; Lee v. Ridsdale (1873), 37 J. P. 804; Bowman v. Lax, [1910] P. 300.

**1399.** ——— ]—*THORPE v. MANSELL* (1810), 1 Hag. Con. 4, n.; 161 E. R. 455.

*Annotations*:—*Refd.* Prankard v. Deacle (1828), 1 Hag. Ecc. 169; R. v. Canterbury, Archbp., [1902] 2 K. B. 503; Bowman v. Lax, [1910] P. 300.

**1400.** ——— Articles must agree with citation.]—

(1) In a criminal proceeding, it is not competent to the promotor to set forth in the articles an offence not contained in the citation. The articles must agree with the citation.

(2) In a criminal proceeding, the burthen of proving the charge lies on the promotor; & the clergyman of the parish is not an improper person to proceed in such a case, for to the incumbent belongs the superintendence of the church & churchyard, & it is his duty to take care that no inscription should be placed there which could be made the means of disseminating doctrines inconsistent with those of the established religion (*SIR H. JENNER*).—*BREKES v. WOOLFEY* (1838), 1 Curt. 880; 163 E. R. 304.

*Annotations*:—As to (2) *Distd.* Pearson v. Stead, Stead v. Pearson, [1903] P. 66. *Generally, Conad.* Egerton v. All of Odd Rode, [1894] P. 15. *Refd.* Hereford, Bp. v. T—n (1853), 2 Rob. Eccl. 595; Martin v. Mackonochie, Flamank v. Simpson (1868), L. R. 2 A. & E. 116; Sheppard v. Bennett (1869), 39 L. J. Eccl. 1; Keet v. Smith (1875), L. R. 4 A. & E. 398. *Mentd.* Bourne v. Keane, [1919] A. C. 815.

**1401.** ——— General charge accompanied with particulars—Sufficiency.—In a suit against a clergyman, for drunkenness & indecent conduct in his church, articles charging him with being addicted to the immoderate use of spirituous liquors, frequenting a public-house, drinking to excess, & thereby becoming intoxicated, followed by charges of drunkenness at different times, one of which was particularly specified, were admitted.

*SPEER v. BURDER* (1840), 3 Moo. P. C. C. 166; Brod. & F. 1; 13 E. R. 71; *subsequent proceedings, sub nom. BURDER v. SPEER* (1841), 1 Notes of Cases, 30.

*Annotations*:—*Refd.* Burder v. Pugh (1855), 1 Jur. N. S. 1178. *Mentd.* Burder v. Langley (1842), 1 Notes of Cases, 512.

**1402.** ——— Articles need not specify canon or constitution—Offence cognisable by general ecclesiastical law.—(1) Where an offence is cognisable by the general ecclesiastical law, articles need not specify the particular canon or constitution intended to be relied on as supporting the charges contained in them.

(2) A clergyman was suspended for three years for publishing in a newspaper, a letter, in derogation & depraving of the Book of Common Prayer, & monished to abstain from similar conduct in future.—*SANDERS v. HEAD* (1843), 3 Curt. 505; 2 Notes of Cases, 355; 7 J. P. 580; 7 Jur. 728; 163 E. R. 827; *sub nom. SAUNDERS v. HEAD*, 1 L. T. O. S. 433.

*Annotations*:—As to (2) *Refd.* St. Albans, Bp. v. Fillingham, [1906] P. 163. *Generally, Conad.* Combe v. De la Bero (1881), 6 P. D. 157. *Refd.* Hodgson v. Oakley (1845), 1 Rob. Eccl. 322; Heath v. Burder (1862), 15 Moo. P. C. C. 1; Pusey v. Jowett (1863), 1 New Rep. 488; Martin v. Mackonochie, Flamank v. Simpson (1868), L. R. 2 A. & E. 116; Beneficed Clerk v. Lee, [1897] A. C. 226.

**1403.** ——— Articles need not negative exceptions.]

—A bishop being the patron of a living held by a clerk charged with an ecclesiastical offence has the power to send letters of request to the Ct. of Appeal

**Sect. 7.—General procedure: Sub-sect. 5, A. (a) & (b) & B.; sub-sects. 6, 7 & 8.]**

of the province under Church Discipline Act, 1840 (c. 86), s. 24.

It is not necessary, when the ct. has a general jurisdiction over the subject-matter, that the promoter of the office of the judge should negative, in pleading, exceptions; it is for deft. so to do, as a defence to the charge against him.—*COOPER v. DODD* (1850), 2 Rob. Eccl. 270; 14 Jur. 724; 163 E. R. 1314.

**1404. — Averment following exact words of rubric.]**—An averment, following the exact words of the third rubric at the end of the Communion service, that there has been communion, that the elements were consecrated & received by the minister, either where no person communicated with him, or where only one person communicated with him, or where only two persons communicated with him, is a sufficient allegation of an ecclesiastical offence having been committed.—*PARNELL v. ROUGHTON* (1874), L. R. 6 P. C. 46; 31 L. T. 594; 39 J. P. 180; 23 W. R. 428, P. C.

**1405. Signature of barrister—Necessity for.]**—*MAJISON v. UNMACK*, No. 441, *ante*.

**1406. Annexation of document pleaded.]**—*ST. DAVID (Bp.) v. DE RUTZEN*, No. 1015, *ante*.

**1407. Particulars—Time for application.]**—In a criminal suit containing charges of misconduct against a clerk in holy orders, an order was made after the close of the pleadings that the promoter should give particulars of the charges. Such particulars should as a rule be applied for on the admission of articles.—*SALISBURY (Bp.) v. OTTLEY* (1885), 10 P. D. 20.

**1408. Admission—Objection to—Notice of objections—Contents.]**—(1) In a criminal suit promoted by the incumbent for ringing the church bells, it is not sufficient to allege that the ringing took place without the consent of the incumbent; it must be alleged to have been against his express wish. (2) When the admission of pleadings in the Ct. of Arches is objected to, the notice must state the grounds of objection.—*DAUNT v. CROCKER* (1867), L. R. 2 A. & E. 41; 37 L. J. Eccl. 1; 32 J. P. 132.

**1409. Delivery—Time of.]**—*HUTCHINS v. DENZILLOE & LOVELAND*, No. 773, *ante*.

**1410. Amendment—When allowed.]**—*SCHULTES v. HODGSON*, No. 1390, *ante*.

**1411. Copy—Right of defence to.]**—A prohibition lies, if the Spiritual Ct. refuses a copy of articles.—*BENNOYER'S CASE* (1703), 6 Mod. Rep. 87; 87 E. R. 845.

**1412. — — —.]**—In a suit in spiritual ct. *ex officio* the party is entitled to have a copy of the articles.

It was formerly held by all the judges of England that when there was a proceeding *ex officio* in the Ecclesiastical Ct., they were not bound to give the party a copy of the articles; but the law is otherwise, for in such cases if they refuse to give a copy of the articles a prohibition shall go *quousque* they deliver it (*HOLT, C.J.*).—*ANON.* (1703), 2 Ld. Raym. 991; 92 E. R. 160.

**1413. Additional articles—When admitted.]**—The whole substantive case of a party should be at once brought before the ct. but where it is clearly shown that the facts could not have been sooner pleaded additional articles may be given in.—*MOORSON v. MOORSON* (1792), 3 Hag. Eccl. 87; 162 E. R. 1090.

*Annotations:—***Reid.** *Cocksedge v. Cocksedge* (1844), 1 Rob. Eccl. 90; *Phillips v. Phillips* (1846), 4 Notes of Cases, 523. **Mentd.** *Eldred v. Eldred* (1840), 2 Curt. 376; *Glennie v. Glennie & Bowles* (1862), 32 L. J. P. M. & A. 17; *Glipps v. Glipps & Hume* (1864), 4 New Rep. 303; *Symons v. Symons*, [1897] P. 167.

**1414. — — —.]**—*SCHULTES v. HODGSON*, No. 1390, *ante*.

**1415. — — —.]**—Two explanatory articles, in a responsive allegation, were admitted.—*ROPER v. ROPER* (1818), 3 Phillim. 97; 161 E. R. 1269.

**1416. — — — Particulars of original charge.]**—In a criminal suit the original articles pleaded a certain transaction, without specification. An additional article was brought in pleading the same transaction, but with greater minuteness:—*Held*: such article was admissible, inasmuch as it brought no fresh charge against deft.—*MADAN v. KARR* (1850), 14 Jur. 275.

**In proceedings under Church Discipline Act, 1840 (c. 86).]**—See Sect. 9, sub-sect. 1, C. (c) iii., *post*.

#### (b) Answer.

**1417. Contents—Redundancy.]**—Every averment of a plea must be fully answered, except where the answer might criminate the party. Answers must not be redundant.

The true meaning of the term ["redundancy"] I take to be this: resp. is not to insert in his answer any matter foreign to the articles he is called upon to answer, although such matter may be admissible in plea, but he may, in his answer, plead matter by way of explanation pertinent to the articles, even if such matter shall be solely in his own knowledge, & to such extent incapable of proof; or he may state matter which can be substantiated by witnesses; but, in this latter instance, if such matter be introduced into the answer, & not afterwards put in plea, or proved, the ct. will give no weight or credence to such part of the answer. When once an allegation has been admitted, either on debate or otherwise, it is too late to consider whether any parts of it are admissible or not; such a course would lead to confusion, expense & uncertainty; the ct. would, on objections to an answer, have to take the whole of the pleadings into its consideration (*DR. LUSHINGTON*).—*DYSART v. DYSART* (1843), 3 Curt. 543; 7 Jur. 658; 163 E. R. 819; *subsequent proceedings* (1844), 1 Rob. Eccl. 470.

**1418. — — — Necessity for specific denial to each averment.]**—In answers it is not open to a party to deny in a general & summary manner any article, but he must give a specific denial to each separate averment in the article.—*BRAYNE & EDWARDS v. BATHUR* (1845), 9 Jur. 518; *subsequent proceedings* (1848), 12 L. T. O. S. 305.

**1419. Affirmative issue—Right of defendant to file explanatory affidavit.]**—*KITSON v. DRURY*, No. 1839, *post*.

**1420. Failure to give in affirmative or negative issue.]**—*LEE v. MEREST*, No. 2273, *post*.

#### B. In Civil Suits.

**1421. Libel—What is—Cross bill.]**—*R. v. BASTWICK, BURTON & PRYNN* (1637), 3 State Tr. 711. *Annotations:—***Mentd.** *Wilson v. Rastall* (1792), 4 Term Rep. 753; *Faulkner v. Litchfield & Stearn* (1845), 1 Rob. Eccl. 184.

**1422. — — — Admission—Objection to—Court confined to contents of libel.]**—In a debate on the admissibility of a libel in a cause of subtraction of church rate, the ct. can take notice of nothing that is not expressly pleaded, or referred to, in the libel.—*BRETTELL v. WILMOT* (1758), 2 Lee, 518; 161 E. R. 435.

*Annotations:—***Reid.** *Farlar v. Chesterton* (1838), 2 Moo. P. C. C. 330; *Griffin v. Ellis* (1840), 11 Ad. & El. 743. **Mentd.** *Butt v. Fellowes* (1843), 3 Curt. 680.

**1423. — — — Copy—Right of defence to.]**—A prohibition lies to the Spiritual Ct. for refusing to

grant a copy of the libel.—**DIGHTON'S CASE** (1616), Cro. Jac. 388; 79 E. R. 332.

*Annotation*:—**Mentd.** Phillips v. Bury (1694), Skin. 447.

**1424.** ————]—If one is sued in the et. christian & is refused copies of the pleadings, prohibition lies.—**BABINGTON'S CASE** (1616), Moore, K. B. 917; 72 E. R. 996.

**1425.** ————]—Prohibition lies to the Spiritual Ct. in any suit for denying a copy of the libel, but not to Admlty.—**ANON.** (1701), 2 Salk. 553; 91 E. R. 469.

**1426.** ————]—**Additional pleadings—When admitted.**—The conclusion of a cause of granting probate of a will was rescinded after publication to allow a party, taken by surprise, to plead & prove an exhibit to be in the handwriting of an adverse party, one of whose witnesses could not depose thereto on cross-examination.

Though there are objections to pleading after publication, a cause is never concluded against the judge, who is always unwilling to exclude written testimony (**SIR HERBERT JENNET FUST**).—**QUAIT & SNOWDEN v. MANBY** (1849), 1 Rob. Eccl. 752; 7 Notes of Cases, 58; 163 E. R. 1202.

**1427. Act on petition—When permissible.**—**GORHAM v. EXETER** (Bp.), No. 2184, *post*.

**1428.** ————]—**KNAPP v. ST. MARY'S, WILLESDEN** (PARISHIONERS), No. 3267, *post*.

**1429.** ————]—**Act based on rejected articles.**—An allegation had been reformed by striking out matter irrelevant to the issue in the cause. The order for its reformation was appealed from, but the appeal was afterwards waived. An act on petition was then brought in, setting forth the facts pleaded in the rejected articles of the allegation:—**Held**: such act on petition could not be received.—**LANEVILLE v. ANDERSON** (1851), 18 L. T. O. S. 26; 15 Jur. 850.

**1430.** ————]—**Defendant must not be prejudiced—Annexation of documents.**—(1) If a question be raised by act on petition, instead of by plea & proof, the suit must be so conducted as not to prejudice the opposite party in the suit.

(2) Documents referred to in an act must be annexed to the act.

(3) A proceeding by petition has these advantages—there is a saving of expense & likewise of delay; & a question of domicile may be more conveniently raised thereby.—**DEASE** (FORMERLY **THIEWLES**) **v. KELLY** (1852), 2 Rob. Eccl. 510; 163 E. R. 1306.

**1431. Answer—Insufficiency—Whether contempt.**—A party is not to be pronounced in contempt at the same time that his answers are held to be insufficient.—**MORGAN v. HOPKINS** (1818), 2 Phillim. 582; 161 E. R. 1238.

#### SUB-SECT. 6.—EVIDENCE.

**1432. Mode of proof—Oral evidence.**—An application made by either party under 17 & 18 Vict. c. 47, to take evidence *via voce* will be granted unless the party opposing such application can show sufficient reason why it should not.—**EDWARDS & MANN v. HATTON** (1865), 13 L. T. 253.

**1433. Degree of proof—Criminal suit.**—**CRAIG v. FARNELL**, No. 1136, *ante*.

**1434.** ————]—**Conjunctive charge.**—**BARNES v. SHORE**, No. 1836, *post*.

**1435.** ————]—**BARNES v. SHORE**, No. 3876, *post*.

**1436. Burden of proof—Criminal suit.**—**BREEKS v. WOOLFREY**, No. 1400, *ante*.

**1437. Witnesses — Competency — Excommunicate.**—**TITCHMARSH v. CHAPMAN**, No. 1486, *post*.

— — — **In proceedings under Church Discipline Act, 1840 (c. 86).**—*See* Sect. 9, sub-sect. 1, C. (c) iv., *post*.

**1438.** ————]—**Attendance—How enforced.**—An ecclesiastical judge has no direct power to compel the appearance of a witness resident out of his jurisdiction to undergo an examination; nevertheless he can accomplish this indirectly; he can do so by means of letters of request to the ordinary of the place in which the witness is resident, which ordinary gives his assistance *sub mutue vicissitudinis obtentu*; & the witness is thus compelled to appear & undergo his examination. This is accomplished, not on the sole authority of the local ordinary who merely compels an appearance, but also by reason of the authority of the judge of the et. having jurisdiction over the cause, from whom the letters of request issued; for the local ordinary could not, of his own mere authority, have examined such witness in a cause over which he had no jurisdiction.—**PARKES v. PARKES** (1852), 2 Rob. Eccl. 518; 16 Jur. 1093; 163 E. R. 1399.

**1439.** ————]—**Examination—As to intentions & thoughts.**—An ecclesiastical judge cannot examine any man upon his oath respecting his intentions, & his thoughts.—**EDWARDS'S CASE** (1608), 13 Co. Rep. 9; 77 E. R. 1121.

*Annotation*:—**Mentd.** Baynum v. Baynum (1746), Amb. 63.

**1440.** ————]—**Incriminating questions.**—An ecclesiastical judge cannot put any one to accuse himself on oath.—**BIRCH v. LAKE** (1674), 1 Freem. K. B. 283; 1 Mod. Rep. 185; 89 E. R. 201.

**1441.** ————]—If the Spiritual Ct. call a man to take an oath tending to accuse himself, a prohibition lies.—**WEEK'S CASE** (1677), 2 Mod. Rep. 278; 86 E. R. 1071.

**1442.** ————]—**Suppletory oath—Confirmation of semiplena probatio.**—**WILLIAMS v. OSBOURNE** (LADY) (1718), 1 Str. 80; 93 E. R. 397.

*Annotation*:—**Refd.** Evans v. Evans (1814), 3 Notes of Cases, 416.

**1443.** ————]—**Necessity for corroboration.**—Prohibition to a suit for offerings. Suggesting debt. had but one witness to prove payment: denied.

You do not suggest that you offered to prove payment of those offerings by one witness & that they [the Consistory Ct.] rejected such proof; now we are not bound to take notice that by their law they will reject a single witness; nor are you injured till they have actually done so. At this rate we should deprive them of all jurisdiction, for possibly they may receive the evidence of your sole witness, & yet give judgment against his testimony upon the credibility of the man (*per Cur.*).—**ANON.** (1729), Fitz-G. 82; 91 E. R. 663.

**1444.** ————]—**BERNEY v. NORWICH** (Bp.), No. 1165, *post*.

**In proceedings under Church Discipline Act, 1840 (c. 86).**—*See* Sect. 9, sub-sect. 1, C. (c) iv., *post*.

#### SUB-SECT. 7.—SENTENCE.

*See* Sect. 10, *post*.

#### SUB-SECT. 8.—APPEALS.

**1445. Who may appeal—Party proceeded against—In criminal suit.**—In criminal suits an appeal is allowed to the party prosecuting as well as to



**Sect. 7.—General procedure: Sub-sects. 8 & 9.**  
**Sects. 8 & 9: Sub-sect. 1, A.]**

**deft.—MILLAR & SIMES v. PALMER & KILLBY** (1837), 1 Curt. 550; 1 J. P. 140; 103 E. R. 193.

**Annotations:—Mentd.** Cooper v. Wickham (1839), 2 Curt. 303; Steward v. Francis (1843), 3 Curt. 209; Lee v. Ridsdale (1873), 37 J. P. 804; St. Stephen, Walbrook (Rector & Churchwardens) & Grocers Co. v. Sun Fire Office, Trustees (1883), Trist. 103; Gordon v. Hayward (1905), 21 T. L. R. 298.

**1446. — Party in contempt.]—HARRISON v. SPARROW**, No. 1383, *ante*.

**1447. From what orders—Refusal of citation—By Dean of Arches.]—In a libel for heresy, the refusal of a citation by the Dean of Arches, was holden a good cause of appeal to the Delegates.—PELLING v. WHISTON** (1714), 1 Com. 199; 1 Hag. Con. 433, n.; *sub nom.* WHISTON'S CASE, Brod. & F. 326; 92 E. R. 1033.

**Annotations:—Consd.** Sheppard v. Bennett (1869), L. R. 2 A. & E. 335. **Mentd.** Butler v. Dolben (1756), 2 Lec. 312; Hodgson v. Oakeley (1845), 1 Rob. Eccl. 322; Heath v. Burder (1862), 15 Moo. P. C. C. 1.

**1448. — By Chancellor.]—(1)** No citation can issue from the registry without the fiat of the Chancellor. If the Chancellor refuses his fiat there is an appeal from his refusal (Dr. TRISTRAM, Q.C.).

**(2)** It is a well established rule of ecclesiastical law that there is an appeal from every *gravamen* alleged to have been committed by an ecclesiastical judge except on the question of costs (Dr. TRISTRAM, Q.C.).—*Ex p.* BRINCKMAN (1895), 11 T. L. R. 387.

**1449. — Rejection of articles.]—The** ct. will not allow an appeal from its decision as to the admission of articles, unless some important principle of law is involved in such decision.—**MARTIN v. MACKONOCHE** (1867), 36 L. J. Eccl. 25. **Annotation:—Mentd.** Parnell v. Roughton (1874), L. R. 6 P. C. 46.

**1450. — Order for costs.]—COLLIER & DRINKWATER v. PEARSON** (1798), cited 3 Hag. Ecc. p. 480; 102 E. R. 1233.

**Annotation:—Consd.** Lloyd & Clarke v. Poole (1831), 3 Hag. Ecc. 477.

**1451. — —.]—(1)** On appeal in a pew cause from condemning churchwardens in costs:—**Held:** giving or refusing costs is not a matter absolutely unappealable; though such appeals, especially for trifling sums, are much to be discouraged.

**(2)** If a party does acts in furtherance of a sentence, he bars his right of appeal.—**LLOYD & CLARKE v. POOLE** (1831), 3 Hag. Ecc. 477; 102 E. R. 1232.

**1452. — —.]—Ex p.** BRINCKMAN, No. 1448, *ante*.

**— Order in criminal suit.]—See** No. 798, *ante*.

**1453. Death of promoter—Pending appeal.]—THORPE v. PLAXTON** (1731), cited L. R. 3 P. C. p. 256. **Annotation:—Consd.** Elphinstone v. Purchas (1870), L. R. 3 P. C. 245.

**— —.]—See, also,** No. 1138, *ante*.

**1454. Appeal per saltum to Archbishop—Judge of subordinate & diocesan courts same person.]—Though the regular appeal from a jurisdiction not peculiar but subordinate is to the diocesan, yet if the judge of the subordinate & diocesan cts. be the same person, the appeal may be *per saltum* to the Metropolitan; but the reason must appear by the formal instruments in the cause.—**BEARE v. JACOB** (1829), 2 Hag. Ecc. 257; 102 E. R. 853.**

**1455. When party admitted as pauper—Respondent.]—A** resp. may be admitted as a pauper in the Ct. of Appeal, & the ct. looks at his faculties at the time of the application, not at what he may have been possessed of at a former time.—**TAYLOR v. MORSE** (1830), 3 Hag. Ecc. 179; 102 E. R. 1122.

**1456. Power of court to re-try question decided by appellate court.]—MARTIN v. MACKONOCHE** (SECOND SUIT), No. 2815, *post*.

#### SUB-SECT. 9.—COSTS.

**1457. Discretion of court.]—[Costs]** are subject to the discretion of the ct., to be exercised on the nature of the suit & the conduct of the parties in it (SIR WILLIAM SCOTT).—**LAGDEN v. ROBINSON & GREEN** (1810), 1 Hag. Con. 501; 161 E. R. 631.

**1458. —.]—In these cts.** it has always been held that costs are a matter of discretion, not of capricious discretion, but according to the just consideration of all the circumstances. It is the duty of the ct. on the one hand to protect parties in the fair assertion of their just & legal rights; & on the other hand to check vexatious litigation (SIR JOHN NICHOLL).—**BURNELL v. JENKINS** (1816), 2 Phillim. 391; 161 E. R. 1178.

**1459. Right to costs—Unnecessary pleading.]—A** party having successfully resisted payment of a church rate, was dismissed, but not with his full costs, he having put matters in plea which caused unnecessary expense.—**CHESTERTON & HUTCHINS v. FARLAR** (1839), 2 Curt. 77; 163 E. R. 342.

**— Effect of death of party entitled to costs.]—See** No. 1622, *post*.

**1460. Liability for costs—Abandonment of proceedings—By intervening party.]—Where** a party intervening in a cause, alleges that he proceeds no further, costs were given.

It is almost a matter of course where a party alleges that he proceeds no further, to give costs, unless some special circumstances are shown why he should not be liable (*per* CUR.).—**HUNTER v. HULMER** (1820), 3 Phillim. 260; 161 E. R. 1319.

**1461. — Pursuant to monition to pay—Waiver.]—The** obligation to pay costs, pursuant to a monition for payment was held, under the circumstances, not to be dispensed with by the party to whom they were due having bound himself to waive them by an instrument executed out of ct.—**COATES v. BROWN** (1822), 1 Add. 345; 162 E. R. 121.

**Annotation:—Mentd.** A.-G. v. Brunning (1859), 4 H. & N. 94.

**1462. — Party convicted of brawling—Provocation.]—Arts.** for brawling, at a vestry held in the vestry room within the churchyard, being proved, the ct. suspended *deft. ab ingressu ecclesie* for one week, but did not condemn him in the whole costs, in consequence of irritating expressions having been proved to have been used by the promoter.

If a party, promoting such a suit, shall have been himself guilty of misconduct, he will stand in a different position with respect to the costs than if he had not misconducted himself (Dr. LUSHINGTON).

The clergyman of the parish ought to consider himself superior to his parishioners, & no provocation ought to tempt him to deviate from temper & calmness, or induce him to place himself on a level with ordinary vestrymen. The same expression from an ordinary vestryman would be less censurable than from the clergyman, whose duty it is to keep the peace & set an example to others (Dr. LUSHINGTON).—**WILLIAMS v. HALL, WILLIAMS v. FARLAR** (1837), 1 Curt. 597; 1 J. P. 236; 163 E. R. 209.

**1463. —.]—JONES v. JELF**, No. 1389, *ante*.

**1464. — Offence committed with impunity by other clergymen of diocese.]—KITSON v. DRURY**, No. 1839, *post*.

**1465. — Bishop respondent.]—(1)** The evi-

dence of a single witness of good character, whose memory is shown to be inaccurate, & whose acts subsequent to the misconduct alleged are not consistent with a resentment of it, will not be sufficient to convict a clergyman of an attempt, by words only, to solicit the chastity of such witness.

(2) Although all the judgment in the ct. below may be on all sides reversed, a bishop, as resp., will not be condemned in the costs of the proceedings either in the Ct. of Arches or in the Ct. of Appeal, if in instituting them he has acted simply in accordance with his duty to the public.—*BERNEY v. NORWICH* (BP.) (1867), 36 L. J. Eccl. 10, P. C.; *revisg. S. C. sub nom. NORWICH* (BP.) *v. BERNEY* (1866), 36 L. J. Eccl. 8.

*Annotations* :—*As to* (1) *Reid. Martin v. Mackonochie* (1868), 37 L. J. Eccl. 17; *Norwich Bp. v. Pearse* (1868), L. R. 2 A. & E. 281.

— *Effect of death of party liable.*—*See* Nos. 1407, 1469, *post*.

**1466. — Effect of pardon—On costs of subsequent appeal.**—On costs taxed in the Spiritual Ct., if the party appeal, & then a pardon come out, & the former sentence is afterwards annulled with costs to applt., the costs given on the appeal are not discharged by the pardon.—*BALDREY v. PACKARD* (1626), Cro. Car. 47; 70 E. R. 644.

— *See, also, CONSTITUTIONAL LAW, Vol. XI., p. 518, Nos. 229, 230.*

**1467. Effect of death—Of several defendants—Survivor's liability.**—Where one of several co-defs. in a suit for tithes wherein a general decree of costs had been made, survived the rest, the ct. refused to order the costs to be apportioned, so as to relieve the survivor from the effect of such decree.—*MICHEL v. BULLEN* (1818), 6 Price, 87; 146 E. R. 749.

**1468. — Of successful promoter—Delay in enforcing payment.**—*BROOKES v. CRESSWELL*, No. 1622, *post*.

**1469. — Of defendant—Liability of estate.**—An order of a consistory ct. to pay costs, followed by a monition to pay the amount, creates a debt upon which a creditor's action for administration of the debtor's estate can be founded after his death.

If deft. admist assets I will give judgment for the amount, with costs; if he does not admit assets I will now make the usual order for administration (*IVE, J.*).—*Re NATHERS, AINGER v. NATHERS* (1919), 88 L. J. Ch. 521; 122 L. T. 154; 83 J. P. 266; 63 Sol. Jo. 800.

**1470. Personal liability of solicitors for court fees—Remedy against unsuccessful party.**—*PEARSON v. STEAD, STEAD v. PEARSON*, No. 435, *ante*.

**1471. Taxation—Not as between proctor & client.**—(1) An attorney is authorised to insert in his bill of costs the amount paid to a proctor employed by him for his client.

(2) In taxing the attorney's bill, the master is not bound to inquire into the reasonableness of the bill so paid to the proctor.

(3) In considering whether more than one-sixth of such attorney's bill has been taxed off, the entire amount of the bill must be taken inclusively of such proctor's bill.

(4) According to the practice of the Ecclesiastical Ct., a bill of costs cannot be taxed as between proctor & client.—*FRANKLIN v. FEATHERSTONHAUGH* (1834), 1 Ad. & El. 475; 3 Nev. & M. K. B. 779; 3 L. J. K. B. 163; 110 E. R. 1289.

*Annotations* :—*As to* (1) *Reid. Re Bedson* (1815), 9 Beav. 5; *Re Remnant* (1849), 18 L. J. Ch. 374.

#### PART IV. SECT. 9, SUB-SECT. 1.—A.

*s. Whether applicable—Enforcement of powers of bishop—Sentence of*

*ecclesiastical tribunal.* Though the letters patent from which the Bishop of Columbia derives his authority do not confer upon him any effective

**1472. Security for costs—When ordered—Criminal suit.**—The ct. will not, in a criminal suit, direct deft. to give security for costs.—*WOODS v. WOODS* (1840), 2 Curt. 516; 163 E. R. 493.

*Annotations* :—*Mentd. Parkes v. Parkes* (1852), 2 Rob. Eccl. 518.

— *Under Church Discipline Act, 1840 (c. 86).*—*See* No. 1548, *post*.

**Appeal against order for costs.**—*See* Nos. 1448, 1450, 1451, *ante*.

#### SECT. 8.—ADVOCATES.

**1473. Proctor—Mandamus to restore to office.**—A *mandamus* does not lie to restore a proctor in the spiritual cts., for they have jurisdiction over their own officers.—*It. v. OXENDEN* (1691), 1 Show. 217, 261; 1 Holt, K. B. 435; 89 E. R. 545, 560; *sub nom. It. v. LEE*, 3 Lev. 309; 1 Show. 251; *sub nom. LEE'S CASE*, Carth. 169; *sub nom. LEIGH'S CASE*, 3 Mod. Rep. 332; *sub nom. LEE v. OXENDEN*, Skin. 290; 3 Salk. 230.

*Annotations* :—*Reid. R. v. Ward* (1729), 1 Barn. K. B. 294. *Mentd. Dale's Case, Enright's Case* (1881), 6 Q. B. D. 376.

**1474. — Penalties for acting without certificate.**—A common informer may recover penalties against a proctor for acting as such, without having obtained & entered his certificate under 37 Geo. 3, c. 90, but two proctors cannot be sued together as for one offence in not having obtained & entered their certificate. *Qu.*: whether it be not bad to sue under the statute for not having obtained & entered a certificate without distinguishing which of those two omissions the person sued has been guilty.—*BARNARD v. GOSTLING* (1805), 1 Bos. & P. N. R. 245; 127 E. R. 454, Ex. Ch.

*Annotations* :—*Mentd. Davis v. Edmonson* (1803), 3 Bos. & P. 382; *Del Campo & Martinez v. R.* (1837), 2 Moo. P. C. C. 15.

**1475. — Qualifications.**—*TELL v. BOND*, No. 1088, *ante*.

— **Recovery of fees.**—*See* Nos. 1221-1228, *ante*.

**1476. Admission—Mandamus.**—No *mandamus* lies to the Archbishop of Canterbury to issue his fiat to the proper officer, etc., for the admission of a Doctor of Civil Law, graduated at Cambridge, as an advocate of the Ct. of Arches.—*It. v. CANTERBURY* (ARCHBP.) (1807), 8 East, 213; 103 E. R. 323.

#### SECT. 9.—PROCEEDINGS IN RESPECT OF OFFENCES OF CLERGY.

SUB-SECT. 1.—UNDER CHURCH DISCIPLINE ACT, 1840.

##### A. In General.

**1477. Necessity for proceeding under Act.**—Where, after the passing of Church Discipline Act, 1840 (c. 86), an Archbishop at his visitation, received a charge of simony against a clerk, & pronounced sentence of deprivation against him, & interdicted him from exercising his functions on pain of the greater excommunication:—*Held*: the proceeding ought to have been conducted in the mode directed by the statute, because it was a criminal proceeding & in ct., within sect. 23, & was not within the reservation of sect. 25,

coercive jurisdiction over his clergy, he can still enforce obedience by having recourse to the civil cts. A ct. of equity will on proper application,

**Sect. 9.—Proceedings in respect of offences of clergy:**  
**Sub-sect. 1, A. & B.]**

because the power of depriving "personally & without process in ct." did not belong to the Archbishop before the statute, & the ct. prohibited the Archbishop from enforcing the sentence.—*Re YORK (DEAN) (1841)*, 2 Q. B. 1; 114 E. R. 1; *sub nom. R. v. YORK (ARCHBP.)*, 2 Gal. & Dav. 202; 10 L. J. Q. B. 306; 6 Jur. 412.

**Annotations:—***Consd. Ex p. Denison (1854)*, 4 E. & B. 292. *Distd. Pusey v. Jowett (1863)*, 1 New Rep. 488. *Consd. McGeath v. Geraghty (1866)*, 15 W. R. 127; *Phillipps v. Boyd (1875)*, L. R. 6 P. C. 435. *Reid. Blane v. Geraghty (1866)*, 15 W. R. 133; *Reid v. Lincoln, Bp. (1889)*, 14 P. D. 88; *Cox v. Hakes (1890)*, 15 App. Cas. 506. *Mentd. Whiston v. Rochester (Dean & Chapter) (1849)*, 7 Hare, 532; *Richards v. Flueher (1873)*, L. R. 4 A. & E. 107; *Worthington v. Jeffries (1875)*, L. R. 10 C. P. 379; *Et. v. Oxford, Bp. (1879)*, 4 Q. B. D. 245.

**1478. —**—(1) A proceeding in the Consistorial Ct. to recover penalties for non-residence under Pluralities Act, 1838 (c. 106), ss. 32 & 141, is not a criminal suit within Church Discipline Act, 1840 (c. 86), s. 23, but a civil suit, & therefore, is not to be instituted in the mode pointed out by sect. 3 of the latter Act.

(2) The ct. will not issue a writ of prohibition after sentence in an ecclesiastical ct., upon an objection in the nature of a special demurrer to the proceedings in that ct., as that a libel exhibited against a beneficed clergyman, for non-residence, did not sufficiently allege that he had cure of souls, the statement being that he was rector of the rectory of the parish church of W., being rightfully inducted thereto.

(3) The ct. will not issue prohibition upon the ground of an objection which relates merely to a rule of practice in the ct. below.

(4) A sentence of the Consistorial Ct., in such proceeding, condemned the party charged in payment of one-third part of the annual value of his benefice, with the reasonable expense of the promotor of the suit. On motion for a prohibition:—*Held*: such sentence was valid & consistent with Pluralities Act, 1838 (c. 106), s. 10, though the ct. would order that the amount of such third part & of such expense should "be ascertained in the usual & accustomed manner by the registrar" of the ct., it appearing that the sentence was conformable to the practice of the Consistorial Ct., & by such practice, payment would not be enforced till the bishop had received the registrar's report of the amount, & made an order thereon.—*RACKHAM v. BLUCK (1846)*, 9 Q. B. 691; 10 L. J. Q. B. 82; 11 J. P. 389; 11 Jur. 325; 115 E. R. 1439; *sub nom. Re BLUCK, RACKHAM v. BLUCK*, 8 L. T. O. S. 275; *previous proceedings, sub nom. BLUCK v. RACKHAM*, 5 Moo. P. C. 305, P. C.

**1479. What is "criminal suit" within Act—Suit to recover penalty for non-residence.]—***RACKHAM v. BLUCK*, No. 1478, *ante*.

**1480. — Proceedings under Public Worship Regulation Act, 1874 (c. 85).]**—(1) The proceeding under the above Act is not a criminal proceeding within Church Discipline Act, 1840 (c. 86).

(2) The Public Worship Regulation Act, 1874 (c. 85), gives no power to substitute a succeeding churchwarden for continuing a proceeding commenced by his predecessor in respect of acts done during the term of the predecessor's office.

(3) *Qu.*: as to the effect upon a suit of the churchwarden who instituted it ceasing to be a

churchwarden or parishioner.—*HARRIS v. PERKINS (1882)*, 7 P. D. 161; 51 L. J. P. C. 83; 47 L. T. 69; 47 J. P. 100, P. C.; *affg. S. C. sub nom. PERKINS v. ENRAGHT (1881)*, 7 P. D. 31.

**1481. Whether appeal to bishop condition precedent—Promotion of suit by parishioner—Refusal to administer communion to parishioner.]—***JENKINS v. COOK*, No. 1047, *ante*.

**1482. Effect of Act—Jurisdiction of University judge to try graduate for breach of University law—Breach constituting ecclesiastical offence.]—**

(1) *Semble*: a power conferred by the University Statutes upon the Vice-Chancellor to inflict a *pœna* upon a graduate, is *primâ facie* a judicial power, & one to be exercised judicially in the Chancellor's Ct.

(2) The Church Discipline Act, 1840 (c. 86), does not debar a University judge from trying a resident clergyman for a breach of University law, notwithstanding such breach may also constitute an ecclesiastical offence, but the ct. will use its discretion as to trying offences over which it possesses, under ancient statutes, a discretionary criminal jurisdiction, when such offences are of a vague character, & do not amount to overt acts.—*PUSEY v. JOWETT (1863)*, 1 New Rep. 488.

**1483. Suit to be commenced within two years—What is commencement of suit—Service of citation.]—***BUOOKES v. CRESSWELL*, No. 1513, *post*.

**1484. — — — — —.]—***HEREFORD (Bp.) v. T—N*, No. 1521, *post*.

**1485. — — — — —.]—**Proceedings under Church Discipline Act, 1840 (c. 86), are commenced by the service of a citation & with the issuing of a commission of inquiry & the report of the comrs. The filing of & service of articles on accused constitute the commencement of a suit or proceeding within sect. 20 of above Act, which requires suits or proceedings to be commenced within two years.—*DITCHER v. DENISON (1858)*, 11 Moo. P. C. C. 321; *Brod. & F. 156*; 31 L. T. O. S. 61; 22 J. P. 337; 6 W. R. 312; 14 E. R. 718, P. C.; *affg. S. C. sub nom. DENISON v. DITCHER (1857)*, *Dea. & Sw. 334*.

**Annotations:—***Consd. Beardsley v. Giddings, [1904] 1 K. B. 847. Reid. Simpson v. Flamank (1867)*, L. R. 1 P. C. 463; *Sheppard v. Bennett (1870)*, L. R. 4 P. C. 350; *Martin v. Macknochie (1879)*, 4 Q. B. D. 697. *Mentd. Heath v. Burder (1862)*, 15 Moo. P. C. C. 1; *Julius v. Oxford, Lord Bp. (1880)*, 5 App. Cas. 214; *Yates v. R. (1885)*, 52 L. T. 305.

**1486. — — — — — Continuing offence.]—**Church Discipline Act, 1840 (c. 86), s. 20, enacts: "That every suit against a clergyman, for any offence against the laws ecclesiastical, shall be commenced within two years from the commission of the offence." On Feb. 17, 1840, a clergyman refused to bury a corpse of a parishioner brought for interment; on May 26, 1841, a second request to him to do so was made, & refused. On May 20, 1843, a citation issued against him from this ct.:—*Held*: protest to appearing, on the ground that the two years, limited by the Act, had expired, would be overruled, the two refusals in respect of the one child being separate offences; (2) a child, baptised with water in the name of the Holy Trinity, by a person alleged to be in heresy or schism with the Church of England, was not unbaptised within the meaning of the Rubric for the burial service, in the book of Common Prayer. Lay & heretical baptism are contrary to the orders of the Church, but both are valid, and if valid, entitle the recipients, in either case, to the privi-

supply coercive jurisdiction to enforce the sentence of ecclesiastical tribunals of assessors, appointed in accordance with the provisions of Church Dis-

cipline Act, 1840, so far as its provisions are applicable, when the finding of such tribunal is not unreasonable, & its proceedings are conducted in a way

consonant with the principles of justice, as understood in a ct. of equity.—*COLUMBIA (Bp.) v. CRIDE* (1874), 1 B. C. R. pt. 1, 5.—*CAN.*

legs conferred by valid baptism, whatever those privileges may be.

(3) Excommunication, *ipso facto*, must be preceded by a declaratory sentence of a competent ct.

(4) A party is not prevented either from promoting the office of judge, or being a witness in a cause of office; even supposing such party to be excommunicate, he may be imprisoned for six months, & that is all.—*TITCHMARSH v. CHAPMAN* (1844), 3 Curt. 703, 810; 3 Notes of Cases, 370; 3 L. T. O. S. 353; 7 Jur. 1020; 8 Jur. 626; 163 E. R. 874, 920; *subsequent proceedings*, 1 Rob. Eccl. 175.

#### B. What Offences within Act.

**1487. General rule.**—*Ex p.* DENISON, No. 1500, *post*.

**1488. Criminal offence—No conviction by temporal court.**—An ecclesiastical ct. may entertain a suit against a clergyman for the purpose of deprivation or suspension from his ecclesiastical preferment, by reason of a public scandal existing against him, although the scandal originates from a charge which, if true, would constitute a criminal offence cognisable solely in a common law ct., & though no conviction by common law is pleaded.—*BURDER v.* — (1814), 3 Curt. 822; 8 Jur. 520; 163 E. R. 914; *sub nom.* BURDER v. HODGSON, 3 L. T. O. S. 242; *subsequent proceedings, sub nom.* BURDER v. HODGSON (1815), 5 L. T. O. S. 92; (1816), 4 Notes of Cases, 483.

*Annotations*:—*Apld.* Borough v. Collins (1890), 15 P. D. 81. *Refd.* Pusey v. Jowett (1863), 1 New Rep. 488; Bowman v. Lax, [1910] P. 300.

**1489. Sodomy.**—Letters of request were presented to the official principal of the Chancery Ct. of York, requesting that a clerk might be cited before him to answer a charge that he had been guilty of the criminal offence of sodomy:—*Held*: the letters ought not to be accepted, for a charge of so grave a character ought not to be investigated by an ecclesiastical ct. until the person charged had been tried & convicted by a criminal ct. of competent jurisdiction.—*Re A. B.* (1886), 11 P. D. 56.

**1490. Conviction by temporal court—Forgery.**—A beneficed clergyman was tried & convicted at the Central Criminal Ct. for forging a transfer of shares, & sentenced to penal servitude for the term of ten years:—*Held*: he had been guilty of “an offence against the laws ecclesiastical,” within Church Discipline Act, 1840 (c. 86), s. 3; & he should be deprived of his living, & inhibited from all future performance of divine offices in the province of Canterbury.—*HUSSEY v. RADCLIFFE* (1859), 5 Jur. N. S. 1011.

**1491. Simony.**—*BENEFICED CLERK v. LEE*, No. 1573, *post*.

**1492. Refusal to perform divine service.**—*RUGG v. WINCHESTER* (Bp.), No. 162, *ante*.

**Refusal to administer communion.**—*See* No. 1017, *ante*.

**1493. Retaining alms.**—The ct. declined to order a decree or citation in a criminal suit to issue against a clergyman officiating in a chapel to which no district is assigned, for refusing to pay over to the incumbent & churchwardens of the church of the district in which such chapel is situated the alms collected at the offertory in such chapel, there being no satisfactory evidence before the ct. that the district had become a separate parish. It ordered a citation to issue in a civil suit, calling upon the clergyman to show cause why he should not pay over to the incumbent & churchwardens of the district church the moneys he had received at the offertory in his chapel.

It is doubtful whether the disposing to pious & charitable uses of the alms of the parishioners is the exercising of a civil right under Church Discipline Act, 1840 (c. 86), s. 19, so that a suit in a criminal form can be brought in a consistorial ct. to ascertain to whom such right belongs.—*LIDDELL v. RAINSFORD* (1808), 37 L. J. Eccl. 83; 32 J. P. 487.

*Annotation*:—*Refd.* Richards v. Fincher (1873), L. R. 4 A. & E. 107.

**1494. Officiating without consent of incumbent—& in disobedience to inhibition.**—It is an ecclesiastical offence under Church Discipline Act, 1840 (c. 86), for a clerk in holy orders of the Church of England to publicly perform any of the services of the Church of England without lawful authority in a parish without the consent & against the express wish of the incumbent of the parish, & such offence is aggravated where the accused clerk has in so acting disobeyed the inhibition of the Ordinary.—*NESBITT v. WALLACE*, [1901] P. 351; 17 T. L. R. 727.

**1495. Assuming to exercise episcopal function of ordination.**—It is an offence against ecclesiastical law for the incumbent of a parish church, not being a bishop, to purport to ordain a priest without having been given public authority to take upon himself the power of ordination. The incumbent of a parish church, not being himself a bishop, after public notice & in express disobedience to the commands of the bishop of the diocese, read Evening Prayer, celebrated Holy Communion according to the use of the Church of England, & preached a sermon in a Nonconformist chapel in another parish wherein he had no cure of souls, & also then & there purported to ordain a layman as a presbyter of the Church of God, reading portions of the form of ordering of priests according to the Prayer Book, & taking the part of the ordaining bishop:—*Held*: in a criminal suit by letters of request brought under Church Discipline Act, 1840 (c. 86), within two years of the above acts, in which suit the incumbent appeared as deft., & attempted to justify his actions as lawful, but at the close of the case regretted his error & submitted to the judgment of the ct., deft., in so purporting to ordain a priest, was guilty of an offence against ecclesiastical law, punishable in the case of an incorrigible offender by a sentence of deprivation.—*ST. ALBANS (Bp.) v. FILLINGHAM*, [1906] P. 163; 22 T. L. R. 293, 332.

*Annotation*:—*Refd.* Oxford, Bp. v. Henly, [1907] P. 88.

**“Scandal or evil report”—Criminal offence—No conviction by temporal court.**—*See* No. 1188, *ante*.

**1496. Drunkenness—Conviction by justices—No inquiry into truth of original charge.**—In a suit instituted in the Ct. of Arches against a clerk in orders, the articles alleged that he had been convicted before justices in petty sessions of having been drunk & riotous in a public place, & prayed that he might be punished for the scandal caused thereby. Resp. by his plea, denied that he had been drunk & riotous, or that the conviction had caused scandal, alleged that it had been obtained by perjured evidence, & demanded a full inquiry into the facts. On motion to strike out this plea:—*Held*: the plea was no answer to the articles & could not be admitted, for the ct. had jurisdiction to suspend a clerk *ab officio* on account of the scandal caused by the conviction without considering whether the offence charged had been actually committed.—*BOROUGH v. COLLINS* (1890), 15 P. D. 81.

**1497. Immoral acts.**—*BOWMAN v. LAX*, No. 1568, *post*.

**Sect. 9.—Proceedings in respect of offences of clergy:**  
**Sub-sect. 1, C. (a) & (b).]**

**C. Procedure.**

**(a) Commission of Inquiry.**

**1498. Nature of commission.]—**(1) A commission issued by the bishop in pursuance of Church Discipline Act, 1840 (c. 86), is merely a preparatory step to ascertain whether or not there is sufficient *prima facie* case for further inquiry before a regular tribunal. It is not necessary, therefore, to state in such commission more than the generic nature of the offence, sufficient to found the arts. on, & to give the party proceeded against notice of the general nature of the charges he is called upon to answer, & which must be fully specified in the arts. to be exhibited.—**SHEPPARD v. BENNETT** (1870), L. R. 4 P. C. 350; 9 Moo. P. C. C. N. S. 120; 39 L. J. Eccl. 59; 23 L. T. 145; 34 J. P. 789; 18 W. R. 650; 17 M. R. 459, P. C. **Annotation:—****Reid**. L. v. Oxford, 13p. (1879), 4 Q. B. D. 245.

**1499. Issue of commission.—At whose instance—More than one complainant.]—****HEREFORD** (Bp.) v. T.—N. No. 1521, *post*.

**1500. —Right of Archbishop—Bishop patron of accused's preferment.]—**J. presented the Bishop of B. & W., the diocesan of Archdeacon D., with articles to be filed in the Ct. of Arches, charging the archdeacon with preaching doctrines "contrary to the articles of our religion as by law established, or some of them." The bishop, after a private correspondence with the archdeacon, declined to grant letters of request, & to send the question to be adjudicated on by the Ct. of Arches, but "admonished" the archdeacon in a private letter as to his future conduct. After the decease of the bishop, J. applied to his successor to proceed in the matter by granting letters of request. This the new bishop refused to do, for, among other reasons, that the question had already been adjudicated on by his predecessor. The Archbishop of C. having given notice to the archdeacon of his intention to issue a commission of inquiry under Church Discipline Act, 1840 (c. 86):—**Held**: (1) a rule for a prohibition to restrain the Archbishop from issuing such commission should be refused by the ct.; (2) the above Act regulates the mode of proceeding in a criminal suit against a clerk in holy orders for any offence against the law ecclesiastical; (3) this statute does not only apply to cases where clerks in holy orders are charged with immorality, but to clerks charged with any offence against the laws ecclesiastical, & preaching heretical doctrines contrary to the formularies of the Church is an offence against those laws; (4) the offence created by 13 Eliz. c. 12, s. 2, is not taken away by the former Act, but the mode of proceeding for an offence under 13 Eliz. c. 12, is regulated by the Act of 1840; (5) articles filed in the Ct. of Arches against a clerk in holy orders charging him with preaching doctrines "contrary to the articles of our religion as by law established, or some of them, & contrary to the provisions of 13 Eliz. c. 12," is a criminal suit or proceeding against such clerk for an offence against the laws ecclesiastical; & the admonition given to the archdeacon by the deceased bishop was no adjudication of the charges preferred against him by J. so as to make the issuing of a commission to inquire into such charge an excess of jurisdiction on the part of the Archbishop; (6) letters of request not being granted by the bishop, the Archbishop under Church Discipline Act, 1840 (c. 86), s. 24, has the power of issuing a commission.

After the passing of Church Discipline Act, 1840 (c. 86), a charge of maintaining false doctrine was made against a clerk in holy orders to the bishop of the diocese, who was also patron of the living held by the accused clerk; & the bishop was desired to send the case, by letters of request, to the Ct. of Arches. Instead of doing so, he called upon the clerk for an explanation of his doctrine upon certain points; & having received an answer, wrote to him a letter, wherein he expressed his own opinion that the clerk's views were erroneous, though not absolutely condemned by the Church, & concluded by admonishing him that though he was at liberty to hold as a pious opinion a doctrine which the Church of England had not condemned, he should abstain for the future from all attempts to enforce the acceptance of his own opinion as the only condition of holding faithfully the true doctrine. The bishop declined therefore to issue letters of request; & upon a similar application to his successor, he also declined, on the ground that the case had already been decided. Subsequently, the Archbishop of Canterbury issued a commission of inquiry into the grounds of the above-mentioned charge, pursuant to sect. 3 of the above Act.

(7) This was a criminal suit or proceeding for an offence against the laws ecclesiastical, within the meaning of the above Act; & the bishop had no authority to proceed against the clerk under 13 Eliz. c. 12, s. 2, even if he had intended to do so; (8) upon the correspondence it appeared that the bishop did not intend to proceed judicially under that statute; & he never legally adjudicated upon the charge preferred against the clerk.—**Ex p. DENISON** (1854), 4 E. & B. 292; 3 C. L. R. 247; 24 L. J. Q. B. 34; 1 Jur. N. S. 517; 119 E. R. 113; *sub nom. Re TAUNTON* (ARCHDEACON), 24 L. T. O. S. 140; *sub nom. Re EAST BRENT* (VICAR), 18 J. P. 808; *sub nom. R. v. CANTERBURY* (ARCHBP.), 3 W. R. 105.

**Annotations:—**As to (1) **Reid**. Sheppard v. Phillimore & Bennett (1869), L. R. 2 P. C. 450; L. v. Oxford, Bp. (1879), 4 Q. B. D. 525.

**1501. —Discretion of bishop—Interest of applicant.]—**G., a clerk in holy orders, residing in the city & diocese of O., applied to the Bishop of C. to issue a commission, under Church Discipline Act, 1840 (c. 86), s. 3, against R., rector of the parish of W., in the diocese of C., to inquire into certain charges made by G. against R. of offences against the laws ecclesiastical. G. had no connection with the parish of W. or diocese of C., nor had he any private or personal interest in the said charges. The Bishop declined, after inquiry, to issue a commission. Upon showing cause against a rule for a *mandamus* to the Bishop, commanding him to issue a commission:—**Held**: (1) under the statute, the Bishop had a discretion as to issuing a commission or not; (2) as it was in the discretion of the ct. to grant a *mandamus* or not, the *mandamus* ought not to issue upon the application of one who was a stranger to the parish & diocese, & had no personal interest in the investigation of the charges.—**R. v. CHICHESTER** (Br.) (1859), 2 F. & L. 209; 29 L. J. Q. B. 23; 33 L. T. O. S. 301; 23 J. P. 821; 6 Jur. N. S. 120; 7 W. R. 629; 121 E. R. 80.

**Annotations:—**As to (1) **Folld. Re Bennett**, *Ex p. Shepherd* (1869), 33 J. P. Jo. 293. **Distd. Sheppard v. Phillimore & Bennett** (1869), L. R. 2 P. C. 450. **Apprvd. Julius v. Oxford**, Lord Bp. (1889), 5 App. Cas. 214; L. v. London, Bp. (1889), 24 Q. B. 10. 215. **Reid. Re Newport Bridge** (1859), 2 E. & E. 377; **Martin v. Mackonochie**, *Flamank v. Simpson* (1868), L. R. 2 A. & E. 116. **As to (2) Reid. R. v. Monmouthshire**, 1 J. (1859), 1 L. T. 131; L. v. Canterbury, Archbp., [1902] 2 K. B. 503. **Generally, Reid. Elphinstone v. Purchase** (1870), L. R. 3 P. C. 245.

**1502.** ———.]—*Re* BENNETT, *Ex p.* SHEPHERD (1869), 33 J. P. Jo. 293.

**1503.** ———.]—**Whether obliged to hear objections against applicant.**—The bishop is not, before issuing a commission of inquiry into charges against a clerk in holy orders, obliged to hear objections against the person who has made the application to the bishop. *Qu.*: whether the bishop has a discretion, on account of the character of the promoter, to refuse to issue a commission of inquiry.—*Ex p.* EDWARDS (1873), 9 Ch. App. 138; 43 L. J. Ch. 350; 29 L. T. 711; 38 J. P. 277; 22 W. R. 143, L. C. & L. J.

*Annotation*:—*Consd.* R. v. Oxford, Bp. (1879), 4 Q. B. D. 525.

**1504.** ———.]—(1) Church Discipline Act, 1840 (c. 86), s. 3, provides that in every case of any clerk in holy orders who may be charged with any offence against the Laws Ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit, of his own mere motion, to issue a commission under his hand & seal to certain persons for the purpose of making inquiry as to the grounds of such charge or report: *Held*: this sect. gave the bishop complete discretion to issue or decline to issue such commission. The Act recites that the manner of proceeding in cases for the correction of clerks requires amendment. Its provisions, therefore, may be construed independently of the practice under the previously existing law.

(2) There is no duty cast on the bishop by the statute, unless perhaps a duty to hear & consider the application, which in this case he has performed (LORD BLACKBURN).—*JULIUS v. OXFORD* (LORD BP.) (1880), 5 App. Cas. 214; 49 L. J. Q. B. 577; 42 L. T. 546; 44 J. P. 600; 28 W. R. 726, H. L.; *affy.* S. C. *sub nom.* R. v. OXFORD (BP.) (1879), 4 Q. B. D. 525, C. A.

*Annotations*:—*As to* (1) *Apld.* Abergavenny (Marquis) v. Llandaff (Bp.) (1888), 20 Q. B. D. 460. *Refd.* Allcroft v. London (Lord Bp.), Lighton v. London (Lord Bp.), [1891] A. C. 666; Hakes v. Cox, [1892] P. 110. *Generally*, *Mentd.* S. E. Ry. v. Railway Comrs. & Hastings Corpn. (1880), 50 L. J. Q. B. 201; Fleming v. Manchester Corpn. (1881), 44 L. T. 517; R. v. Barclay (1881), 8 Q. B. D. 306; *Re* Serjeant v. Dale, *Ex p.* Dale, *Re* Perkins v. Enraght, *Ex p.* Enraght (1881), 43 L. T. 769; Loosenmore v. Tiverton & North Devon Ry. (1882), 22 Ch. D. 25; Central Wales & Carmarthen Junction Ry. v. L. & N. W. Ry. & G. W. Ry. (1883), 4 Ry. & Can. Tr. Cas. 211; Dormont v. Furness Ry. (1883), 11 Q. B. D. 496; Ledue v. Ward (1886), 54 L. T. 214; R. v. Bloomsbury County Court Judge (1886), 2 T. L. R. 665; *Re* Baker, Nichols v. Baker (1890), 44 Ch. D. 262; Pure Spirit Co. v. Fowler (1890), 25 Q. B. D. 235; R. v. St. Pancras Vestry (1890), 62 L. T. 440; Emmott v. "Star" Newspaper Co. (1892), 9 T. L. R. 111; Kirkheaton District L. B. v. Ainley, Sons, [1892] 2 Q. B. 274; River Thames Conservators v. Port of London Port Sanitary Authority, [1894] 1 Q. B. 647; Russell v. Russell, [1895] P. 315; R. v. Turner, [1897] 1 Q. B. 445; *Re* Knight, [1898] 1 Ch. 257; Southwark & Vauxhall Water Co. v. Wandsworth Board of Works, [1898] 2 Ch. 603; R. v. Locke, [1910] 2 K. B. 201; Golden Horseshoe Estates Co. v. L., [1911] A. C. 480; R. v. Metropolitan Police Comr., *Ex p.* Holloway, [1911] 2 K. B. 1131; R. v. Mitchell, *Ex p.* Liversay, [1913] 1 K. B. 561; Grocock v. Grocock, [1920] 1 K. B. 1; R. v. Marshland Smeeth & Fen District Comrs., [1920] 1 K. B. 155; Taylor v. Pades (1920), 65 Sol. Jo. 116; Mersey Docks & Harbour Board v. Hay, [1923] A. C. 345.

**1505. Form of commission—Sufficiency of contents—Averment that offence committed within preceding two years.**—(1) In a commission issued under Church Discipline Act, 1840, c. 86, it is not necessary that the offences complained of should be stated to have been committed within the two years limited by sect. 20 of that Act, if they are charged & admitted as continuing offences.

(2) No appeal is given by the Act either to the Arches Ct., or thence to Her Majesty in Council, from the decision of the comrs. on the regularity or irregularity of the proceedings.

(3) A citation or decree issued by the ct. under letters of request being in the form prescribed by the rules made pursuant to sect. 13 of the Act, it is no valid objection that it does not state the offences complained of to have been committed within two years, the time prescribed. It is sufficient if the letters of request, which are the foundation of the suit, allege that fact.—*SIMPSON v. FLAMANK* (1867), L. R. 1 P. C. 463; 4 Moo. P. C. C. N. S. 385; 36 L. J. Eccl. 28; 16 L. T. 724; 31 J. P. 515; 16 W. R. 8; 16 E. R. 363, P. C.; *affy.* S. C. *sub nom.* FLAMANK v. SIMPSON (1866), L. R. 1 A. & E. 276; *subsequent proceedings, sub nom.* MARTIN v. MACKONOCHE, FLAMANK v. SIMPSON (1868), L. R. 2 A. & E. 116. *Annotation*:—*Generally, Refd.* Martin v. Mackonochie (1868), 38 L. J. Eccl. 1.

**1506.** ———.]—**Generic nature of offence.**—*SHEPPARD v. BENNETT*, No. 1498, *ante*.

**1507. Procedure at inquiry—Rules of evidence.**—*Re* MONCKTON (1845), 3 Notes of Cases Supp. lv.

*Annotations*:—*Consd.* London, Bp. v. Bonwell (1860), 6 Jur. N. S. 709. *Refd.* Ditcher v. Denison (1858), Brod. & E. 156; Bowman v. Lax, [1910] P. 300.

**1508.** ———.]—**Hearing of counsel.**—*Re* MONCKTON (1845), 3 Notes of Cases Supp. lv.

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**1509.** ———.]—**Scope of inquiry—Offence within diocese of issue.**—The bishop in whose diocese an offence is committed by a clerk holding preferment in another diocese, may issue a commission of inquiry, & if the comrs. report that there is *prima facie* ground for the complaint the bishop of the diocese in which deft. holds his preferment is to proceed.—*BLOOMER v. JONES* (1845), 4 L. T. O. S. 400; 9 Jur. 107.

*Annotations*:—*Consd.* Sheppard v. Bennett (1869), 39 L. J. Eccl. 1. *Refd.* London, Bp. v. Bonwell (1860), 6 Jur. N. S. 709.

**1510.** ———.]—**Duty of commissioners.**—The meaning of the words "the comrs. shall, after due consideration of the depositions taken before them, openly & publicly declare the opinion of the majority of the comrs. present," is not that there is sufficient evidence to have procured the finding of a bill by a grand jury, had it been a criminal charge, so as to put deft. on his trial, but that in the opinion of the comrs., there is such evidence as in reasonable probability, & with due regard to justice, would obtain a verdict if further proceedings be instituted.—*Re* BONWELL (1859), 1 L. T. 199; *subsequent proceedings, sub nom.* LONDON (BP.) v. BONWELL (1860), 6 Jur. N. S. 709.

**1511. Appeal—From decision of commissioners—Not maintainable.**—*SIMPSON v. FLAMANK*, No. 1505, *ante*.

(b) *Transmission of Proceedings by Letters of Request.*

**1512. Who may send letters of request—Bishop—In first instance—Notwithstanding notice of intention to issue commission of inquiry.**—(1) Service of notice of the intention to issue a commission by the bishop, but upon which no commission issued, will not preclude the bishop from sending the case to the Ct. of Appeal by letters of request, in the first instance.

(2) *Resp.* having prayed the ct. to retain the cause, the ct. refused doing so, being of opinion that a ct. of appeal of the last resort ought not to



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After the passing of Church Discipline Act, 1840 (c. 86), a charge of maintaining false doctrine was made against a clerk in holy orders to the bishop of the diocese, who was also patron of the living held by the accused clerk; & the bishop was desired to send the case, by letters of request, to the Ct. of Arches. Instead of doing so, he called upon the clerk for an explanation of his doctrine upon certain points; & having received an answer, wrote to him a letter, wherein he expressed his own opinion that the clerk's views were erroneous, though not absolutely condemned by the Church, & concluded by admonishing him that though he was at liberty to hold as a pious opinion a doctrine which the Church of England had not condemned, he should abstain for the future from all attempts to enforce the acceptance of his own opinion as the only condition of holding faithfully the true doctrine. The bishop declined therefore to issue letters of request; & upon a similar application to his successor, he also declined, on the ground that the case had already been decided. Subsequently, the Archbishop of Canterbury issued a commission of inquiry into the grounds of the above-mentioned charge, pursuant to sect. 3 of the above Act.

(7) This was a criminal suit or proceeding for an offence against the laws ecclesiastical, within the meaning of the above Act; & the bishop had no authority to proceed against the clerk under 13 Eliz. c. 12, s. 2, even if he had intended to do so; (8) upon the correspondence it appeared that the bishop did not intend to proceed judicially under that statute; & he never legally adjudicated upon the charge preferred against the clerk.—*Ex p. DENISON* (1854), 4 E. & B. 292; 3 C. L. R. 247; 24 L. J. Q. B. 34; 1 Jur. N. S. 517; 119 E. R. 113; *sub nom. Re TAUNTON* (ARCHDEACON), 24 L. T. O. S. 110; *sub nom. Re EAST BRENT* (VICAR), 18 J. P. 808; *sub nom. R. v. CANTERBURY* (ARCHB.), 3 W. R. 105.

Annotations:—As to (1) *Reid*. *Sheppard v. Phillimore & Bennett* (1869), L. R. 2 P. C. 450; R. v. Oxford, Bp. (1879), 4 Q. B. D. 325.

**1501. — Discretion of bishop—Interest of applicant.]—**G., a clerk in holy orders, residing in the city & diocese of O., applied to the Bishop of C. to issue a commission, under Church Discipline Act, 1840 (c. 86), s. 3, against R., rector of the parish of W., in the diocese of C., to inquire into certain charges made by G. against R. of offences against the laws ecclesiastical. G. had no connection with the parish of W. or diocese of C., nor had he any private or personal interest in the said charges. The Bishop declined, after inquiry, to issue a commission. Upon showing cause against a rule for a *mandamus* to the Bishop, commanding him to issue a commission:—*Held*: (1) under the statute, the Bishop had a discretion as to issuing a commission or not; (2) as it was in the discretion of the ct. to grant a *mandamus* or not, the *mandamus* ought not to issue upon the application of one who was a stranger to the parish & diocese, & had no personal interest in the investigation of the charges.—*R. v. CHICHESTER* (Bp.) (1850), 2 E. & E. 209; 29 L. J. Q. B. 23; 33 L. T. O. S. 301; 23 J. P. 821; 6 Jur. N. S. 120; 7 W. R. 629; 121 E. R. 80.

Annotations:—As to (1) *Folld. Re Bennett, Ex p. Sheppard* (1869), 33 J. P. Jo. 295. *Distd. Sheppard v. Phillimore & Bennett* (1869), L. R. 2 P. C. 450. *Appvd. Julius v. Oxford, Lord Bp.* (1880), 5 App. Cas. 214; R. v. London, Bp. (1889), 24 Q. B. D. 213. *Reid. Re Newport Bridge* (1859), 2 E. & E. 377; *Martin v. Macconochie, Hamank v. Shapson* (1868), L. R. 2 A. & E. 116. As to (2) *Reid. R. v. Monmouthshire JJ.* (1859), 1 L. T. 131; R. v. Canterbury, Archbp. (1892) 2 K. B. 503. *Generally, Reid. Elphinstone v. Purchas* (1870), L. R. 3 P. C. 245.



**1502.** ———.]—*Re* BENNETT, *Ex p.* SHEPHERD (1869), 33 J. P. Jo. 293.

**1503.** ———.]—**Whether obliged to hear objections against applicant.**—The bishop is not, before issuing a commission of inquiry into charges against a clerk in holy orders, obliged to hear objections against the person who has made the application to the bishop. *Qu.*: whether the bishop has a discretion, on account of the character of the promoter, to refuse to issue a commission of inquiry.—*Ex p.* EDWARDS (1873), 9 Ch. App. 138; 43 L. J. Ch. 350; 29 L. T. 711; 38 J. P. 277; 22 W. R. 143, L. C. & L. J.

*Annotation*:—*Consd.* R. v. Oxford, Bp. (1879), 4 Q. B. D. 525.

**1504.** ———.]—(1) Church Discipline Act, 1840 (c. 86), s. 3, provides that in every case of any clerk in holy orders who may be charged with any offence against the Laws Ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit, of his own mere motion, to issue a commission under his hand & seal to certain persons for the purpose of making inquiry as to the grounds of such charge or report:—*Held*: this sect. gave the bishop complete discretion to issue or decline to issue such commission. The Act recites that the manner of proceeding in cases for the correction of clerks requires amendment. Its provisions, therefore, may be construed independently of the practice under the previously existing law.

(2) There is no duty cast on the bishop by the statute, unless perhaps a duty to hear & consider the application, which in this case he has performed (LORD BLACKBURN).—*JULIUS v. OXFORD* (LORD BP.) (1880), 5 App. Cas. 214; 49 L. J. Q. B. 577; 42 L. T. 546; 44 J. P. 600; 28 W. R. 726, H. L.; *affg.* S. C. *sub nom.* R. v. OXFORD (BP.) (1879), 4 Q. B. D. 525, C. A.

*Annotations*:—*As to* (1) *Apld.* Abergavenny (Marquis) v. Llandaff (Bp.) (1888), 20 Q. B. D. 460. *Refd.* Allcroft v. London (Lord Bp.), Lighton v. London (Lord Bp.), [1891] A. C. 666; Hakes v. Cox, [1892] P. 110. *Generally*. *Mentd.* S. B. Ry. v. Railway Comrs. & Hastings Corpn. (1880), 50 L. J. Q. B. 201; Fleming v. Manchester Corpn. (1881), 44 L. T. 517; R. v. Barclay (1881), 8 Q. B. D. 306; *Re* Sergeant v. Dale, *Ex p.* Dale, *Re* Perkins v. Enraght, *Ex p.* Enraght (1881), 43 L. T. 769; Loosmore v. Tiverton & North Devon Rly. (1882), 22 Ch. D. 25; Central Wales & Carmarthen Junction Rly. v. L. & N. W. Ry. & G. W. Ry. (1883), 4 Rly. & Can. Tr. Cas. 211; Dormont v. Furness Rly. (1883), 11 Q. B. D. 496; Leduc v. Ward (1886), 54 L. T. 214; R. v. Bloomsbury County Court Judge (1886), 2 T. L. L. 665; *Re* Baker, Nichols v. Baker (1890), 44 Ch. D. 262; Pure Spirit Co. v. Fowler (1890), 25 Q. B. D. 235; R. v. St. Pancras Vestry (1890), 62 L. T. 440; Emmott v. "Star" Newspaper Co. (1892), 9 T. L. L. 111; Kirkheaton District L. B. v. Ainley, Sons, [1892] 2 Q. B. 274; River Thames Conservators v. Port of London Port Sanitary Authority, [1894] 1 Q. B. 647; Russell v. Russell, [1895] P. 315; R. v. Turner, [1897] 1 Q. B. 445; *Re* Knight, [1898] 1 Ch. 257; Southwark & Vauxhall Water Co. v. Wandsworth Board of Works, [1898] 2 Ch. 603; R. v. Locke, [1910] 2 K. B. 201; Golden Horseshoe Estates Co. v. L., [1911] A. C. 480; R. v. Metropolitan Police Comr., *Ex p.* Holloway, [1911] 2 K. B. 1131; R. v. Mitchell, *Ex p.* Livesey, [1913] 1 K. B. 561; Grocock v. Grocock, [1920] 1 K. B. 1; R. v. Marshland Smeeth & Fen District Comrs., [1920] 1 K. B. 155; Taylor v. Faireds (1920), 65 Sol. Jo. 116; Mersey Docks & Harbour Board v. Hay, [1923] A. C. 345.

**1505. Form of commission—Sufficiency of contents—Averment that offence committed within preceding two years.**—(1) In a commission issued under Church Discipline Act, 1840, c. 86, it is not necessary that the offences complained of should be stated to have been committed within the two years limited by sect. 20 of that Act, if they are charged & admitted as continuing offences.

(2) No appeal is given by the Act either to the Arches Ct., or thence to Her Majesty in Council, from the decision of the comrs. on the regularity or irregularity of the proceedings.

(3) A citation or decree issued by the ct. under letters of request being in the form prescribed by the rules made pursuant to sect. 13 of the Act, it is no valid objection that it does not state the offences complained of to have been committed within two years, the time prescribed. It is sufficient if the letters of request, which are the foundation of the suit, allege that fact.—*SIMPSON v. FLAMANK* (1867), L. R. 1 P. C. 463; 4 Moo. P. C. C. N. S. 385; 30 L. J. Eccl. 28; 10 L. T. 724; 31 J. P. 515; 16 W. R. 8; 10 E. R. 363, P. C.; *affg.* S. C. *sub nom.* FLAMANK v. SIMPSON (1866), L. R. 1 A. & E. 278; *subsequent proceedings, sub nom.* MARTIN v. MACKONCHIE, FLAMANK v. SIMPSON (1868), L. R. 2 A. & E. 116.

*Annotation*:—*Generally, Refd.* Martin v. Mackonochie (1868), 38 L. J. Eccl. 1.

**1506.** ———.]—**Generic nature of offence.**—*SHEPARD v. BENNETT*, No. 1498, *ante*.

**1507. Procedure at inquiry—Rules of evidence.**—*Re* MONCKTON (1845), 3 Notes of Cases Supp. Iv.

*Annotations*:—*Consd.* London, Bp. v. Bonwell (1860), 6 Jur. N. S. 709. *Refd.* Ditcher v. Denison (1858), Brod. & F. 156; Bowman v. Lux, [1910] P. 300.

**1508.** ———.]—**Hearing of counsel.**—*Re* MONCKTON (1845), 3 Notes of Cases Supp. Iv.

*Annotations*:—*Consd.* London, Bp. v. Bonwell (1860), 6 Jur. N. S. 709. *Refd.* Ditcher v. Denison (1858), Brod. & F. 156; Bowman v. Lux, [1910] P. 300.

**1509.** ———.]—**Scope of inquiry—Offence within diocese of issue.**—The bishop in whose diocese an offence is committed by a clerk holding preferment in another diocese, may issue a commission of inquiry, & if the comrs. report that there is *prima facie* ground for the complaint the bishop of the diocese in which deft. holds his preferment is to proceed.—*BLOOMER v. JONES* (1845), 4 L. T. O. S. 400; 9 Jur. 167.

*Annotations*:—*Consd.* Sheppard v. Bennett (1869), 39 L. J. Eccl. 1. *Refd.* London, Bp. v. Bonwell (1860), 6 Jur. N. S. 709.

**1510.** ———.]—**Duty of commissioners.**—The meaning of the words "the comrs. shall, after due consideration of the depositions taken before them, openly & publicly declare the opinion of the majority of the comrs. present," is not that there is sufficient evidence to have procured the finding of a bill by a grand jury, had it been a criminal charge, so as to put deft. on his trial, but that in the opinion of the comrs., there is such evidence as is reasonable probability, & with due regard to justice, would obtain a verdict if further proceedings be instituted.—*Re* BONWELL (1859), 1 L. T. 190; *subsequent proceedings, sub nom.* LONDON (BP.) v. BONWELL (1860), 6 Jur. N. S. 709.

**1511. Appeal—From decision of commissioners—Not maintainable.**—*SIMPSON v. FLAMANK*, No. 1505, *ante*.

(b) *Transmission of Proceedings by Letters of Request.*

**1512. Who may send letters of request—Bishop—In first instance—Notwithstanding notice of intention to issue commission of inquiry.**—(1) Service of notice of the intention to issue a commission by the bishop, but upon which no commission issued, will not preclude the bishop from sending the case to the Ct. of Appeal by letters of request, in the first instance.

(2) Resp. having prayed the ct. to retain the cause, the ct. refused doing so, being of opinion that a ct. of appeal of the last resort ought not to



1524. ————.]—**BONWELL v. LONDON** (Bp.), No. 1102, *ante*.

1525. ————.] **Case sent by letters of request in first instance.**—(1) In articles against a clerk, offences of incontinency were charged to have been committed in the dioceses of Lincoln & London. The clerk was benefited in the diocese of Lincoln, & the Bishop of Lincoln sent the case by letters of request to the Arches (Ct. in the first instance):—*Held*: though where there had been a commission of inquiry, which had limited its investigation to a particular offence, the articles afterwards exhibited could not add to the offence, inquired into by the commission, another offence, committed in another diocese which did not come within the scope of this inquiry; yet there was no objection to coupling in the articles offences committed in different dioceses, where the bishop sent the case by letters of request to the Ct. of Arches in the first instance.

(2) Church Discipline Act, 1840 (c. 86), s. 20, requires only that the *corpus delicti* on which the clerk is to be judged shall be shown to have been committed within two years before the service of the citation; but evidence of matters anterior to that period is not thereby excluded. — **EDWARDS v. MOSS** (1869), 20 L. T. 831, P. C.

1526. ————.] **Charges made by bishop *mero motu*.**—Articles against a clerk for habitual intoxication, frequenting a public-house, & having been convicted & imprisoned for an assault, were sustained. The charges were partly the subject of a commission of inquiry, & partly made by the bishop *mero motu*: — *Held*: he should be suspended for three years.—**LINCOLN (Bp.) v. DAY** (1845), 4 Notes of Cases, 299.

*Annotations*:—**Consd.** London, Bp. v. Bonwell (1860), 6 Jur. N. S. 709. **Refd.** Brookes v. Cresswell (1816), 4 Notes of Cases, 429; Ditcher v. Denison (1858), 11 Moo. P. C. C. 324.

1527. ————.] **Offences not charged by commissioners' report.**—**BONWELL v. LONDON** (Bp.), No. 1102, *ante*.

1528. ————.] **Signature.**—By barrister practising in Court of Arches.]—The approval & signature of any barrister practising in the Arches (Ct. of Canterbury will satisfy Church Discipline Act, 1840 (c. 86), s. 7.—**MOUNCEY v. ROBINSON** (1867), 37 L. J. Eccl. 8.

*Annotation*:—**Refd.** Marson v. Unmack, [1923] P. 163.

Pleading in criminal suits generally, *see* Sect. 7, sub-sect. 5, A., *ante*.

#### iv. Evidence.

1529. **Application of common law rules.**—(1) A clergyman prosecuted under the Church Discipline Act, 1840 (c. 86), is not a competent witness under Evidence Act, 1851 (c. 99), s. 2, even although the case is not one of the cases excepted under sect. 3.

(2) The rules & practice of the common law etc. as to evidence now exclusively prevail in the Ct. of Arches in prosecutions under the Church Discipline Act, 1840 (c. 86).—**BURDER v. O'NEILL** (1863), 2 New Rep. 551; 9 L. T. 232; 9 Jur. N. S. 1109.

*Annotations*:—*As to* (1) **Dtd.** Berney v. Norwich, Bp. (1867), 36 L. J. Eccl. 10. **N.F.** Norwich, Bp. v. Pearse (1868), L. R. 2 A. & E. 281.

1530. **Admissibility.—Facts outside diocese of commission.—Not before commissioners.**—**BONWELL v. LONDON** (Bp.), No. 1102, *ante*.

1531. ————.] **Negative issue.**—In a proceeding under Church Discipline Act, 1840 (c. 86), against a clergyman, if a negative issue be filed on his behalf without any defensive plea, evidence may nevertheless be given of all material facts necessary

to the defence, but not of special circumstances which do not arise immediately out of the charges made against deft.—**MOSS v. EDWARDS** (1868), 37 L. J. Eccl. 80.

1532. **Witnesses.—Competency.—Defendant.**—**BURDER v. O'NEILL**, No. 1529, *ante*.

1533. ————.]—In a criminal suit against a clergyman under Church Discipline Act, 1840 (c. 86), deft. is competent & compellable to give evidence since Evidence Act, 1851 (c. 99).—**NORWICH (Bp.) v. PEARSE** (1868), L. R. 2 A. & E. 281; 37 L. J. Eccl. 90; 32 J. P. 724.

*Annotations*:—**Fold.** Moss v. Edwards (1868), 37 L. J. Eccl. 89. **Mentd.** Martin v. Mackonochie (1883), 8 P. D. 191.

1534. ————.]—**MOSS v. EDWARDS**, No. 1531, *ante*.

1535. **Production of documents.—What documents ordered to be produced.**—In a proceeding by articles against a clerk, under Church Discipline Act, 1840 (c. 86), after the admission of pleas on both sides & publication had passed, an application to the ct., for "an order" or "request" to the Vicar-General of the Archbishop, to produce a letter containing the primary accusation of the promoter, sent to the bishop, but which formed no part of the proceedings before the Commission of Inquiry, was refused, on the grounds, that this ct. had no control over the Vicar-General; that an article in the defensive allegation, pleading the letter, had been rejected by the ct., as not relating to the cause, & that the present application was made after publication.—**FARNALL v. CRAIG** (1847), 5 Notes of Cases 116; 8 L. T. O. S. 417; 11 Jur. 71. Evidence generally, *see* Sect. 7, sub-sect. 6, *ante*.

#### v. Hearing.

1536. **Place of hearing.—Whether in diocese or in province.—Archbishop acting in lieu of bishop.—Bishop patron of accused's preferment.**—**R. v. CANTERBURY (ARCHBP.)**, No. 1520, *ante*.

1537. ————.] **Outside local limits of court.**—**NORLE v. AHER**, No. 1119, *ante*.

1538. **Who may adjudicate.—Bishop.—Promoting suit by secretary.**—Under Church Discipline Act, 1840 (c. 86), which empowers a bishop to hear & determine a charge against a clerk in orders of having committed an ecclesiastical offence, if the bishop be not patron of any preferment held by accused, the mere fact that the bishop is, by his secretary, promoter of the suit does not, in the absence of any personal interest or bias, disqualify him from adjudicating upon the case. — **R. v. ST. ALBANS (Bp.)** (1882), 9 Q. B. D. 454; 46 L. T. 692; 47 J. P. 68.

**Evidence at hearing.**—*See* Nos. 1529–1535, *ante*.

1539. **Power of court.—To adopt recommendation in report.—Made by archdeacon on request by court.—Suit for making alterations in church without sanction.**—**SIEVEKING & EVANS v. KINGSFORD**, No. 276, *ante*.

— **Sentence.**—*See* Nos. 1623–1631, *post*.

#### vi. Sentence.

1540. **Summary sentence.—Form of consent of clerk.—Form of consent of complainant.**—*Re* **MONCKTON** (1845), 3 Notes of Cases Supp. Iv.

*Annotations*:—**Consd.** Bowman v. Lux, [1910] P. 300. **Mentd.** Ditcher v. Denison (1858), 22 J. P. 337; London, Bp. v. Bonwell (1860), 6 Jur. N. S. 709.

— **Of suspension.**—*See* No. 1614, *post*.

1541. **Form.—Whether statement of offence bad for uncertainty.—Defendant found guilty of adultery or fornication.**—**MORRIS v. OGDEN**, No. 2601, *post*.

1542. ————.] **Whether jurisdiction of bishop to**

**Sect. 9.—Proceedings in respect of offences of clergy:**  
**Sub-sect. 1, C. (b) & (c) i., ii., iii., iv., v. & vi.]**

decide a cause of this nature in the first instance.—**HEAD v. SANDERS** (1842), 4 Moo. P. C. C. 186; Brod. & P. 30; 6 Jur. 1071; 13 E. R. 273, P. C.

**Annotations:**—As to (1) **Refd.** Sheppard v. Phillimore & Bennett (1869), L. R. 2 P. C. 450; R. v. Oxford, Bp. (1879), 4 Q. B. D. 525. As to (2) **Fold.** Martin v. Macdonochie (1882), 7 P. D. 94.

**1513.** ————]—(1) In proceedings under Church Discipline Act, 1840 (c. 86), the bishop sent the case, by letters of request, in the first instance, & without issuing a commission of inquiry, to the Ct. of Appeal of the province:—**Held:** the bishop might make his election as to the mode of proceeding, & the Ct. of Appeal could not refuse the letters of request.

(2) One of the offences charged was committed in Oct. 1842; the citation was extracted in July, & served in Aug., but not returned till Nov. 1844:—**Held:** in computing the two years from the commission of the offence, within which the suit must be commenced under sect. 20, the commencement of the suit was to be dated from the time when the citation was served.—**BROOKES v. CRESSWELL** (1846), 4 Notes of Cases, 431; 10 Jur. 617.

**Annotations:**—As to (1) **Refd.** Sheppard v. Phillimore & Bennett (1869), L. R. 2 P. C. 450. As to (2) **Fold.** Ditcher v. Denison (1858), 11 Moo. P. C. C. 325. **Generally, Mentd.** Burder v. Pugh (1855), 1 Jur. N. S. 1178.

**1514.** ———— **Patron of defendant's preferment.**—**COOPER v. DODD**, No. 1403, *ante*.

**1515. Form & contents of letters of request—Sufficiency.**—Letters of request under Church Discipline Act, 1840 (c. 86), & 6 & 7 Vict. c. 62, did not set forth whether there had been any commission of inquiry under the former statute, nor whether the provisions of the latter statute respecting the appointment of a bishop to perform the functions of an incompetent bishop had been duly complied with. They ran in the name of the incompetent bishop, & were signed in his name by the bishop performing his functions:—**Held:** the letters of request were correct in form, & they had been properly signed.—**BROOKES v. CRESSWELL** (1846), 4 Notes of Cases, 429; 9 Jur. 1062.

**Annotations:**—**Mentd.** Burder v. Pugh (1855), 1 Jur. N. S. 1178; Ditcher v. Denison (1858), 11 Moo. P. C. C. 325.

**1516.** ———— **Charges not found by commissioners.**—**BONWELL v. LONDON** (Bp.), No. 1102, *ante*.

**1517.** ———— **Reason for transmission.**—The acceptance of letters of request, sent by a bishop to the Arches Ct. of Canterbury, in proceedings taken under Church Discipline Act, 1840 (c. 86), is not optional with the Dean of the Arches, the bishop being empowered by sect. 13 of that Act to send such cases "to the Ct. of Appeal of the Province, to be there heard & determined according to the law & practice of such ct."; & it is not requisite that the letters of request should contain any reason for their being sent.—**SHEPPARD v. PHILLIMORE & BENNETT** (1869), L. R. 2 P. C. 450; 6 Moo. P. C. C. N. S. 58; 38 L. J. Eccl. 49; 20 L. T. 762; 33 J. P. 790; 17 W. R. 807; 16 E. R. 619, P. C.

**Annotation:**—**Mentd.** R. v. Leicester Union, [1899] 2 Q. B. 632.

**1518. Signature to letters of request—Bishop acting for incompetent bishop.**—**BROOKES v. CRESSWELL**, No. 1515, *ante*.

**1519. Acceptance of letters of request—Whether optional or compulsory.**—**SHEPPARD v. PHILLIMORE & BENNETT**, No. 1517, *ante*.

**(c) Proceedings after Inquiry.**  
**i. In General.**

**1520. Duty of bishop to proceed—Complainant wishing to continue.**—On the application of a clerk holding a benefice in the diocese of B., in the province of Canterbury, complaining that a clerk holding preferment in the same diocese had published, in the same diocese, doctrines contrary to the Articles of the Established Church, the patronage of the preferment being in the Bishop of B., the Archbishop of Canterbury, under Church Discipline Act, 1840 (c. 86), ss. 3, 24, issued a commission, which reported that there was sufficient *prima facie* ground for instituting further proceedings:—**Held:** (1) complainant thinking fit to proceed against the party accused, the Archbishop was bound, under sects. 9, 11, to require the appearance of the party complained against, & to hear the cause & pronounce sentence, & had no discretion in the matter; (2) the appearance & hearing ought to be within the diocese of B., & not in any place without such diocese, though within the province of Canterbury.—**R. v. CANTERBURY (ARCHBP.)** (1856), 6 E. & B. 546; 25 L. J. Q. B. 346; 27 L. T. O. S. 153; 21 J. P. 20; 2 Jur. N. S. 835; 119 E. R. 908.

**Annotations:**—As to (1) **Refd.** Wensleydale Peerage Case (1856), 8 State Tr. N. S. 479; Elphinstone v. Purchase (1870), L. R. 3 P. C. 245; R. v. Oxford, Bp. (1876), 4 Q. B. D. 525. As to (2) **Refd.** Hudson v. Tooth (1877), 3 Q. B. D. 46. **Generally, Mentd.** R. v. Dodson (1857), 7 E. & B. 315; Ditcher v. Denison (1858), 6 W. R. 342.

**1521. Right of bishop to substitute himself for original promotor.**—(1) To a citation against a clerk in holy orders, under Church Discipline Act, 1840 (c. 86), the clerk appeared under protest, on the ground that the bishop of the diocese could not substitute himself for the original promoters:—**Held:** the objection failed.

(2) In a suit by letters of request under sect. 20 of the above Act, the "two years" within which a suit or proceeding must be commenced against a clerk in holy orders for an offence against the laws ecclesiastical, date back from the day on which the decree or citation is issued from the Ct. of Appeal of the province, & not from the day on which the commrs. gave notice to the clerk of their intention to meet to hold an inquiry into the offence charged.—**HEREFORD (Bp.) v. T—N** (1853), 2 Rob. Eccl. 595; 163 E. R. 1125; *sub nom.* **HEREFORD (Bp.) v. THOMPSON**, 17 Jur. 190.

**Annotations:**—As to (2) **Refd.** Ditcher v. Denison (1858), 11 Moo. P. C. C. 324; Flamank v. Simpson (1866), L. R. 1 A. & E. 276.

**ii. Citation.**

**1522. Form—Sufficiency of contents—No allegation that offence committed within two years.**—**SIMPSON v. FLAMANK**, No. 1505, *ante*.

Citation generally, *see* Sect. 7, sub-sect. 3, *ante*.

**iii. Pleadings.**

**1523. Articles—Contents—Offences committed outside diocese of commission.**—(1) Where, after a commission of inquiry, a case is sent, under Church Discipline Act, 1840 (c. 86), s. 13, to the Ct. of Appeal of the province by the bishop of the diocese, within which the clerk proceeded against holds preferment, the articles must be confined to offences committed within that diocese.

(2) Commrs., under sect. 3, are bound to confine their inquiry within the diocese of the bishop who issues the commission.—**HOMER & BLOOMER v. JONES** (1845), 4 L. T. O. S. 400; 9 Jur. 167.

**Annotations:**—As to (1) **Distd.** London, Bp. v. Bonwell (1860), 6 Jur. N. S. 709. **Consd.** Sheppard v. Bennett (1869), 39 L. J. Eccl. 1.

1524. ————.]—BONWELL v. LONDON (Bp.), No. 1102, *ante*.

1525. ———— Case sent by letters of request in first instance.]—(1) In articles against a clerk, offences of incontinency were charged to have been committed in the dioceses of Lincoln & London. The clerk was benefited in the diocese of Lincoln, & the Bishop of Lincoln sent the case by letters of request to the Arches Ct. in the first instance:—*Held*: though where there had been a commission of inquiry, which had limited its investigation to a particular offence, the articles afterwards exhibited could not add to the offence, inquired into by the commission, another offence, committed in another diocese which did not come within the scope of this inquiry; yet there was no objection to coupling in the articles offences committed in different dioceses, where the bishop sent the case by letters of request to the Ct. of Arches in the first instance.

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1526. ———— Charges made by bishop *mero motu*.]—Articles against a clerk for habitual intoxication, frequenting a public-house, & having been convicted & imprisoned for an assault, were sustained. The charges were partly the subject of a commission of inquiry, & partly made by the bishop *mero motu*:—*Held*: he should be suspended for three years.—LINCOLN (Bp.) v. DAY (1845), 4 Notes of Cases, 299.

*Annotations*:—*Consd.* London, Bp. v. Bonwell (1860), 6 Jur. N. S. 709. *Refd.* Brookes v. Cresswell (1846), 4 Notes of Cases, 429; Ditcher v. Denison (1858), 11 Moo. P. C. C. 324.

1527. ———— Offences not charged by commissioners' report.]—BONWELL v. LONDON (Bp.), No. 1102, *ante*.

1528. ———— Signature—By barrister practising in Court of Arches.]—The approval & signature of any barrister practising in the Arches Ct. of Canterbury will satisfy Church Discipline Act, 1840 (c. 86), s. 7.—MOUNCEY v. ROBINSON (1867), 37 L. J. Eccl. 8.

*Annotation*:—*Refd.* Marson v. Umack, [1923] P. 163.

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#### iv. Evidence.

1529. Application of common law rules.]—(1) A clergyman prosecuted under the Church Discipline Act, 1840 (c. 86), is not a competent witness under Evidence Act, 1851 (c. 99), s. 2, even although the case is not one of the cases excepted under sect. 3.

(2) The rules & practice of the common law cts. as to evidence now exclusively prevail in the Ct. of Arches in prosecutions under the Church Discipline Act, 1840 (c. 86).—BURDER v. O'NEILL (1863), 2 New Rep. 551; 9 L. T. 232; 9 Jur. N. S. 1109.

*Annotations*:—As to (1) *Dtd.* Berney v. Norwich, Bp. (1867), 36 L. J. Eccl. 10. *W.F.* Norwich, Bp. v. Pearse (1868), L. R. 2 A. & E. 281.

1530. Admissibility—Facts outside diocese of commission—Not before commissioners.]—BONWELL v. LONDON (Bp.), No. 1102, *ante*.

1531. ———— Negative issue.]—In a proceeding under Church Discipline Act, 1840 (c. 86), against a clergyman, if a negative issue be filed on his behalf without any defensive plea, evidence may nevertheless be given of all material facts necessary

to the defence, but not of special circumstances which do not arise immediately out of the charges made against deff.—MOSS v. EDWARDS (1868), 37 L. J. Eccl. 80.

1532. Witnesses—Competency—Defendant.]—BURDER v. O'NEILL, No. 1529, *ante*.

1533. ————.]—In a criminal suit against a clergyman under Church Discipline Act, 1840 (c. 86), deff. is competent & compellable to give evidence since Evidence Act, 1851 (c. 99).—NORWICH (Bp.) v. PEARSE (1868), L. R. 2 A. & E. 281; 37 L. J. Eccl. 90; 32 J. P. 724.

*Annotations*:—*Fold.* Moss v. Edwards (1868), 37 L. J. Eccl. 80. *Mentd.* Martin v. Mackenzie (1883), 8 P. D. 191.

1534. ————.]—MOSS v. EDWARDS, No. 1531, *ante*.

1535. Production of documents—What documents ordered to be produced.]—In a proceeding by articles against a clerk, under Church Discipline Act, 1840 (c. 86), after the admission of pleas on both sides & publication had passed, an application to the ct., for "an order" or "request" to the Vicar-General of the Archbishop, to produce a letter containing the primary accusation of the promoter, sent to the bishop, but which formed no part of the proceedings before the Commission of Inquiry, was refused, on the grounds, that this ct. had no control over the Vicar-General; that an article in the defensive allegation, pleading the letter, had been rejected by the ct., as not relating to the cause, & that the present application was made after publication.—FARNALL v. CRAIG (1817), 5 Notes of Cases 116; 8 L. T. O. S. 417; 11 Jur. 71. Evidence generally, *see* Sect. 7, sub-sect. 6, *ante*.

#### v. Hearing.

1536. Place of hearing—Whether in diocese or in province—Archbishop acting in lieu of bishop—Bishop patron of accused's preferment.]—*It. v.* CANTERBURY (ARCHB.), No. 1520, *ante*.

1537. ———— Outside local limits of court.]—NORWICH v. AHER, No. 1119, *ante*.

1538. Who may adjudicate Bishop—Promoting suit by secretary.]—Under Church Discipline Act, 1840 (c. 86), which empowers a bishop to hear & determine a charge against a clerk in orders of having committed an ecclesiastical offence, if the bishop be not patron of any preferment held by accused, the mere fact that the bishop is, by his secretary, promoter of the suit does not, in the absence of any personal interest or bias, disqualify him from adjudicating upon the case. *R. v. ST. ALBANS (Bp.)* (1882), 9 Q. B. D. 454; 46 L. T. 692; 47 J. P. 68.

Evidence at hearing.]—*See* Nos. 1529–1535, *ante*.

1539. Power of court—To adopt recommendation in report—Made by archdeacon on request by court—Suit for making alterations in church without sanction.]—SIEVEKING & EVANS v. KINGSFORD, No. 276, *ante*.

Sentence.]—*See* Nos. 1623–1631, *post*.

#### vi. Sentence.

1540. Summary sentence—Form of consent of clerk—Form of consent of complainant.]—*Re* MONCKTON (1845), 3 Notes of Cases Supp. Iv.

*Annotations*:—*Consd.* Bowman v. Lax, [1910] P. 300. *Mentd.* Ditcher v. Denison (1858), 22 J. P. 337; London, Bp. v. Bonwell (1860), 6 Jur. N. S. 709.

— Of suspension.]—*See* No. 1614, *post*.

1541. Form—Whether statement of offence bad for uncertainty—Defendant found guilty of adultery or fornication.]—MORRIS v. OGDEN, No. 2601, *post*.

1542. ———— Whether jurisdiction of bishop to

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**pronounce sufficiently stated.]—MORRIS v. OGDEN,**  
 No. 2604, *post*.

**1543. Whether interlocutory or final—Conditional order of suspension.]—**A suit having been brought against a clerk in the Ct. of Arches, under Church Discipline Act, 1840 (c. 86), a sentence of suspension for six months was pronounced against him on Mar. 9, 1878, but was made conditional on an affidavit being filed. Afterwards the affidavit was filed, & an unconditional sentence was pronounced on Mar. 23 & served on deft. A fresh suit was instituted in 1880 for fresh offences, & also for contumacious disobedience to the sentence of Mar. 23, 1878. These offences being proved, deft. was sentenced to be deprived of his benefice. This sentence was pronounced by the Dean of Arches in Committee Room E of the House of Lords. A motion for a prohibition having been brought to restrain the Ct. of Arches from enforcing the sentence:—*Held*: (1) the sentence of Mar. 9 was an interlocutory order which did not end the suit, & therefore the ct. was not *functus officio* when it pronounced the unconditional sentence of suspension; (2) even if unconditional sentence had been void, the ct. would not have exceeded its jurisdiction in passing the sentence of deprivation, as there were other offences proved which would have supported it; (3) the site of the old Palace of Westminster is no longer a peculiar, but is within the diocese of London & the jurisdiction of the Ct. of Arches; (4) the new Palace of Westminster is not exempt from the jurisdiction of the ordinary civil & ecclesiastical cts. on the ground of privilege, inasmuch as it had ceased to be a royal residence.

*Qn.*: whether Committee Room E of the House of Lords is within the precincts of the old Palace of Westminster.

(5) The Dean & Chapter of Westminster, as the successors of the monastery, have since the Reformation been, & are still, a royal peculiar, & as such subject in matters ecclesiastical to the immediate jurisdiction of the Crown as head of the Church (CHURCH, J.).—*COMBE v. DE LA BERE* (1882), 22 Ch. D. 316; 48 L. T. 298; 31 W. R. 258, C. A.

*Annotation*:—*Mentl.* Martin v. Mackonochie (1883), 8 P. D. 101.

Punishments generally, *see* Sect. 10, *post*.

#### vii. Appeals.

**1544. Whether appeal lies—Interlocutory order—Necessity for leave of lower court.]—**By Church Discipline Act, 1840 (c. 86), the judges of the Judicial Committee of the Privy Council have no power to review an interlocutory order or decree of the ct. below, unless an appeal from such order has been allowed by such ct.—*LANGLEY v. BURDER* (1843), Brod. & F. 30; 2 L. T. O. S. 185.

**1545. Judgment of archbishop sitting in lieu of bishop—Bishop patron of accused's preferment.]—**An appeal lies to the Ct. of Arches, under Church Discipline Act, 1840 (c. 86), s. 15, from a judgment of a diocesan ct., presided over by the Archbishop of Canterbury, under sect. 24 of the Act, in consequence of the bishop of the diocese being the patron of the preferment held by the party proceeded against.—*R. v. ARCHES COURT JUDGE* (1857), 7 E. & B. 315; 119 E. R. 1264; *sub nom.* *R. v. ARCHES COURT JUDGE, Ex p. DENISON*, 20 L. J. Q. B. 178; *sub nom.* *R. v. DODSON, Re DENISON*, 28 L. T. O. S. 268; 3 Jur.

N. S. 439; 5 W. R. 320; *sub nom.* *Ex p. DENISON* (ARCHDEACON), 21 J. P. Jo. 132.

**1546. Decision of commissioners—On regularity of proceedings.]—SIMPSON v. FLAMANK,** No. 1505, *ante*.

**1547. Parties—Death of promotor pending appeal—Substitution of appellant.]—ELPHINSTONE v. PURCHAS,** No. 1138, *ante*.

**1548. Security for costs—When ordered.]—**A criminal suit, under Church Discipline Act, 1840 (c. 86), having been promoted against the incumbent of a parish, the proof given of the charges made in the articles in the suit, the bishop of the diocese pronounced sentence suspending deft. for two years *ab officio et beneficio*, & condemning him in the costs of the proceedings. Deft. appealed to the Ct. of Arches. On motion on behalf of the bishop, who had promoted his own office & appeared as resp. in the appeal, the Dean of Arches on proof that deft. was in a state of poverty, & had not paid any part of the costs in which he had been condemned, ordered deft. to give security for the costs of the appeal in the sum of £100 within four months from the date of making the order for security.—*O'MALLEY v. NORWICH* (Br.), [1892] P. 175.

#### SUB-SECT. 2. UNDER PUBLIC WORSHIP REGULATION ACT, 1874.

##### A. In General.

##### Effect of Act—On jurisdiction of Court of Arches.]

—*See* No. 1719, *post*.

**1549. — On Church Discipline Act, 1840 (c. 86).]**—Under Public Worship Regulation Act, 1874 (c. 85), which applies also to offences such as formed the subject-matter of the complaint by appet., there is no provision for the summoning of a commission of inquiry, but three parishioners can set the bishop in motion, who then has an arbitrary discretion to determine whether the suit shall proceed or not. It is further provided by sect. 18 that, where sentence has been pronounced against an incumbent for an offence under Church Discipline Act, 1840 (c. 86), he shall not also be proceeded against under the later Act, & *vice versa*:—*Held*: the Act of 1874 does not repeal the earlier statute & does not preclude a promotor from applying to the bishop to take proceedings under it, for the Public Worship Regulation Act, 1874 (c. 85), was intended to provide a more expeditious & a more simple procedure in criminal ecclesiastical suits.—*R. v. OXFORD* (Br.) (1879), 4 Q. B. D. 525; 48 L. J. Q. B. 609; 41 L. T. 122; 44 J. P. 3, 10, C. A.; *affd. sub nom.* *JULIUS v. OXFORD* (LORD BR.) (1880), 5 App. Cas. 214, H. L.

*Annotations*:—*Mentl.* S. E. Ry. v. Railway Comrs. & Hastings Corpn. (1880), 50 L. J. Q. B. 201; Fleming v. Manchester Corpn. (1881), 44 L. T. 517; R. v. Barclay (1881), 8 Q. B. D. 306; R. v. Barclay & Essex J.J., *Ex p.* Weaver (1881), 46 J. P. 167; *Re Serjeant v. Dale, Ex p.* Dale, *Re Perkins v. Enraght, Ex p.* Enraght (1881), 43 L. T. 769; Loosemore v. Tiverton & North Devon Ry. (1882), 22 Ch. D. 25; Central Wales & Carmarthen Junction Ry. v. L. & N. W. Ry. & G. W. Ry. (1883), 4 Ry. & Can. Tr. Cas. 211; Dormont v. Furness Ry. (1883), 11 Q. B. D. 496; Leduc v. Ward (1886), 54 L. T. 214; R. v. Bloomsbury County Court Judge (1886), 2 T. L. R. 665; Abergavenny (Marquis) v. Llandaff (Br.) (1888), 20 Q. B. D. 460; R. v. London, Br. (1889), 24 Q. B. D. 213; *Re Baker, Nichols v. Baker* (1890), 44 Ch. D. 262; Pure Spirit Co. v. Fowler (1890), 25 Q. B. D. 235; R. v. St. Pancras Vestry (1890), 62 L. T. 440; Allerott v. London (Lord Br.), Lighton v. London (Lord Br.) (1891) A. C. 666; R. v. London, Br. (1891), 55 J. P. 773; Emmott v. "Star" Newspaper Co. (1892), 9 T. L. R. 111; Hakes v. Cox, [1892] P. 110; Kirkheaton District L. B. v. Ainley Sons, [1892] 2 Q. B. 374; River Thames Conservators v. Port of London, Port Sanitary Authority, [1894] 1 Q. B. 647; Russell v. Russell, [1895]

P. 315; *R. v. Turner*, [1897] 1 Q. B. 445; *Re Knight*, [1898] 1 Ch. 257; *Southwark & Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 603; *Re White* (No. 2) (1898), 42 Sol. Jo. 198; *R. v. Locke*, [1910] 2 K. B. 201; *Golden Horseshoe Estates Co. v. R.*, [1911] A. C. 480; *R. v. Metropolitan Police Comr.*, *Ex p. Holloway*, [1911] 2 K. B. 1151; *R. v. Mitchell*, *Ex p. Livesey*, [1913] 1 K. B. 561; *Grocock v. Grocock*, [1920] 1 K. B. 1; *R. v. Marshland Smeeth & Fen District Comrs.*, [1920] 1 K. B. 155; *Taylor v. Faires* (1920), 65 Sol. Jo. 116; *Mersey Docks & Harbour Board v. Hay*, [1923] A. C. 345.

**Nature of proceedings under Act—Whether “criminal suit” within Church Discipline Act, 1840 (c. 86).—***See* No. 1480, *ante*.

**1550. Powers of judge under Act.**—(GREEN v. PENZANCE (LORD), No. 1118, *ante*.)

**1551.** —.—[A monition, precisely following a judgment pronounced by the judge under Public Worship Regulation Act, 1874 (c. 85), admonished a clerk to abstain for the future when officiating in his church from doing each of certain specified acts, & amongst them, from wearing the vestments known as an alb, a chasuble, & a biretta; & from causing to be formed a procession at the commencement of morning service; & also “from all practices, acts, matters & things of the same or a like nature to those hereinbefore particularly set forth or any of them, or from unlawfully permitting the same or any of them.” A subsequent inhibition, after reciting the monition & the disobedience of the clerk thereto in regard to several other matters, recited his disobedience in permitting his curate to wear a vestment known as a biretta & a vestment known as a stole, & also in permitting his curate to form a procession between morning prayer & the communion service, & for such his disobedience inhibited the clerk from performing services for three months & until relaxation. The clerk having applied for a writ of prohibition:—*Held*: the judge had jurisdiction, subject to correction on appeal, to insert the *alia similia* clause in the monition; & under sect. 13 of the above Act, the judge had jurisdiction to determine whether the wearing of a stole, & the forming a procession between morning prayer & the communion services were practices, acts, matters & things of the same or a like nature to those particularly set forth in the monition; & if he had determined that question wrongly it might be the subject of appeal—if an appeal lies—but could not afford any ground for prohibition; & even if the wearing of a stole & the forming a procession were not breaches of the monition, yet as it appeared on the face of the inhibition that the clerk had committed several other acts of disobedience any one of which would have justified an inhibition for the full period, there was no excess of jurisdiction & no ground for prohibition. —ENRAGHT v. PENZANCE (LORD) (1882), 7 App. Cas. 240; 51 L. J. Q. B. 508; 46 L. T. 779; 46 J. P. 644; 30 W. R. 753, II. L.; *affy.* S. C. *sub nom.* DALE’S CASE, ENRAGHT’S CASE (1881), 6 Q. B. D. 370, C. A.]

*Annotations*:—*Consd.* *Combe v. De La Bere* (1882), 22 Ch. D. 316. *Mentd.* *Green v. Penzance* (1881), 6 App. Cas. 657; *R. v. Southampton J.J.*, *Ex p. Carly* (1906), 94 L. T. 437; *Colchester Brewing Co. v. Tendring Licensing J.J.*, [1916] 2 K. B. 126.

**1552. Rules & forms made under Act—Validity.**—DALE’S CASE, ENRAGHT’S CASE, No. 1550, *post*.

**What offences cognisable.**—*See* specific Sects. *passim*.

#### B. Procedure.

**1553. Representation—Service of copy on defendant—Necessity for service within time prescribed by Act.**—Public Worship Regulation Act, 1870 (c. 85), s. 9, provides that unless the bishop, to whom a representation of illegal acts

or omissions on the part of any incumbent within his diocese has been sent, shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation, “he shall within twenty-one days after receiving the representation transmit a copy thereof to the person complained of, & shall then transmit the representation to the Archbishop, who shall forthwith require the judge to hear the matter of the representation.” By sect. 10 it is further provided that, if any bishop is the patron of the benefice held by the incumbent respecting whom a representation shall have been made, the Archbishop of the province shall act in the place of such bishop in all matters thereafter arising in relation to such representation. A representation, under the above Act, was sent to the bishop of the diocese on Aug. 29, 1870. The bishop received the representation on Aug. 30, & finding that the party complained of was the incumbent of a benefice in his patronage, forwarded it on Sept. 15 to the Archbishop of the province. On Oct. 21, the Archbishop transmitted a copy of the representation to the party complained of. The party complained of did not acknowledge the receipt of the copy of the representation so submitted to him, & though subsequently personally served with a duplicate copy of the representation entered no appearance. Afterwards the Archbishop required the judge to hear the matter of the representation:—*Held*: the proceedings were void, & must be dismissed by the judge, for the provision as to the time within which a copy of a representation should be transmitted to the party complained of was imperative, & had not been complied with.—HOWARD v. BODINGTON (1877), 2 P. D. 203; 42 J. P. 6.

*Annotation*:—*Distd.* *Caldow v. Pixell* (1877), 2 C. P. D. 562.

**1554. —Power of bishop to proceed—Bishop patron of defendant’s preferment.**—SERJEANT v. DALE, No. 160, *ante*.

**1555. —Duty of bishop to proceed—Discretion of bishop to refuse to proceed.**—(1) By Public Worship Regulation Act, 1874 (c. 85), s. 9, it is provided that where a representation has, under sect. 8, been sent to the bishop of the diocese complaining of an unlawful alteration in, or addition to the fabric, ornaments or furniture of a cathedral church, the bishop shall take certain specified steps to have the matter of the complaint tried in one of the ways prescribed by the Act “unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation, in which case he shall state in writing the reason for his opinion,” etc.

A representation was sent to the Bishop of London complaining that the Dean & Chapter of St. Paul’s Cathedral Church had set up on a reredos in that church images of Our Lord & of the Virgin & Child, & that the images tended to encourage ideas & devotions of an unauthorised & superstitious kind, & were unlawful. The bishop replied that, having in pursuance of the Act considered the whole circumstances attending the representation, he was of opinion that proceedings should not be taken for reasons which he stated at length. On an application for a *mandamus* to compel the bishop to proceed according to the Act, upon the ground that the bishop’s reasons showed that he had not considered the whole circumstances of the case & also had considered matters which were not circumstances of the case, the Ct. of Appeal held that there did not appear to be any ground for either contention & that a *mandamus* ought not to issue.



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While the appeal from that decision was pending in this House, a second representation was made to the bishop with regard to the same images & in similar terms, with the additional allegation that the images had in fact encouraged idolatrous & superstitious ideas & devotion, & that idolatrous & superstitious reverence had been paid to them. The bishop replied that, having considered the whole circumstances attending the representation, he was of opinion that proceedings should not be taken for the reason that the questions raised in the case were in substance identical with those raised in the first case, & that the appeal in the first case was then pending in this House. A similar application for a *mandamus* having been made, the Ct. of Appeal held that there was no ground for the *mandamus*:—*Held*: the bishop had acted within his jurisdiction & exercised the discretion vested in him; whether the reasons he gave were good or bad, the bishop having considered all the circumstances which appeared to him, honestly exercising his judgment, to bear upon the particular case, his reasons could not be reviewed: & there was no ground for a *mandamus*.

(2) The legislature, when using the language "after considering the whole circumstances of the case," intended to show that the bishop's jurisdiction was not confined to the mere question whether there had been an infraction of the law. They intended to widen & enlarge the considerations which might weigh on the bishop's mind in determining the question whether the proceedings should go on (LORD HALSBURY, C.). —*ALLCROFT v. LONDON* (LORD BR.), *LIGHTON v. LONDON* (LORD BR.), [1891] A. C. 666; 61 L. J. Q. B. 62; 65 L. T. 92, II. 1.; *affg.* 8 C. sub nom. R. v. LONDON (BR.) (1889), 21 Q. B. D. 213, C. A.; (1890), 63 L. T. 819, C. A.

*Annotations: Generally, Mentd.* St. John, Pendlebury (Vicar, etc.) v. St. John, Pendlebury (Parishioners), [1895] P. 178; St. John the Baptist, Timberhill (Vicar, etc.) v. Same (Rectors, etc.), [1895] P. 71; Barsham, Suffolk (Rector, etc.) v. Same (Parishioners), [1896] P. 256; Great Bardfield (Vicar) v. All Having Interest, [1897] P. 185; Poulton v. Moore, [1915] 1 K. B. 400; Field v. Ommamey (1920), 36 T. L. R. 695; *Re* St. Luke's, Southport (1920), 36 T. L. R. 733.

**1556. Requisition to judge Form.]**—A representation under Public Worship Regulation Act, 1874 (c. 85), was made in July, 1878, by the churchwardens of a parish to the bishop of the diocese, complaining of the incumbent for certain illegal practices in the conduct of divine worship. The bishop & archbishop being alternate patrons of the benefice, the bishop of the diocese of E. was appointed to act in the place of such bishop & archbishop in the matter of the representation under sect. 10 of the above Act. The Bishop of E. having considered the representation sent a requisition to the judge under the above Act, requiring him to hear the case in London or Westminster, or within the diocese:—*Held*: (1) the requisition under sect. 9 of the Act must name the limits within which, under the sect., the hearing is to take place, but need not name the particular place within such limits; (2) the requisition made by the Bishop of E. was valid, & the form of it was sufficient on the following grounds: first, it sufficiently showed by necessary implication that the parties had been required to state whether they were willing to submit to the directions of the bishop; secondly, it was not competent to the party complained of to object to the form of the requisition to the judge if all the facts essential

to the jurisdiction in truth existed; & thirdly, the requisition was in substantial accordance with the form given by the rules & orders.

The judge under the Act proceeded to hear the matter of the above mentioned representation, & issued a monition commanding the incumbent complained of to abstain from certain practices which he pronounced unlawful. The incumbent disregarded such monition, & continued the practices, whereupon the judge issued an inhibition inhibiting the incumbent from the performance of divine service & the exercise of the cure of souls within the diocese for three months, & thereafter until the inhibition should be relaxed. The monition issued while the rules & orders of 1875 were in force, but the inhibition issued after the amended rules of 1879 had come into force. In the monition the judge was styled the official principal of the Arches Ct. of Canterbury, he having become such official principal under sect. 7 of the Act upon the resignation of the previous official principal, but except in this respect the monition exactly followed the form given by the rules & orders of 1875. The inhibition exactly followed the form given by the rules & orders of 1879. The incumbent disregarded the inhibition, & continued to exercise the cure of souls. The judge then issued a *significavit* against him for contempt. A writ *de contumace capiendo* was thereupon issued from the Petty Bag Office on Oct. 29, & recorded in the Q. B. on the following day (the ct. not being then sitting), & delivered to the sheriff. Under this writ the incumbent was arrested & lodged in prison:—*Held*: (3) the judge under the Act is not the judge of a new ct. constituted by the Act, but is the official principal of the old Ct. of Arches, & has all the old powers of that ct., including the power of signifying for contempt if his orders are disobeyed, & that as the Act does not contain any special power of enforcing an inhibition issued under it, such inhibition can be enforced by *significavit* under Ecclesiastical Courts Act, 1813 (c. 127); (1) though Petty Bag Act, 1819 (c. 109), authorised the issuing of the writ *de contumace capienda* in vacation, it did not repeal the enactment that the writ should be opened in the Q. B. in the presence of the justices, & as it had only been brought into the Crown Office at a time when the judges were not sitting, the requisitions of Ecclesiastical Courts Act, 1813 (c. 127), had not been complied with, & the incumbent was entitled to be discharged from custody.—*DALE'S CASE*, *ENRAGHT'S CASE* (1881), 6 Q. B. D. 376; *sub nom. Re DALE, R. v. PENZANCE* (LORD), *Re ENRAGHT, R. v. PENZANCE* (LORD), 50 L. J. Q. B. 234; *sub nom. SERJEANT v. DALE, Ex p. DALE, PERKINS v. ENRAGHT, Ex p. ENRAGHT*, 43 L. T. 769; *sub nom. Ex p. DALE, Ex p. ENRAGHT*, 45 J. P. 281, 300, C. A.; *on appeal, sub nom. ENRAGHT v. PENZANCE* (LORD) (1882), 7 App. Cas. 240, II. 1.

*Annotations:—As to (1) Reid.* Green v. Penzance (1881), 6 App. Cas. 657. *Generally, Mentd.* R. v. Southampton JJ., *Ex p. Cardy* (1906), 94 L. T. 437; *Re Hardy's Crown Brewery & St. Philip's Tavern, Manchester* (1910), 103 L. T. 520; Colchester Brewing Co. v. Tendring Licensing JJ., [1916] 2 K. B. 126.

**1557. Hearing of suit—Promoted by churchwarden—Power to substitute succeeding churchwarden as promoter.]**—*HARRIS v. PERKINS*, No. 1480, *ante*.

**1558. — Place of hearing.]**—Public Worship Act, 1874 (c. 85), s. 7, makes provision for the appointment of a Judge of the Provincial Cts. of Canterbury & York. By sect. 8 a representation under certain circumstances may be made to the bishop of illegal acts or omissions in the performance of the church services, by any incumbent

within his diocese; by sect. 9, if the bishop is of opinion that proceedings should be taken on the representation, he shall, if the parties are unwilling to submit to his directions without appeal, transmit the representation to the archbishop of the province, & the archbishop "shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster." A representation under the above Act was forwarded to the Bishop of Rochester charging that T., the incumbent of a parish within the diocese, had been guilty of illegal practices in the conduct of divine service. The bishop transmitted the representation to the Archbishop of Canterbury, & the archbishop thereupon by instrument of requisition required the judge to hear & determine the matter of the representation "at any place in London or Westminster, or within the diocese of Rochester, as you may deem fit." Notice was given to T. that the case would be heard in Lambeth Palace, which, although within the province of Canterbury, is neither in London, Westminster, nor the diocese of Rochester. In July, 1876, the case was heard at Lambeth Palace in his absence, & he was adjudged to have been guilty of illegal practices, & a monition was made for him to abstain from them. On his non-compliance with the monition, he was pronounced guilty of contempt & imprisoned. From first to last he took no notice of the proceedings, & in no way acquiesced in them:—*Held*: the whole proceeding was void & a prohibition must be granted, for the word "London" in the requisition could only be construed in its strict sense as the city proper of London, & the judge had no power, under the Act or otherwise, to sit in any place beyond the limits fixed by the archbishop:—HUDSON v. TOOTH (1877), 3 Q. B. D. 46; 47 L. J. Q. B. 18; 37 L. T. 402; 42 J. P. 133; 26 W. R. 95; *previous proceedings*, 2 P. D. 125.

*Annotation*:—*Consd.* Dale's Case, Enraght's Case (1881), 6 Q. B. D. 376.

**1559.** — **Number of counsel—Questions of law & fact.**—CLIFTON v. RIDSDALE, No. 2900, *post*.

— **Powers of judge.**—*See* No. 1118, *ante*.

**1560. Orders—Monition—Form.**—DALE'S CASE, ENRAGHT'S CASE, No. 1556, *ante*.

**1561.** — **Postponement—For application for faculty—Erection of ornaments without faculty.**—RIDSDALE v. CLIFTON, No. 1145, *ante*.

**1562.** — **Enforcement.**—GREEN v. PENZANCE (LORD), No. 1118, *ante*.

**1563.** — **Defendant in prison for contempt—Application for discharge.**—DEAN v. GREEN, No. 1717, *post*.

**1564. Appeal—Suspension of sentence—Discretion of appellate court.**—Although in every appeal in ecclesiastical cases it has been very much a matter of course & a ministerial act of the officer of the Ct. to issue an inhibition, yet a discretion rests with the appellate tribunal to issue it or not. Under Public Worship Regulation Act, 1874 (c. 85), s. 9, the ecclesiastical judge has power to restrain proceedings under the decree during the whole of the appeal. In an appeal pending against a decree of the judge of the Arches Ct. the judge refused to suspend the execution of any part of the decree. The Judicial Committee of the Privy Council, although no appeal was given from such order by the Act, nevertheless, on motion made, in the exercise of their discretion, directed that by the inhibition the execution of that portion of the decree which related to the crucifix should be suspended pending the appeal.—RIDSDALE v.

CLIFTON (1876), 1 P. D. 383; 45 L. J. P. C. 12; 34 L. T. 515; 40 J. P. 500; 24 W. R. 1021, P. C.; *previous proceedings*, *sub nom.* CLIFTON v. RIDSDALE, 1 P. D. 361.

*Annotation*:—*Mentd.* Combe v. De la Bere (1881), 6 P. D. 137.

#### SUB-SECT. 3.—UNDER CLERGY DISCIPLINE ACT, 1892.

##### A. What Offences within Act.

**1565. "Judicial separation in divorce or matrimonial cause"—Separation order.**—An order made by justices for a separation between a clergyman & his wife on the ground of his "persistent cruelty," is not an order for judicial separation made "in a divorce or matrimonial cause" within Clergy Discipline Act, 1892 (c. 32), s. 1, (1) (d); & where a bishop, in consequence of such an order having been made against a clergyman, has declared his living vacant in pursuance of the Act, such a declaration will be held to be unauthorised & invalid.—SWIER v. ELY (BP.), [1902] 2 Ch. 508; 71 L. J. Ch. 771; 86 L. T. 679; 50 W. R. 520; 18 T. L. R. 632; 46 Sol. Jo. 531.

**1566. "Ecclesiastical offence"—Conviction by temporal court—Not offence against morality.**—GIBET v. FILLINGHAM, No. 2741, *post*.

**1567. "Immoral act"—Occasioning scandal.**—(1) The complaint in a criminal suit tried before the Chancellor of the Diocese of Rochester sitting with assessors, under Clergy Discipline Act, 1892 (c. 32), after charging deft., a clergyman holding preferment within the diocese of Rochester, with certain specified offences against morality, further charged him with "occasioning grave scandal & offence in the parish of which he was incumbent by his scandalous conduct in the several preceding charges set forth":—*Held*: the ecclesiastical offence of "occasioning scandal & evil report" was not an offence which could be legally tried under that Act, & all reference to any such charge must be struck out of the complaint.

(2) Practice of the Consistory Ct. of Rochester as to admitting to proof in a criminal suit charges of habitual drunkenness & of acts of drunkenness, the precise dates of which the prosecutor cannot specify.—ROCHESTER (BP.) v. HARRIS, [1893] P. 137.

*Annotation*:—*Generally, Mentd.* Gordon v. Hayward (1905), 21 T. L. R. 298.

**1568.** — **Seventy-fifth canon.**—The offence of occasioning scandal within Church Discipline Act, 1892 (c. 32), s. 3, cannot be entertained in a criminal suit by letters of request under that Act against a clerk in holy orders of the Church of England in any case where the acts which appear to have occasioned the scandal are immoral acts within Canon 75 of 1603, & constitute an offence in respect of which resp. has not been proved guilty; the cts. appointed to have jurisdiction under Clergy Discipline Act, 1892 (c. 32), being the only ecclesiastical cts. having jurisdiction to inquire as to the truth of the immoral acts or offences so occasioning the scandal.—BOWMAN v. LAX, [1910] P. 300; 27 T. L. R. 2.

**1569.** — **Fraudulent collection of alms.**—The collection of alms on false & fraudulent pretences is an immoral act within the meaning of Clergy Discipline Act, 1892 (c. 32).—FITZMAURICE v. HESKETH, [1904] A. C. 266; 73 L. J. P. C. 53; 90 L. T. 216; 20 T. L. R. 302, P. C.

**1570.** — **Writing indecent letter.**—ELY (BP.) v. CLOSE, No. 1575, *post*.

**1571. "Immoral conduct"—Conduct unworthy**

**Sect. 9.—Proceedings in respect of offences of clergy:**  
*Sub-sect. 3, A. & B.; sub-sect. 4. Sect. 10:*  
*Sub-sects. 1 & 2.]*

**of ministers.]**—If the conduct of a clerk in holy orders is "unworthy of the characters of ministers of religion," then he is guilty of "immoral conduct" within the meaning of Clergy Discipline Act, 1892 (c. 32), s. 2, notwithstanding that no act of indecency is proved against him.—*SWEET v. YOUNG*, [1902] P. 37; 50 W. R. 96.

**1572. — Habitual swearing & ribaldry.]**—On the true construction of Clergy Discipline Act 1892 (c. 34), s. 2, habitual swearing & ribaldry is immoral conduct & an offence thereunder, but it is not established by evidence of occasional use of language of that character.—*MOORE v. OXFORD (Br.)*, [1904] A. C. 283; 73 L. J. P. C. 43; 90 L. T. 425, P. C.

*Annotations:—Distd. Ely, Bp. v. Close*, [1913] P. 184. *Reid. Wakeford v. Lincoln, Bp.*, [1921] 1 A. C. 813.

**1573. "Offence against morality"—Simony.]**—In order to punish the offence of simony in a clerk resort cannot be had to the provisions of Clergy Discipline Act, 1892 (c. 32), but proceedings must still be taken under Church Discipline Act, 1840 (c. 86). The immorality against which the Act of 1892 is directed is so defined by ss. 2, 12 as to exclude simony from its scope.

(2) A false declaration against simony under Clerical Subscription Act, 1865 (c. 122), cannot be isolated from the charge of simony & brought within the scope of the Act of 1892.—*BENEFICED CLERK v. LEE*, [1897] A. C. 226; 66 L. J. P. C. 8; 75 L. T. 461; 13 T. L. R. 125, P. C.; *reversg. S. C. sub nom. LEE v. FLACK*, [1896] P. 138.

*Annotations:—As to (1) Conn. Sweet v. Young*, [1902] P. 37; *Bowman v. Lux*, [1910] P. 300.

**1574. — False declaration against simony.]**—*BENEFICED CLERK v. LEE*, No. 1573, *ante*.

### B. Procedure.

**1575. No prosecution in temporal court—Whether bar to proceedings in consistory court.]**—The incumbent of a parish, a married man, was charged in a criminal suit instituted under Clergy Discipline Act, 1892 (c. 32), with having within five years then last past been guilty of immoral acts, immoral conduct, & of offences against the laws ecclesiastical being offences against morality in that he wrote & sent by post addressed to B., an unmarried woman, then or lately a parishioner of & resident in the parish, an obscene & indecent letter. Deft. appeared in the suit & brought in a defence which, after admitting & deeply regretting the writing of the letter & pleading that at the time deft. wrote it he had not had control over his feelings & was unable to appreciate the meaning of what he was writing, submitted that the letter was not in itself sufficient to constitute an offence under the above Act. At the hearing of the suit in the Consistory Ct. of the diocese in which deft. held preferment evidence in support of the charge was given by witnesses for the prosecutor, but the judge of the Consistory Ct. after hearing arguments, without any evidence having been adduced on behalf of deft., dismissed the prosecution on the ground that the charge was not one maintainable under the Act. The prosecutor appealed to the Arches Ct. of Canterbury:—*Held*: (1) the act charged against deft. was "an immoral act" within sect. 2 of the Act, & constituted an offence justiciable under the Act; (2) assuming the act charged against deft. was one for which he might have been prosecuted in a temporal ct., the fact that no such prosecution had taken place would

not have been a bar to the proceedings in the ct. below.—*ELY (Bp.) v. CLOSE*, [1913] P. 184; 29 T. L. R. 668.

**1576. Assessors—Position.]**—*WAKEFORD v. LINCOLN (Bp.)*, No. 1140, *ante*.

**1577. Evidence—Proof of drunkenness—Prosecutor unable to specify precise dates.]**—*ROCHESTER (Bp.) v. HARRIS*, No. 1507, *ante*.

**1578. Appeal—Leave to appeal—Enlargement of time.]**—In order to obtain an enlargement of time to appeal, as limited by the rules made under Clergy Discipline Act, 1892 (c. 32), a perfect explanation must be given of the delay incurred.—*LEE v. ATHERTON*, [1904] A. C. 805; 74 L. J. P. C. 14, P. C.

*Annotation:—Reid. Wakeford v. Lincoln, Bp.*, [1921] 1 A. C. 813.

**1579. — — — When granted.]**—Leave to appeal will not be given under Clergy Discipline Act, 1892 (c. 32), s. 4 (2), in respect of the facts unless there is a *prima facie* case; &, in the absence of even a definite suggestion to that effect, an application for leave is idle & frivolous.—*RE EVANS v. WOODS, Ex p. WOODS*, [1900] A. C. 338; *sub nom. EVANS v. WOODS*, 69 L. J. P. C. 82, P. C. *Annotation:—Reid. Wakeford v. Lincoln, Bp.*, [1921] 1 A. C. 813.

**1580. — — — — —.]**—Leave to appeal on matters of fact to the Chancery Ct. of York was granted by the judge of that ct. in a case under Clergy Discipline Act, 1892 (c. 32), where on an appeal on matters of law in the same case it had appeared that material evidence for the prosecutor which ought to have been excluded had been admitted in the ct. below.

Rule 69 of the Clergy Discipline Rules, 1892, provides that the appellate ct. on any appeal as to the facts under the Act may, if in the opinion of the ct. the justice of the case requires it, summon any witness heard at the trial to give evidence with respect to the case, & order any witness not heard at the trial to give evidence with respect to the case. Deft. who had been adjudged guilty in the Consistory Ct. of the diocese in which he held preferment of immoral acts within the provisions of the above Act, appealed to the Chancery Ct. of York in respect of matters of law on the ground, *inter alia*, of the improper admission of evidence in the ct. below, & also applied in the same case for leave to appeal on matters of fact. On the appeal on matters of law being heard, the appellate ct. was of opinion that certain of the evidence alleged by applt. to have been improperly admitted ought to have been excluded, & on the application for leave to appeal on matters of fact coming on, granted leave to appeal on fact on the ground of the improper admission of evidence in the case as above stated, & directed that under the above rule three witnesses who had given evidence in the ct. below should be recalled for examination at the hearing of the appeal, & that another witness not heard in the ct. below should be summoned to give evidence at the same hearing.—*CHESNEY v. NEWSHOLME, NEWSHOLME v. CHESNEY*, [1908] P. 301.

**1581. Sentence of deposition—Need not be passed concurrently with sentence of deprivation—May be passed subsequently.]**—*R. v. BRISTOL (Bp.)* (1897), 41 Sol. Jo. 695, C. A.

**1582. — — — — —.]**—Where a clergyman is deprived by sentence of the Consistory Ct., & it appears to the bishop of the diocese that the clergyman ought also to be deposed from Holy Orders, the sentence of deposition, under Clergy Discipline Act, 1892 (c. 32), s. 8, need not be delivered concurrently with that of deprivation,

but may be passed at a subsequent time.—*R. v. DURHAM* (LORD BP.), [1897] 2 Q. B. 414; 66 L. J. Q. B. 826; 77 L. T. 190; 46 W. R. 30; 13 T. L. R. 530, C. A.

#### SUB-SECT. 4.—UNDER OTHER ACTS.

**1583. Act of Uniformity, 1559 (c. 2)—Second offence—Form of indictment.**—*FLEMMINGS* (CASE) (1584), 1 Leon. 295; 74 E. R. 269.

**1584. Pluralities Acts—Pluralities Act, 1838 (c. 106), s. 109—Effect of.**—*RUGG v. WINCHESTER* (BP.), No. 162, *ante*.

**1585. — Commission to inquire into performance of duties by incumbent—Judicial tribunal.**—A commission, issued by the bishop of a diocese under Pluralities Act, 1838 (c. 106), & Pluralities Acts Amendment Act, 1885 (c. 54), to inquire into the inadequate performance of the ecclesiastical duties of any benefice, creates a judicial tribunal, & the occasion on which a witness gives evidence before the comrs. is absolutely privileged, & no action is maintainable in respect of evidence so given.—*BARRATT v. KEARNS*, [1905] 1 K. B. 504; 74 L. J. K. B. 318; 92 L. T. 255; 53 W. R. 356; 21 T. L. R. 212, C. A.

*Annotations:—*Consd. Copartnership Farms v. Harvey-Smith, [1918] 2 K. B. 405. *Refd.* Slack v. Barr (1918), 82 J. P. 91.

**1586. — Scope of inquiry.**—When the bishop of a diocese appoints a commission under Pluralities Act, 1838 (c. 106), s. 77, as amended by Pluralities Acts Amendment Act, 1885 (c. 54), s. 3, & Benefices Act, 1898 (c. 48), s. 8, to inquire whether the ecclesiastical duties of a benefice are inadequately performed owing to the negligence or wilful default of the incumbent, such commission is not confined to the charges set out in the particulars, but (subject to the right of the incumbent to ask for an adjournment if taken by surprise) may consider any other matters brought before it, including the conduct of the incumbent at the hearing before them; & any conduct of the incumbent before the date of the inhibition may be considered by the bishop if reported on by the commission.—*MAUGHAN-ETTRICK v. CHELMSFORD* (BP.) (1921), 90 L. J. K. B. 766; 151 L. T. Jo. 315.

### SECT. 10.—CENSURES OR PUNISHMENTS.

#### SUB-SECT. 1.—IN GENERAL.

**1587. Duty of judge to pronounce appropriate sentence.**—(1) A judge has no discretion, while finding deft. guilty of ecclesiastical offences, to absolve him from all ecclesiastical censure or punishment for those offences, but should pronounce that which he considers to be an appropriate sentence.

(2) The case was remitted to the ct. below for that purpose as, except under peculiar circumstances, a ct. of final appeal ought not to decide any cause in the first instance.

(3) Although it may not be proper to institute a new suit for the mere purpose of punishing contumacy or disobedience to orders passed in a former suit, yet a new suit may be brought for new substantial offences, & the former disobedience be relied upon as a matter of aggravation.

(4) An order having the force of a definitive sentence may inflict canonical punishment, such as deprivation, degradation, & excommunication which cannot lawfully be inflicted for mere con-

tumacy or contempt.—*MARTIN v. MACKONCHIE* (1882), 7 P. D. 94; 51 L. J. P. C. 88; 40 L. T. 699; 46 J. P. 213; 31 W. R. 1, P. C.

*Annotation:—*As to (1) *Refd.* Martin v. Mackonochie (1883), 8 P. D. 191.

**1588. Order having force of definitive sentence—Infliction of canonical punishment.**—*MARTIN v. MACKONCHIE*, No. 1587, *ante*.

**1589. Ecclesiastical censures & temporal punishment both levied against identical offence—Nemo bis puniri debet pro eodem delicto.**—*MIDDLETON v. GROVES*, No. 30, *ante*.

#### SUB-SECT. 2.—MONITION.

**1590. Discretion of court to issue—Assurance by defendant of future submission.**—*READ v. LINCOLN* (BP.), No. 1146, *ante*.

**1591. Issue of monition—Citation to show cause against unnecessary.**—*BARTLETT v. KIRWOOD*, No. 2601, *post*.

**1592. — Added to definitive sentence.**—*ORCHARD'S CASE* (1692), Return of Appeals before the High Court of Delegates, p. 47, No. 98 (Parliamentary Papers 199, April 3, 1868), cited 42 J. P. at p. 823.

*Annotation:—*Refd. Combe v. Edwards (1878), 42 J. P. 820.

**1593. — — — — —**—*TURNINE v. CLARKSON* (1826), Coote's Eccl. Practice, p. 253.

*Annotation:—*Refd. Combe v. Edwards (1878), 42 J. P. 820.

**1594. — — — — —**—Deft., on giving an affirmative issue, suspended *ab ingressu ecclesie* for a month, & condemned in costs for brawling on two occasions at a vestry held in the chancel.—*FIELD v. COSENS* (1830), 3 Hag. Eccl. 178; 162 E. R. 1122.

*Annotation:—*Consd. Combe v. Edwards (1878), 3 P. D. 103.

**1595. — — — — —**—*SANDERS v. HEAD*, No. 1402, *ante*.

**1596. — — — — —**—(1) Under the general ecclesiastical law the punishment of a beneficed clergyman, who is found to have published doctrine contrary to any of the Thirty-Nine Articles is in the judicial discretion of the ct. In the present case the ct. suspended deft. for one year *ab officio et beneficio*, monished him not to offend in like manner in future & condemned him in the costs.

(2) The true construction of the Articles, Formularies, & Canons has to be ascertained according to strict legal principles.

(3) The clergy are bound by Articles 6, 7, & 20, to conform to all the books of scripture declared by the Church to be canonical, & cannot publish or espouse any opinions to the contrary. Nevertheless the *bona fide* following or sanctioning conclusions of orthodox divines as to certain verses, or parts of the canonical books having been erroneously introduced into scripture, is not a derogation of the books themselves, or of their authority, & is therefore not an ecclesiastical offence.—*SALISBURY* (BP.) v. *WILLIAMS* (1862), 1 New Rep. 196; 7 L. T. 472; 27 J. P. 375; 11 W. R. 211; *reversd.* on other grounds, *sub nom.* *WILLIAMS v. SALISBURY* (BP.) (1863), 2 Moo. P. C. C. N. S. 375, P. C.

*Annotations:—*As to (1) *Refd.* Combe v. Edwards (1878), 3 P. D. 103; *Mackonochie v. Penzance* (1881), 6 App. Cas. 424. As to (2) *Consd.* Voysey v. Noble, Noble v. Voysey (1871), L. R. 3 P. C. 357. As to (3) *Consd.* Voysey v. Noble, Noble v. Voysey (1871), L. R. 3 P. C. 357. *Refd.* Merriman v. Williams (1882), 7 App. Cas. 484. *Generally.* *Mordaunt v. Jowett* (1863), 1 New Rep. 488; *Sheppard v. Bennett* (First Appeal) (1870), L. R. 4 P. C. 350; *Sheppard v. Bennett* (Second Appeal) (1871), L. R. 4 P. C. 371; *Jenkins v. Cook* (1875), 1 P. D. 80.

**Sect. 10.—Censures or punishments: Sub-sects. 2, 3 & 4.]**

1597. ———.]—MACKONCHIE v. PENZANCE  
(LORD), No. 16, *ante*.

— In respect of particular offences.]—See specific Sects. *passim*.

—By bishop in exercise of visitatorial powers.]  
—See Part III., Sect. 5, sub-sect. 2, E., *ante*.

**1598. Condemnation in costs.**—**WESTON v. HAND** (1733), Return of Appeals before the High Court of Delegates, No. 154 (Parliamentary Papers 199, April 3, 1868), cited 4 Q. B. D. at p. 717.

*Annotation* :—**Reid**, *Martin v. Mackonochie* (1879), 4 Q. B. D. 697.

**1599.** — —. — **WILCOX v. WHITE** (1833), Return of Appeals before the High Court of Delegates, No. 192 (Parliamentary Papers 190, April 3, 1868).

**Annotation :—** *Mentd.* Trower v. Hurst (1817), 5 Notes of Cases, 160.

— *See, also*, Nos. 1402, 1594, 1596, *ante*.

**1600. Duration of monition.**— (1) Monitions in a criminal suit under Church Discipline Act, 1840 (c. 86), against a clerk in orders, though general in terms & admonishing deft. to abstain for the future from the like offences to those the ct. at the hearing pronounced him to have committed, are not to be regarded as forbidding him under pain of being pronounced in contempt to resort at any time during his life to the practices from which he has been so admonished to abstain.

(2) Upon an application against a clerk in orders to enforce monitions by which he had been admonished to abstain in future from certain illegal practices in the conduct of Divine Service, it appeared that in July, 1885, *deft.*, a clerk in orders, holding a benefice within the province of York, had been pronounced by the *ct.* to have, in July, 1884, committed certain offences in matters of ritual when officiating in his church; that two monitions to abstain from the like offences, dated Dec. 31, 1885, & June 7, 1886, obedience to which it was sought to enforce, had been duly served on him on Jan. 2, 1886, & June 13, 1886, respectively; that, founded upon disobedience to the former of these two monitions, a decree of suspension *ab officio* for six months had been pronounced against him in the same suit in Apr. 1886, & subsequently, the suspension having been disregarded, proceedings by way of *significavit* had been taken, under which he was imprisoned from May 4, 1887, to May 20 in that year: that during all the time between Aug. 7, 1886, & April 28, 1887, & between May 20, 1887, & Aug. 7, 1890, proceedings in the temporal *cts.* were pending relative to & in connection with the suit; & that in Oct. 1890, *deft.*, when officiating in the church, repeated some of the offences he had been pronounced guilty of at the hearing. The application to enforce the monitions was made on Apr. 9, 1891; & there was no evidence before the *ct.* as to the conduct of *deft.* between May 20, 1887, & Oct. 19, 1890;—*Held:* having regard to the time which had elapsed since the expiration of the sentence of suspension, the application ought not to be granted.

—HAKES F. COX, [1892] P. 110.

1601. Disobedience to monition -- What amounts to. -- MARTIN v. MACKONOCHE, No. 2814, *post*.

1802. — When party pronounced contumacious. — When no sufficient cause is shown for neglecting to comply with a monition personally served, a party may, at once, be pronounced contumacious: but *aliter*, for a mere informality if he has virtually obeyed, or is ready to obey, the

**monition.**—**HAMERTON v. HAMERTON** (1827), 1 Hag. Ecc. 23 ; 162 E. R. 493.

**Annotations:—***Refrid.* Mackonochie v. Penzance (1881), 6 App. Cas. 424. *Mentid.* Bailey v. Bailey (1884), 50 L. T. 799.

**1603.** — **Punished by suspension.**—**JONES v. BANGOR (Br.)** (1671), Return of Appeals before the High Court of Delegates, No. 63 (Parliamentary Papers 190, April 3, 1868), cited in 3 Q. B. D. at p. 771.

*Annotation*:—**Consd.** Mackonochie v. Penzance (1881), 6 App. Cas. 424.

1604. ———.]—MARTIN v. MACKONOCHE,  
No. 2814, *post*.

**1805.** — — — — —.]—Order of suspension *ab officio et a beneficio* decreed against a clerk in order, the perpetual curate of a chapel of ease to a parish church, for persistent contempt in disobeying a monition, issued to enforce obedience to an Order in Council made in an ecclesiastical cause, declaring illegal & prohibiting the use & practice of certain rites & ceremonies, & vestments, in the services of the Church.—HERBERT v. PURCHAS (1872), L. R. 4 P. C. 301; 9 Moo. P. C. C. N. S. 51; 17 E. R. 434.

*Annotations:* **Consd.** *Combe v. Edwards* (1878), 3 P. D. 103. **Apprvd.** *Mackonochie v. Penzance* (1881), 6 App. Cas. 421. **Refd.** *Martin v. Mackonochie* (1882), 7 P. D. 94.

**1608.** — [M.] M., a clerk, having been proceeded against for offences against discipline, & suspended as well as admonished to discontinue certain ritualistic practices, & having disobeyed the monition frequently, the ct. sentenced him to three years' suspension *ad officio et beneficio*. — **MARTIN v. MACKNOCHIE** (1878), 42 J. P. 392.

1807. — **Power of court.**—(1) In a criminal suit, articles, which charged the vicar of a parish with having offended against the laws ecclesiastical by several illegal ceremonial acts & observances during the celebration of divine service in his parish church, were duly proved, & deft. was ordered to file in the registry a declaration stating whether he would in future abstain from the matters set forth in the articles, with intimation that should he repent the same & not abstain therefrom, the ct. would proceed as by law directed. Deft. did not file any such declaration, & afterwards repeated certain of the matters set forth in the articles. On proof of the repetition of the last-mentioned matters, the ct. on motion by the promoter & without fresh articles being exhibited, suspended deft. *ab officio et a beneficio* for six months. Afterwards the promoter proved by affidavit that deft., subsequently to the date of the sentence of suspension, had officiated in his parish church & had repeated certain of the matters before complained of, & moved the ct. to enforce the sentence of suspension.

Before the motion was disposed of the Q. B. D. prohibited the Dean of Arches from enforcing a decree of suspension, in a similar case. The Dean of Arches, in deference to the decision of the Q. B. D., though strongly dissenting from it, ordered the motion to stand over:—*Held*: (2) the facts of the present case being similar, the judgment must be followed, but the authority of decided cases & the established practice of the ct. showed that the sentence, the execution of which the Q. B. D. had prohibited, was within the jurisdiction of the ct.; & the Q. B. D. had exceeded their jurisdiction in reviewing decisions of the Privy Council; the Q. B. D. had no power to interfere with the Ct. of Arches by way of prohibition in a matter over which the Ct. of Arches had jurisdiction, & the ancient practice of the Ecclesiastical Ct. showed that a monition did prolong the jurisdiction of the ct. so as to warrant punishment, for

a repetition of the offence, as for contumacy.—**COMBE v. EDWARDS** (1878), 3 P. D. 103; 42 J. P. 820; *sub nom.* **COOMBE v. EDWARDS**, 39 L. T. 295.  
*Annotation* :—*As to* (2) **Expld.** **Martin v. Mackonochie** (1879), 4 Q. B. D. 697.

**1608.** ———. ———.]—**MACKONOCHE v. PENZANCE** (LORD), No. 16, *ante*.

**1609.** ———. ———.] **Visitatorial jurisdiction of Archbishop.**]—**HIGGINS v. DUBLIN** (ARCHBP.) (1719), Return of Appeals before the High Court of Delegates, p. 60, No. 136 (Parliamentary Papers 199, April 3, 1868), cited 4 Q. B. D. at p. 729.

*Annotations* :—**Consd.** **Combe v. Edwards** (1878), 3 P. D. 103. **Refd.** **Mackonochie v. Penzance** (1881), 6 App. Cas. 421.

**1610.** ———. ———.] **Punished by excommunication.**]—**CHAMBERLAYNE v. HEWITSON** (1696), Return of Appeals before the High Court of Delegates, p. 47, No. 100 (Parliamentary Papers 199, April 3, 1868), cited 4 Q. B. D. at p. 720.

*Annotations* :—**Refd.** **Combe v. Edwards** (1878), 42 J. P. 820; **Martin v. Mackonochie** (1879), 4 Q. B. D. 697.

**1611.** ———. ———.] **Punished by deprivation.**] **OXFORD (Bp.) v. HENLY**, No. 2971, *post*.

**1612.** ———. ———.] **Application to enforce monition. Locus standi of complainant. Removal from parish before hearing.**]—**LIDDELL v. BEAL**, No. 1125, *ante*.

**1613.** ———. ———.] **Effect of delay.**] **HAKES v. COX**, No. 1600, *ante*.

#### SUB-SECT. 3. — INHIBITION UNDER PUBLIC WORSHIP REGULATION ACT, 1871 (c. 85).

*See, generally*, Sect. 9, sub-sect. 2, B., *ante*.

**In respect of particular offences.**]—*See* specific Sects. *passim*.

#### SUB-SECT. 4. — SUSPENSION.

##### **1614. Nature of punishment General rule.**

(1) Where a beneficed clergyman charged with an offence by report of comrs. under Church Discipline Act, 1840 (c. 86), s. 5, consents, under sect. 6, to abide the judgment of the bishop without further proceedings, & is thereupon sentenced to suspension from the functions & emoluments of his office for a term of years, the bishop may lawfully make it a part of such sentence that, when the term expires, the suspended party shall produce a certificate of his good behaviour during such term, under the hands of three beneficed clergymen in his vicinity, such certificate to be approved of by the bishop before the suspension be taken off; & that the suspension shall continue, notwithstanding the expiration of the term, until such approval.

(2) Suspension may be of several kinds; it may be for a limited time, or it may be unqualified in its duration. If it is suspension for ever, it takes the name of deprivation; they are *eiusdem generis*. As to the bishop taking it for granted at the end of the time of his suspension that during that time he had conducted himself well, it is improper to expect the bishop to assume anything of the kind, & yet if appet. has not done so, he is unfit to resume his duties in the parish. The added condition seems to me most reasonable, & when appet. submitted himself to this particular jurisdiction, he was bound to know that he was taking the case out of the rules of the general law (COLERIDGE, J.).—**Ex p. ROSE** (1852), 18 Q. B. 751; 21 L. J. Q. B. 339; 19 L. T. O. S. 183; 16 J. P. 406; 17 Jur. 180; 118 E. R. 284.

*Annotations* :—*As to* (1) **Consd.** **Martin v. Mackonochie** (1879), 4 Q. B. D. 697. *As to* (2) **Consd.** **Combe v. Edwards** (1878), 3 P. D. 103.

**1615.** ———. ———.] **Defendant without preferment.**—

A priest in Holy Orders, without preferment, having been convicted at a quarter sessions of attempting a nameless offence, was subsequently article against, & a sentence was prayed against him of degradation. That prayer was refused, but a sentence of unlimited suspension was pronounced.—**CLARKER v. H**—(1810), 1 Rob. Eccl. 377; 163 E. R. 1072; *sub nom.* **CLARKE v. HEATHCOTE**, 4 Notes of Cases, 321.

**1616. When inflicted.—To compel appearance.**]—**HANCOCK v. BOMER** (1692), Return of Appeals before the High Court of Delegates, No. 99 (Parliamentary Papers 199, April 3, 1868), cited in 3 P. D. at p. 111.

*Annotations* :—**Consd.** **Combe v. Edwards** (1878), 3 P. D. 103; **Mackonochie v. Penzance** (1881), 6 App. Cas. 421.

**1617.** ———. ———.] **Disobedience to order of ecclesiastical court.**]—**HART v. CAREY** (undated), Return of Appeals before the High Court of Delegates, No. 58 (Parliamentary Papers 199, April 3, 1868), cited in 3 P. D. at p. 110.

*Annotation* :—**Consd.** **Combe v. Edwards** (1878), 3 P. D. 103.

**1618.** ———. ———.] (1) The ordinary sentence of deprivation in use in the ecclesiastical cts. is not limited to the particular preferment or benefice stated in the articles to be held by resp., but extends to all ecclesiastical promotions within the jurisdiction held by resp. at the time that sentence is pronounced.

(2) It is contrary to the practice of the Ct. of Arches to pronounce a sentence of perpetual suspension from the performance of Divine Service against a resp. who holds a benefice of which the ct. has jurisdiction to deprive him. The articles in a criminal suit by letters of request under Church Discipline Act, 1840 (c. 86), contained allegations charging that resp. was perpetual curate of the parish of A., in the diocese of London, & that he had within two years of the institution of the suit committed, repeated & aggravated offences against the laws ecclesiastical in matters of ritual whilst officiating in the performance of Divine Service in the parish church of A. At the hearing of the suit the above-mentioned allegations were held to be proved, & the Official Principal, in his discretion, condemned resp. in costs, but refused to pronounce any sentence of deprivation or canonical punishment. The promoter appealed, & the appeal having been allowed, the Queen in Council remitted the cause, with an intimation that resp. ought to be canonically punished. After the cause had been so remitted, but before the terms of the remission had been complied with, resp. resigned the perpetual curacy of A. & was instituted to the incumbency of P. in the diocese of London. On the cause subsequently coming on for sentence, the Official Principal of the Ct. of Arches pronounced sentence depriving resp. of all ecclesiastical promotions within the province of Canterbury of which he was possessed when the sentence was pronounced & of all the ecclesiastical emoluments thereto belonging.—**MARTIN v. MACKONOCHE** (1883), 8 P. D. 191; 47 J. P. 567; *previous proceedings* (1882), 7 P. D. 91, P. C.

**1619.** ———. ———.] **Offences committed after commencement of suit.**]—**PULLEN v. CLEWER** (1684), 1 Hag. Ecc. App. B. 2; 162 E. R. 790; *sub nom.* **CLEWER v. PULLEN**, Return of Appeals before the High Court of Delegates, No. 79 (Parliamentary Papers 199, April 3, 1868).

*Annotations* :—**Consd.** **Combe v. Edwards** (1878), 3 P. D. 103; **Martin v. Mackonochie** (1879), 4 Q. B. D. 697; **Combe v. De la Bere** (1881), 6 P. D. 157. **Refd.** **Martin v. Mackonochie** (1882), 7 P. D. 91.

— **Disobedience to monition.**]—*See* Nos. 1607–1613, *ante*.





Vaugh. 1. *Reid*. *Hunston v. Cocket* (1610), Cro. Jac. 252; *R. v. Zakar* (1615), 3 Bulst. 88; *Osserie Bp. Case* (1620), Palm. 22; *R. v. Canterbury, Archbp.* (1634), Cro. Car. 354. *As to* (4) *Consd.* *Tufton v. Temple* (1666), Vaugh. 1. *Reid*. *Hitcham & Glover's Case* (1617), 2 Roll. Rep. 6; *Elvis v. York, Archbp.*, Taylor & Bishop (1619), Hob. 315; *Browne v. Spence* (1663), 1 Sid. 163. *As to* (5) *Reid*. *Tufton v. Temple* (1666), Vaugh. 1. *Generally*, *Mentd.* *A. G. v. Windsor* (Dean & Canons) (1800), 30 L. J. Ch. 529.

**1635. Extent of punishment—Not limited to particular preferment.**—*MARTIN v. MACKONOEHLIE*, No. 1618, *ante*.

**1636. Condemnation in costs.**—*JACKSON v. MUGG* (1674), Return of Appeals before the High Court of Delegates, p. 27, No. 59 (Parliamentary Papers 190, April 3, 1868).

**1637. Disobedience to sentence—Punished by proceedings for contempt.**—*ASTILL v. BICKLES* (1002), cited 6 App. Cas. at p. 431.

*Annotation*:—*Consd.* *Mackonochie v. Penzance* (1881), 6 App. Cas. 424.

**1638. Effect of punishment.**—A sentence of deprivation *quia merè laicus*, does not make marriage, or any spiritual act done by the parson, void; not even a lease made by him, & confirmed by the patron & Ordinary. —(*OSTARD v. WINDER* (1600), Cro. Eliz. 775; 78 E. R. 1005.

*Annotation*:—*Reid*. *R. v. Millis* (1841), 10 Cl. & Fin. 531.

#### SUB-SECT. 6.—DEPOSITION UNDER CLERGY DISCIPLINE ACT, 1892 (c. 32).

See Sect. 9, sub-sect. 3, B., *ante*.

#### SUB-SECT. 7.—EXCOMMUNICATION.

##### A. In General.

**1639. Defined.**—*KEMP v. WICKES*, No. 14, *ante*.

**1640. Whether declaratory sentence condition precedent.**—*COLLI v. COLLI* (1751), cited 1 Lee, 593; 161 E. R. 217.

*Annotations*:—*Foll.* *Scrimsshire v. Scrimsshire* (1752), 2 Hag. Con. 395. *N.F.* *Grant v. Grant* (1754), 1 Lee, 592. *Consd.* *Mastin v. Escott* (1841), 2 Curt. 692. *Reid*. *Titchmarsh v. Chapman* (1844), 3 Curt. 840.

**1641.**—It is the constant practice in Ecclesiastical Cts. to repel the testimony of persons present at clandestine marriages till they have been absolved. Persons present at such marriages are excommunicated *ipso facto*, & in our Cts. it is not thought necessary to have a declaratory sentence of an excommunication *ipso facto*, for the Ct. can *ex officio* take notice of it (*SIR E. SIMPSON*).—*SCRIMSHIRE v. SCRIMSHIRE* (1752) 2 Hag. Con. 395; 161 E. R. 782.

*Annotations*:—*Consd.* *Mastin v. Escott* (1841), 2 Curt. 692. *Reid*. *Titchmarsh v. Chapman* (1844), 3 Curt. 840. *Mentd.* *Harford v. Morris* (1776), 2 Hag. Con. 423; *Middleton v. Janverin* (1802), 2 Hag. Con. 437; *Ruding v. Smith* (1821), 2 Hag. Con. 371; *R. v. Millis* (1841), 10 Cl. & Fin. 534; *Connelly v. Connelly* (1850), 2 Rob. Eccl. 201; *Simonin* (falsely called *Mallac*) *v. Mallac* (1860), 2 Sw. & Tr. 67; *Brook v. Brook* (1861), 9 H. L. Cas. 193; *Sottomayer v. De Barros* (1879), 5 P. D. 94; *Ogden v. Ogden* (1908) P. 46; *Mitford v. Mitford*, [1923] P. 130.

**1642.**—*TITCHMARSH v. CHAPMAN*, No. 1180, *ante*.

**1643. Who can be excommunicated—Party outside diocese.**—A bishop can only excommunicate a person within his diocese, though for purposes of ordination he is bishop for all England (*WHITELOCK, J.*).—*BROWN'S CASE* (1626), Benl. 200; 73 E. R. 1057.

**1644.**—An inhabitant of Yorkshire was excommunicated in Worcester diocese.—*WILLIMOT v. WORCESTER* (CHANCELLOR) (1706), 11 Mod. Rep. 83; 88 E. R. 909.

**1645.**—At time of citation.]—(1) A writ *de excommunicato capiendo* stated that deft. was excommunicated in a cause of "defamation & slander merely spiritual":—*Held*: sufficient.

(2) If the sentence of the greater, instead of the lesser, excommunication be pronounced, it is only a ground of appeal: but this Ct. will not quash a writ *de excommunicato capiendo* for that objection.

(3) It is not necessary that deft. should be resident in the diocese at the time of the excommunication; it is sufficient if he were there at the time of the citation.—*R. v. PAYTON* (1707), 7 Term Rep. 153; 101 E. R. 906.

*Annotation*:—*As to* (2) *Reid*. *Martin v. Mackonochie* (1879) 4 Q. B. D. 697.

**1646.**—Bishop.]—(1) A bishop may be excommunicated & an *excommunicato capiendo* lies against him.

(2) A writ of *excommunicato capiendo* reciting that the party was condemned in costs in *quodam negotio officii sive correctionis* is bad for uncertainty.—*R. v. WATSON* (1702), 2 Ld. Raym. 817; 92 E. R. 45; *sub nom.* *WATSON'S CASE*, 7 Mod. Rep. 117; *sub nom.* *LUCY v. ST. DAVID'S* (Bp.), 7 Mod. Rep. 50; Brod. & P. 332.

*Annotations*:—*As to* (2) *Reid*. *R. v. Dugger* (1822), 5 B. & Ald. 791. *Generally*, *Mentd.* *R. v. Hewitt* (1837), 6 Ad. & El. 517, n.; *R. v. Balnes* (1841), 5 J. P. 91; *Ex p. Cox* (1887), 20 Q. B. D. 1.

**1647. Certificate of excommunication By whom made.**—(1) An excommunication must be certified by the bishop, & not by his official or commissary, for the bishop is the immediate officer to the Ct.; & none shall certify an excommunication whereby any shall be disabled, but he to whom the Ct. may write to absolve the party excommunicated.

(2) A certificate directed to a particular Ct. & in a particular manner, shall not be extended further.

(3) The certificate ought not to be general, but ought to show the speciality of the cause for which the party is excommunicated.

(4) The bishop must certify that which hath been sentenced in his own Ct. & not in another Ct.

(5) If the bishop makes a certificate, & dies before it be received, it is a nullity; but his successor ought to certify.

(6) If the bishop is *in remotis agendis*, the vicar-general may certify an excommunication; a bishop may certify after election & before consecration.—*TROLLOP'S CASE* (1608), 8 Co. Rep. 68 a; 77 E. R. 577.

*Annotations*:—*Generally*, *Mentd.* *R. v. Hill* (1701), 12 Mod. Rep. 517; *Lucy v. St. David's, Bp.* (1702), 7 Mod. Rep. 56; *Everett v. Everett & McCullum*, [1919] P. 298.

**1648.**—Form—Sufficiency of contents.]—*TROLLOP'S CASE*, No. 1647, *ante*.

**1649. Appeal—Greater sentence instead of lesser.**—*R. v. PAYTON*, No. 1645, *ante*.

**1650. Absolution of excommunication—By Archbishop Must be on appeal.**—*ABURGAVERNNY* (LORD) *v. EDWARDS* (1005), Moore, K. B. 775; 72 E. R. 898.

**1651.**—Of one or two excommunications—No absolution of other.]—*POWELL v. HARMAN* (1616), Moore, K. B. 840; 72 E. R. 947.

**1652.**—Necessity for notice of writ.]—*BOATNE'S CASE* (1809), 10 Ves. 346; 33 E. R. 1015, L. C.

**1653.**—By prohibition.]—If a man be excommunicated, a prohibition shall assolve him (*HOLT, C. J.*).—*ANON.* (1699), 12 Mod. Rep. 311; 88 E. R. 1312.

**1654. Liability of judge for excommunicating party—Refusal to obey ultra vires order.**—(1) An action on the case may be maintained against a judge of the ecclesiastical Ct. who excommunicates

**Sect. 10.—Censures or punishments: Sub-sect. 7, A., B. & C.; sub-sect. 8, A. & B. (a) & (b).]**

a party for refusing to obey an order which the ct. has not authority to make, or where the party has not been previously served with a citation or monition, nor had due notice of the order.

(2) The practice of the ecclesiastical ct. is matter of fact to be proved by evidence, & left to the jury.—**BEAURAIN v. SCOTT** (1812), 3 Camp. 388, N. P.

**Annotations:—As to (1) *Consd.*** Wood v. Wood (1874), L. R. 9 Exch. 190. ***Refd.*** *Dicas v. Brougham* (1833), 6 C. & P. 249; *Houlden v. Smith* (1850) 19 L. J. Q. B. 170; *Foster v. Dodd* (1867), 8 B. & S. 812.

**1655. — Party cited by void citation.**—**ACKERLEY v. PARKINSON**, No. 229, *ante*.

#### *B. Signification of Offence.*

**1656. Form of significavit.—Sufficiency of contents.—Necessity for statement of residence within diocese.**—**BEAMOUNT'S CASE** (1597), Moore, K. B. 467; 72 E. R. 701.

**1657. — Necessity for showing some cause required by 5 Eliz. c. 23.** On an *excommunicato capiendo* if the *significavit* does not show some of the causes required by 5 Eliz. c. 23, the King's Bench, on *habeas corpus* will quash the writ; but the excommunication continues.—**HUGHES'S CASE** (1630), Cro. Car. 196; 79 E. R. 773.

**Annotations:—*Refd.*** R. v. Fowler (1700), 1 Ld. Raym. 618. ***Mentd.*** *Anon.* (1698), 5 Mod. Rep. 425; *Lucy v. St. David's, Bp.* (1702), 7 Mod. Rep. 56.

**1658. —** On an *excommunicato capiendo* for a contempt of ct., if the *significavit* to Chancery does not show that the writ issued for one of the causes mentioned in 5 Eliz. c. 23, the party shall be discharged. R. & **CODRINGTON v. RODMAN** (1630), Cro. Car. 198; 79 E. R. 771.

**Annotation:—*Mentd.*** *Lucy v. St. David's, Bp.* (1702), 7 Mod. Rep. 56.

**1659. — Necessity for particular specification of cause.**—R. v. **FOWLER**, No. 1667, *post*.

**1660. —**—R. v. **LATTER** (1733), 2 Barn. K. B. 330, 365; 91 E. R. 533, 556.

#### *C. Writ de excommunicato capiendo.*

**1661. Nature of writ.**—An *excommunicato capiendo* is a viscontil writ (**VARNY, M.R.**).—**ANON.** (1730), Mos. 305; 25 E. R. 442.

**1662. Necessity for opening of writ in court.**—The writ of *excommunicato capiendo* must be delivered openly in ct.—**ANON.** (1620), Cro. Jac. 566; 79 E. R. 485.

**1663. —**—An *excommunicato capiendo* is void by 5 Eliz. c. 23, unless it be returned into K. B. & delivered of record to the sheriff.—**PARKER'S CASE** (1640), Cro. Car. 582; 79 E. R. 1100.

**1664. —**—R. v. **COLGATE** (1663), 1 Sid. 165; 82 E. R. 1034.

**Annotation:—*Consd.*** *Dale's Case*, *Enraght's Case* (1881), 6 Q. B. D. 376.

**1665. Stay of delivery by defendant.—Issue of new writ.**—Where the writ of *excommunicato capiendo* has been opened & enrolled in K. B. & the delivery of it to the sheriff is stayed by deft. until the return is out, Chancery may issue a second. So, though the judge is made a party, & condemned in costs.—R. v. **EYRE** (1713), 2 Stra. 1180; 93 E. R. 1118.

**Annotations:—*Refd.*** R. v. *Blake* (1833), 2 Nev. & M. K. B. 312. ***Mentd.*** R. v. *Dugger* (1822), 5 B. & Ald. 791.

**1666. Validity of writ Defects in form.—Misnomer.**—Misnomer cannot be pleaded to the writ of *excommunicato capiendo*.—**BONSFIELD'S CASE** (1670), 1 Mod. Rep. 70; 80 E. R. 739.

**1667. — Necessity for particular speci-**

**cation of cause.]—(1)** The cause of excommunication must be particularly specified, not only in the *significavit*, but in the writ of *excommunicato capiendo*.

(2) *Excommunicato capiendo pro quibrisdam causis subtractionis decimarum sive aliorum jurium ecclesiasticorum* quashed for uncertainty.—R. v. **FOWLER** (1700), 12 Mod. Rep. 418; 1 Salk. 293, 350; Fortes. Rep. 243; Holt. K. B. 334; 1 Ld. Raym. 586, 618; 88 E. R. 1421.

**Annotations:—As to (1) *Consd.*** R. v. *Dugger* (1822), 1 Dow. & Ry. K. B. 460. ***As to (2) *Distd.**** R. v. *Turfoot* (1736), Lec temp. Hard. 314; *Trebec v. Keith* (1742), 2 Atk. 498. ***Consd.*** R. v. *Payton* (1797), 7 Mod. Rep. 153. ***Refd.*** *Lucy v. St. David's, Bp.* (1702), 7 Mod. Rep. 56; R. v. *Baines* (1840), 12 Ad. & El. 210. ***Generally, *Refd.**** R. v. *Watson* (1702), 2 Ld. Raym. 817; R. v. *Eyre* (1746), 2 Stra. 1067.

**1668. —**—A writ of *excommunicato capiendo* in the conjunctive, i.e. for subtraction of tithes & other ecclesiastical duties:—*Held*: good.—R. v. **TURFOOT** (1736), Lec temp. Hard. 314; 95 E. R. 203.

**1669. —**—R. v. **WATSON**, No. 1646, *ante*.

**1670. —**—A writ of *excommunicato capiendo* for matters ecclesiastical, without stating them particularly, is bad.—R. v. **BLOWER** (1708), 11 Mod. Rep. 173; 88 E. R. 970.

**1671. —**—The writ of *excommunicato capiendo* though opened by the Ct. of K. B. & delivered to the sheriff to execute, may, if it appear to have been issued erroneously or without just cause, be superseded before it is returned.—R. v. **THEED** (1717), 10 Mod. Rep. 350; 1 Stra. 43; 88 E. R. 760.

**Annotation:—*Refd.*** *Dale's Case*, *Enraght's Case* (1881), 6 Q. B. 376.

**1672. —**—R. v. **MUNNERY** (1718), 1 Stra. 76; 93 E. R. 391.

**1673. —**—R. v. **PAYTON**, No. 1615, *ante*.

**1674. — Necessity for statement that crime of ecclesiastical cognisance.**—It must appear in a writ of *excommunicato capiendo* that the crime was of ecclesiastical cognisance.—R. v. **HAYNES** (1708), 11 Mod. Rep. 173; 88 E. R. 970.

**1675. — Necessity for statement that defendant resident in diocese.**—Motion to supersede a writ of *excommunicato capiendo* for want of addition, & because not said deft. was comorant in the diocese. Ct. disallowed both the exceptions, but inclined to think that after the writ had been issued out of this ct. & then brought into K. B. & there delivered to the sheriff, but not yet actually returned into K. B., this ct. on a plain error appearing, may supersede or quash it.—R. v. **BURRARD** (1718), 1 P. Wms. 436; 21 E. R. 400.

**Annotation:—*Refd.*** *Trebec v. Keith* (1742), 2 Atk. 498.

**1676. — Judge made party & condemned in costs.**—R. v. **EYRE**, No. 1665, *ante*.

**1677. — Capias with penalty instead of simple capias.**—If in an *excommunicato capiendo* a *capias* with a penalty issue, where it ought to be a *capias* only, the ct. will discharge the penalty but not abate the writ.—R. v. **CANTELL** (1702), 7 Mod. Rep. 82; 87 E. R. 1108; *sub nom.* R. v. **SANGWAY**, 1 Salk. 294.

**Annotation:—*Mentd.*** R. v. *Thorogood* (1840), 3 Per. & Dav. 629.

**1678. —**—R. v. **CLARKE** (1720), 1 Stra. 265; 93 E. R. 512.

**1679. — Absence of schedule.**—**PYTT v. FENDALL** (1753), 1 Lec. 381; 161 E. R. 141.

**1680. — Irregularity published.**—**PYTT v. FENDALL** (1753), 1 Lec. 381; 161 E. R. 141.

**1681. Setting aside of writ.—How application made.**—*Supersedas* to a writ of *excommunicato*

*capiendo* denied, though the *significavit* was general & uncertain; the method was to proceed by *habeas corpus*. But an appeal being brought a *supersedeas* was granted.—R. v. SNELLER (1681), 1 Vern. 24; 1 Eq. Cas. Abr. 415; 23 E. R. 279.

**1682.** ————]—H. taken on *excommunicato capiendo* cannot come into K. B. but by *habeas corpus*, & that not before the return of the process.—R. v. ST. DAVID'S (Bp.) (1702), 1 Salk. 294; 91 E. R. 261; *sub nom.* LUCY v. ST. DAVID'S (Bp.), 7 Mod. Rep. 56; Brod. & F. 332; *sub nom.* R. v. WATSON, 2 Ld. Raym. 817; *sub nom.* WATSON'S CASE, 7 Mod. Rep. 117; 1 Salk. 100.

*Annotations:—*Reid. *Ex p.* Cox (1887), 20 Q. B. D. 1. *Mentid.* R. v. Duggen (1822), 5 B. & Ald. 791; R. v. Hewitt (1837), 6 Ad. & El. 547, n.; R. v. Baines (1841), 5 J. P. 91.

**1683.** ———— *Before return.*]—R. v. ST. DAVID'S (Bp.), No. 1682, *ante*.

**1684.** ————]—R. v. THEED, No. 1671, *ante*.

**1685.** ————]—R. v. BURHARD, No. 1675, *ante*.

**1686.** ————]—R. v. BLACKGRAVE (1727), 1 Barn. K. B. 38; 91 E. R. 26.

**1687.** ———— *After return.*]—(1) This ct. cannot do anything after the return of the writ of *excommunicato capiendo* is out, for K. B. has the cognisance, for it can compel the sheriff to return it, & the application to quash it must be there.

(2) If the writ had issued in the vacation, & had not been yet returnable, this ct. would have given relief, & discharged the person out of custody (LORD HARDWICKE, C.).—*Ex p.* LITTLE (1747), 3 Atk. 479; 26 E. R. 1075.

*Annotation:—*Generally, Reid. Foot v. Collins (1836), 1 My. & Cr. 250.

**1688.** ———— *Costs—Applicant unsuccessful.*]—*Ex p.* CHEVELEY (1772), Dick. 473; 21 E. R. 353.

**1689.** *Escape after committal under writ—Issue of new writ.*]—If a person committed on an *excommunicato capiendo* escape, a new writ shall issue, if the sheriff has not returned the old writ, or the party been removed by *habeas corpus*.—R. v. BALL (1703), 6 Mod. Rep. 78; 87 E. R. 836.

**1690.** ———— *Liability of gaoler.*]—R. v. ILLING (1713), Gibb. 85; 93 E. R. 268.

#### SUB-SECT. 8.—ENFORCEMENT OF SENTENCES, DECREES AND ORDERS.

##### A. In General.

**1691. Condition precedent—Service of order.**]—Whatever is to be done personally by the party principal in the cause requires, in strictness, a personal service of the notice, or decree, for doing it, upon the party principal. Hence, the service of a decree for answers upon the proctor will not justify the ct. in putting the principal in contempt, if those answers are not brought in.—DURANT v. DURANT (1822), 1 Add. 114; 162 E. R. 40.

*Annotation:—*Mentid. Swift v. Swift (1832), 4 Hag. Ecc. 139.

**1692. Successful party in contempt of Court of King's Bench.**]—The ct. will not withhold the enforcement of its order, by reason that the party obtaining such order is in contempt of the Ct. of K. B., & is resident out of the country, in order to evade the process of that ct.—GREENHILL v. GREENHILL (1836), 1 Curt. 462; 163 E. R. 102.

*Annotations:—*Apld. Morse v. Morse (1846), 5 Notes of Cases, 49. *Mentid.* Hope v. Hope (1854), 18 Jur. 1086.

**1693. Appeal—Confirmation of sentence—Republishing.**]—In a suit for brawling in the parish church deft. was sentenced by the Arches Ct. of Canterbury to suspension from his clerical duties for a period of eight calendar months, to be computed from the time of the publication of the

sentence. Against that sentence deft. appealed. The Judicial Committee of the Privy Council affirmed the sentence of the Arches Ct. & remitted the cause. On a motion that the proceedings might now go on "according to the tenor of former acts," & that the sentence of suspension might be republished:—*Held*: the ct. would not decree the republication of the sentence.

I must have all the facts before me as to the effect of the different dates. All I can do now is to decree that the proceedings go on according to the tenor of former acts (SIR H. JENNER FUST).—BURDER v. LANGLEY (1814), 2 L. T. O. S. 286.

**1694.** ———— *Commencement of sentence.*]—BURDER v. LANGLEY, No. 1693, *ante*.

**1695. In temporal courts—Judicial notice.**]—The Cts. of Common Law will give credit to the sentences of the Spiritual Cts. in matters wherein the latter have consueance.—PHILLIPS v. CRAWLEY (1673), 1 Freem. K. B. 83; 89 E. R. 61.

**1696.** ————]—A temporal ct. will always give credit to the judicial acts of a spiritual one.—WYNDHAM v. BOWEN (1751), Say. 141; 96 E. R. 831.

*Enforcement of particular punishments.*]—See Sect. 9, sub-sect. 3, B., *ante*.

##### B. Proceedings for Contempt of Court.

###### (a) In General.

**1697. Right to bring subsequent suit for new offences.**]—MARTIN v. MACKNOCHIE, No. 1587, *ante*.

###### (b) Signification of Contempt.

**1698. Who may signify—Monition issued by three delegates—Significavit by two.**]—(1) A writ *de contumace capiendo* was directed to the Sheriff of Herefordshire & commanded him to take R. of P., in the County of Radnor:—*Held*: to be bad.

(2) One of these writs recited a *significavit* by two delegates appointed under a commission, of a contempt in disobeying a monition issued by three delegates:—*Held*: bad, on the ground that the two could not signify the contempt.—R. v. RICKETTS (1837), 6 Ad. & El. 537; 1 Nev. & P. K. B. 680; Will. Woll. & Dav. 294; 6 L. J. K. B. 172; 1 J. P. 197; 112 E. R. 200.

*Annotation:—*Reid. R. v. Baines (1840), 12 Ad. & El. 210.

**1699. Surrogate of bishop's principal official.**]—The surrogate of the bishop's official principal is not the proper party to signify the contumacy of deft., in a suit before him as judge of the Consistory Ct.; & this both before & after Ecclesiastical Cts. Act, 1813 (c. 127); & where deft. is taken under a *contumace capiendo* issued upon such certificate, this ct. will discharge him out of custody.—R. v. JONES (1839), 10 Ad. & El. 570; 113 E. R. 218.

*Annotation:—*Consd. Dale's Case, Enright's Case (1881), 6 Q. B. D. 376.

**1700.** ———— *Official principal.*]—R. v. BAINES, No. 1185, *ante*.

**1701. Whether foundation for significavit—No pronouncement of contempt.**]—Deft. condemned in the rate & costs, disobeying a monition to pay the same, the ct. was moved to pronounce him in contempt, but "reserved its pain" & being moved to signify his contempt, refused. On appeal:—*Held*: deft. not having been pronounced in contempt, there was nothing on which to found a *significavit*.—BERMAN & CHATTAWAY v. GUYVES (1850), 7 Notes of Cases, 550.

**1702. Form of significavit—Sufficiency of contents Description of suit.**]—Ecclesiastical Courts Act, 1813 (c. 127), substitutes the writ *de contumace*

*Sect. 10.—Censures or punishments: Sub-sect. 8, B. (b) & (c). Sect. 11: Sub-sects. 1 & 2.]*

*capiendo* for the old writ *de excommunicato capiendo*, & directs that the former shall be considered in the same way, & be open to the same objections as the latter. Therefore where deft. was committed by an ecclesiastical judge of appeal for contumacy in not paying costs, & the *significavit* only described the suit to be "a certain cause of appeal, & complaint of nullity" without showing that deft. was committed for a cause within the jurisdiction of the spiritual judge:—*Held*: deft. was entitled to be discharged on *habeas corpus*.—*R. v. DUGGER* (1822), 5 B. & Ald. 791; 1 Dow. & Ry. K. B. 460; 2 Dow. & Ry. M. C. 118; 100 E. R. 1280.

*Annotations:—Reid. R. v. Baines* (1840), 12 Ad. & El. 210; *R. v. Thorogood* (1840), 12 Ad. & El. 183.

1703. ————]—*R. v. THOROGOOD*, No. 190, *ante*.

1704. ————]—*Effect of Insufficiency.*—*HUGHES'S CASE*, No. 1657, *ante*.

1705. *Significavit to County Palatine of Lancaster—Mittimus—How tested.*—*GREEN v. PENZANCE (LORD)*, No. 1118, *ante*.

(c) *Writ de contumace capiendo*.

1706. *General rule.*—*HUDSON v. TOOTH*, No. 1558, *ante*.

1707. *Necessity for opening of writ in court of King's Bench.*—*DALLEN'S CASE*, *ENRAGHT'S CASE*, No. 1550, *ante*.

1708. *Validity of writ Decree not properly exhibited.*—Where a writ *de contumace capiendo* issued under Ecclesiastical Cts. Act, 1813 (c. 127), signified "that deft. was pronounced guilty of a contempt of the law & jurisdiction ecclesiastical, in not having obeyed a decree made upon him to perform the usual penance in the parish church of St. M. in a certain cause of defamation"; & it appeared that at the time sentence was pronounced, a schedule of penance was made out, but which by the practice of the ecclesiastical ct. could not be delivered to deft. until he had paid costs of suit:—*Held*: he ought to have had the decree exhibited to him in its more perfect form, before he could be in contempt, especially as nothing was said in the *significavit* about costs.—*R. v. MARY* (1823), 3 Dow. & Ry. K. B. 570; *sub nom. MARY'S CASE*, 2 L. J. O. S. K. B. 31.

1709. ————]—*Defects in form—Description of defendant.*—A writ *de contumace capiendo*, directed to the Sheriff of Notts, reciting a *significavit* against "J. H., now or heretofore of O., in Kent," & describing the party afterwards, throughout the writ, as "the said J. H.," is bad: & the ct. on motion, will quash such writ after the party is in custody, & before the return, without bringing him up by *habeas corpus*.—*R. v. HEWITT* (1837), 6 Ad. & El. 547, n.; 5 Dow. 616; 1 Nev. & P. K. B. 689; Will. Woll. & Dav. 299; 6 L. J. K. B. 235; 1 Jur. 721; 112 E. R. 209.

1710. ————]—*R. v. RICKETTS*, No. 1698, *ante*.

1711. ————]—*R. v. BAINES*, No. 1185, *ante*.

1712. ————]—*Part of original sentence bad.*—The ct. will not set aside a writ *de contumace capiendo* on account of defects in the sentence on which it purports to be grounded, if there be a distinct & independent part of the sentence, as an award of costs, free from objection, which has been disobeyed.

*Qu.*: whether an ecclesiastical ct. can sentence deft. to perform penance at a minister's house.—

*KINGTON v. HACK* (1838), 7 Ad. & El. 708; 3 Nev. & P. K. B. 3; 1 Will. Woll. & H. 1; 7 L. J. Q. B. 59; 2 J. P. 20; 2 Jur. 14; 112 E. R. 636.

1713. *Warrant—Validity—Necessity for showing jurisdiction of court.*—*Semble*: it ought to appear upon the warrant granted upon a writ of *contumace capiendo*, that the suit was for a subject-matter which was exclusively within the jurisdiction of the Spiritual Ct.: therefore where a warrant merely stated that the suit was for slander, without showing that it was a slander, of which the Spiritual Ct. alone had cognisance, the ct. granted a rule to show cause why the party should not be discharged out of custody.—*Re GALE* (1835), 1 Har. & W. 59.

1714. *Setting aside of writ—How application made.*—*Habeas corpus* to take a party, in custody under a writ *de contumace capiendo*, before an ecclesiastical ct. to purge a contempt, refused by the Ct. of King's Bench to the party himself.—*Ex p. STRONG* (1836), 2 Har. & W. 202.

1715. ————]—*R. v. HEWITT*, No. 1709, *ante*.

1716. ————]—*Effect—Liability of promoter for costs—Attachment.*—A married woman prosecuted another married woman in the Ecclesiastical Ct.: & deft. was committed under a writ *de contumace capiendo* for non-payment of costs. The ct. on a defect in the writ, set it aside, & ordered prosecutrix to pay the costs, deft. & her husband undertaking to bring no action. The costs having been taxed, & not paid by prosecutrix on demand, the ct. granted an attachment against prosecutrix, absolute in the first instance.—*R. v. JOHNSON* (1843), 5 Q. B. 335; 13 L. J. Q. B. 32; 8 Jur. 399; 114 E. R. 1275.

*Annotation:—Reid. Newton v. Boodle* (1847), 4 C. B. 359.

1717. *Release—Who may apply.*—At the hearing of the matter of a representation made under Public Worship Regulation Act, 1874 (c. 85), against the rector of a parish church in the diocese of Manchester & province of York, the Official Principal of the Chancery Ct. of York pronounced that deft. when officiating in the parish church had committed certain offences against ecclesiastical law, & on June 27, 1879, issued a monition admonishing him to refrain from such offences for the future. Deft. failed to obey the monition, & the Official Principal, in Aug. 1879, by an inhibition under the above Act, inhibited him for three months, & until the inhibition had been relaxed, from performing the services of the church or exercising the cure of souls within the diocese of Manchester. Whilst the inhibition was still in force deft. disobeyed it by officiating in the parish church on several occasions, & thereupon his contempt was signified to the Queen in Chancery, & he was in Mar. 1881, taken into custody under a writ *de contumace capiendo*. In Aug. 1882, deft. still remained in custody under the writ, but, by the operation of the Act, ceased to be rector of the parish. The Bishop of Manchester then applied to the Official Principal for the discharge of deft. The application was neither supported by deft. nor opposed by complainants:—*Held*: (1) the application was rightly made by the Bishop of Manchester: (2) deft. had "satisfied his contempt" within Ecclesiastical Cts. Act, 1813 (c. 127), & a writ of deliverance in the form prescribed by that statute ought to issue for his discharge.—*DEAN v. GREEN* (1882), 8 P. D. 79; 40 J. P. 742.

*Annotations:—As to (2) Conad. Ex p. Cox* (1887), 20 Q. B. D. 1. *Reid. R. v. Penzance & Hakes* (1887), 56 L. J. Q. B. 533.

**1718.** — When ordered.]—Under 3 & 4 Vict. c. 93, enabling the judge of an ecclesiastical ct. in a suit for church rate not exceeding £5 to discharge a party from custody, who had suffered imprisonment for six months & upwards, upon payment of the rate & "the costs lawfully incurred by reason of the custody & contempt of such party," costs in the ecclesiastical ct. only are intended.—**BAKER, JEPPE & MOSS v. THOROGOOD** (1840), 2 Curt. 632; 4 J. P. 779; 163 E. R. 532.

*Annotation.*—**Consd. Ex p. Cox** (1887), 20 Q. B. D. 1.

**1719.** — [—]—(1) After the hearing of the matter of a representation in which the vicar of a parish was the party complained of, a monition issued admonishing the vicar to abstain from certain unlawful ceremonies & observances during the performance of divine service in the parish church. The vicar disobeyed this monition, & was served with an inhibition under Public Worship Regulation Act, 1874 (c. 85), inhibiting him for the term of three months from performing divine service within the diocese. Afterwards, & whilst the inhibition was still in force, complainants applied to the ct. on affidavits, which alleged that since the inhibition the vicar had performed divine service in the church, & had there continued the ceremonies & observances from which he had been admonished to abstain, & had also obstructed the curate appointed by the bishop of the diocese from entering the church, & prayed that the vicar should be pronounced contumacious. Thereupon the vicar was pronounced by the ct. to be contumacious; & his contempt having been signified to the Queen in Chancery, he was arrested & imprisoned under a writ *de contumace capiendo*. Shortly after the vicar had been thus arrested, divine service was, without any opposition being offered, performed in the church by the curate appointed by the bishop, & complainants applied to the ct. of motion that the vicar should be released: The ct. ordered that the vicar should be forthwith released without previous payment of the costs of his contempt, but without prejudice to any other remedy for such costs; & that such costs should be recoverable as costs in the cause.

(2) The Ct. of Arches explained to be a purely ecclesiastical ct.

(3) Public Worship Regulation Act, 1874 (c. 85), deals only with matters of procedure, & does not in any respect enlarge the jurisdiction of the Ct. of Arches.—**HUDSON v. TOOTH** (1877), 2 P. D. 125; 41 J. P. 148; *sub nom.* **HATCHAM (PARISHIONERS) v. TOOTH**, 35 L. T. 820.

*Annotations.*—*As to* (1) **Consd. Ex p. Cox** (1887), 20 Q. B. D. 1 (*see* 15 App. Cas. 506). *Generally*, **Monit. Re Holy Trinity Church, Stroud Green** (1887), 12 P. D. 199.

**1720.** — [—]—**DEAN v. GREEN**, No. 1717, *ante*.

**1721.** — Whether appeal lies from order releasing defendant.]—A clerk having been sued in an Ecclesiastical Ct. for offences against the ritual of the Church & pronounced guilty of contempt & contumacy, a writ *de contumace capiendo* was issued, & he was arrested & imprisoned. A rule *nisi* for a *Habeas Corpus* having been granted the Q. B. Div. made the rule absolute & the clerk was discharged from custody. The Ct. of Appeal having reversed the order making the rule absolute:—**Held**: the appeal to the Ct. of Appeal was not "in a criminal cause or matter" within Jud. Act, 1873 (c. 66), s. 47, but no appeal lay to the Ct. of Appeal under sect. 19 from an order discharging a prisoner under a *habeas corpus*.—**COX v. HAKES** (1890), 15 App. Cas. 506; 51 J. P. 820; *sub nom.* **BELL-COX v. HAKES**, 60 L. J. Q. B. 89; 63 L. T. 392; 39 W. R. 145; 6 T. L. R. 465; 17 Cox,

C. O. 158, H. L.; *reversg.* S. C. *sub nom. Ex p. Cox* (1887), 20 Q. B. D. 1, O. A.; *subsequent proceedings*, *sub nom.* **HAKES v. COX**, [1892] P. 110.

*Annotations.*—**Distd. R. v. Barnado, Jones's Case**, [1891] 1 Q. B. 794. **Consd. Re Hoaler**, [1915] 1 K. B. 21. **Expld. & Appl. Secretary of State for Home Affairs v. O'Brien**, [1923] A. C. 603. **Reid. R. v. Barnardo** (1889), 23 Q. B. D. 305; **Barnardo v. McHugh**, [1891] A. C. 388; **R. v. Jackson** (1891), 64 L. T. 679; **The Tynwald**, [1895] P. 142; **Seaman v. Burley**, [1896] 2 Q. B. 344. **Monit. Re Standard Manufacturing Co.**, [1891] 1 Ch. 627; **Watney, Combe, Reid v. Berners**, [1914] 3 K. B. 288; **R. v. Halliday**, [1917] A. C. 260; **Brady v. Gibb** (1921), 37 T. L. R. 975; **R. v. Cannon Row Police Station Inspector, Ex p. Brady** (1921), 91 L. J. K. B. 98; **Fasbender v. A.-G.**, **Kramer v. A.-G.**, [1922] 2 Ch. 850.

**1722. Writ of capias cum proclamatione—Validity—Discontinuance in same term as return of writ de contumace capiendo.**—By a writ of *capias cum proclamatione* for contempt in not paying costs in the Ecclesiastical Ct. it appeared that a writ *de contumace capiendo* had, issued in the same cause, returnable Jan. 11, 1838, & had been duly returned, *non est inventus*; wherefore, the present writ commanded the sheriff to take deft. if found in his bailiwick, & him safely keep, etc., & if he were not found, then to cause proclamation to be made, according to 5 Eliz. c. 23, & Ecclesiastical Cts. Act, 1813 (c. 127). The latter writ was tested May 24, 1838, & did not show any continuance of process from Jan. 11 to May 24. The return of the writ *de contumace capiendo* was "of Trinity term" 1838, & contained this memorandum, "Received June 13, 1838." On application to set aside the *capias*, it appeared by affidavit that there had not in fact been any continuance: that the first writ had not been lodged with the sheriff till after the return day; that he made the return on June 13, after he was out of office; & that the *capias* issued on June 21:—**Held**: the writ was irregular, because the proceedings did not show a proper continuance.—**R. v. RICKETTS** (1838), 8 Ad. & El. 951; 1 Per. & Dav. 150; 1 Will. Woll. & H. 685; 8 L. J. Q. B. 41; 2 Jur. 1039; 112 E. R. 1101.

## SECT. 11.—FACULTY CASES.

### SUB-SECT. 1.—NECESSITY FOR FACULTY.

**1723. Levelling mounds on graves—No disturbance of bodies.**—**BENNETT v. BONAKER**, No. 1367, *ante*.

**1724. Path across churchyard.**—**WALTER v. MOUNTAGUE & LAMPRILL**, No. 431, *ante*.

**Vaults in churches & churchyards.**—*See* **BURIAL**, Vol. VII., pp. 529 *et seq.*

**1725. Alteration of fabric of cathedral church.**—**PHILLIPOTS v. BOYD**, No. 185, *ante*.

**Alteration or extension of church.**—*See* Part VII., Sect. 3, sub-sect. 6, B., *post*.

### SUB-SECT. 2.—TO WHOM FACULTIES GRANTED.

**1726. Applicant & his heirs.**—**WALTER v. GUNNER & DRURY**, No. 1052, *ante*.

**1727. Corporation.**—Where it appeared that the widening of a public highway abutting on a churchyard of a parish church would be a benefit both to the congregation attending the church & to the public in general, & that in the opinion of the highway authority, a municipal corp., it was practically necessary that the widening should be effected by including therein a strip of the churchyard closed for burials by Order in Council, a faculty was granted to the incumbent & churchwardens of the church authorising the

**Sect. 11.—Faculty cases: Sub-sects. 2, 3 & 4, A.]**

removal of human remains interred in the portion of the churchyard required for the widening & the setting back of the churchyard fence so as to throw such portion of the churchyard into the highway on the Ordinary being satisfied that an adequate consideration would be paid by the corp'n. in return for the rights sanctioned. The corp'n. had joined in petitioning for the faculty, but was omitted from the grant, the Ordinary being of opinion that it was preferable that the grant should be made to individuals.—*ST. NICHOLAS, LEICESTER (VICAR) v. LANGTON*, [1899] P. 19.

*Annotation:—Mentd. Re Bideford Parish, Ex p. Bideford (Rector, etc.), [1900] P. 314.*

**1728.** ———. — *ST. MARY LE STRAND CHURCHYARD* (1901), *Times*, Mar. 5.

**SUB-SECT. 3. — PURPOSES FOR WHICH FACULTIES GRANTED.**

**Repair of church.]** — See Part VII., Sect. 3, sub-sect. 5, *post*.

**Alteration & extension of church.]** — See Part VII., Sect. 3, sub-sect. 6, *post*.

**1729. Demolition of church.]** — An application for a faculty to take down a church, so styled, in effect, acceded to by the ct.; under the peculiar circumstances, verified on behalf of appets. of the building being in a state of dilapidation, & there being no person or persons compellable by law to restore & uphold it. — *HOLLAN v. ST. MARTIN ORGANS* (1824), 2 Add. 255.

*Annotations:—Beld. (Layton v. Dean (1849), 7 Notes of Cases, 46. Mentd. St. John's, Walbrook (Rector & Churchwardens) v. Parishioners (1852), 2 Rob. Eccl. 515.*

**1730.** ———. (1) The Ecclesiastical Ct. has power to grant a faculty for taking down, removing & rebuilding a chapel & will grant it if the circumstances of the case appear to render such a course desirable. A clause will be inserted to preserve the site of the old church from desecration.

(2) The wishes of the inhabitants & the opinion of the bishop will be of primary importance. — *(LAYTON v. DEAN (1849), Cripps' Church Cas. 207; 7 Notes of Cases, 46.*

**1731.** ———. **Removal of memorials, bells & clock to new church.]** — Decision of the Chancellor of the diocese of Winchester granting a faculty for the pulling down of the nave of an old parish church, & the removal of the memorials, bells, & clock to a new church which had been erected in substitution for the former church, affirmed on appeal to the Ct. of Arches. — *ST. MARY, BISHOPSTOKE* (1909), 26 T. L. R. 86; *on appeal, sub nom. PADDINGTON v. SEDGWICK* (1909), *Times*, Dec. 17, P. C.

**1732. Bells—Restrictive proviso as to—Erection of peal.]** — (1) The ct. has jurisdiction to make an order to prevent church bells from being rung for an improper purpose, or unnecessarily to the detriment of houses in the vicinity.

(2) The ct. decreed a faculty for the erection of a tower & spire with one bell in the tower, subject to a proviso that no peal of bells should hereafter be placed in the tower, except under a faculty decreed after the parishioners had been cited to show cause against its being issued. — *ST. JUDE'S, SOUTH KENSINGTON (VICAR & CHURCHWARDENS) v. ST. JUDE'S, SOUTH KENSINGTON (PARISHIONERS), TOPHAM INTERVENING* (1877), Trist. 207.

**1733.** ———. **Sanction of agreement as to times of ringing.]** — *ST. JUDE'S, HAMSTEAD* (1909), *Times*, Aug. 6.

**Erection or removal of church ornaments & decorations.]** — See Part VI., Sect. 1, sub-sect. 4, B., *post*.

**Pews.]** — See Part VII., Sect. 3, sub-sect. 9, D. (a), *post*.

**1734. Confirmation of unauthorised acts—Unauthorised church ornaments.]** — *SIEVEKING & EVANS v. KINGSFORD*, No. 276, *ante*.

**1735.** ———. — *MARKHAM v. SHIREBROOK OVERSEERS*, No. 1115, *ante*.

**1736.** ———. **Removal of steps to highway.]** — *BATTEN v. GEDYE*, No. 465, *ante*.

**1737. Application of consecrated land to secular purposes—Discretion of ecclesiastical courts.]** —

(1) Land once consecrated is consecrated for ever, or, at any rate, until an Act of Parliament divests it of its sacred character; & no secular ct. has power to grant a faculty for the use of it for secular purposes, although the Ecclesiastical Cts. have jurisdiction to grant faculties, in their discretion, for the erection of buildings & the like in consecrated ground in certain circumstances.

(2) About 1750 a society, which had no trust deed & was not incorporated, was formed of the subscribers towards the foundation of an infirmary for the benefit of the sick & lame poor of certain counties, & in 1752 a lease of land was granted to trustees for the society for a term of years subsequently renewed until 1951. On this land an infirmary was erected, & one of the rooms in the building was appropriated as a chapel & was consecrated by the bishop of the diocese in 1754. From 1754 Church of England services were regularly conducted in the chapel by a chaplain who was a clergyman of that church, & down to 1859 was appointed by the governors of the society, receiving £10 a year under an agreement of the chaplaincy. In 1859 a lady settled a yearly stipend on the chaplain, who was to be appointed by her trustees, & from 1882 to 1906 a further but smaller annual sum was paid to him out of the society's general funds. In 1897, when the society had a written constitution embodied in statutes & rules which recognised & provided for services of the Church of England only in the chapel, the citizens of N., in which the infirmary was situate, subscribed £100,000 to commemorate the Diamond Jubilee of Queen Victoria by building a new infirmary on the site, & in lieu of the existing building; but a citizen of N. offered £100,000 to the governors towards building a new infirmary on a site different from that of the old infirmary on condition that the subscriptions to the new infirmary building fund became available for the general purposes of the institution & that another £100,000 should be subscribed. This offer was accepted, the lease of the old infirmary was surrendered under authority of an Act of Parliament which also enabled the corp'n. of N. to give a new site for the proposed infirmary, & in 1901, another donor gave £100,000 to be used for the building or endowment of the new infirmary as might seem best to the governors. The new site was conveyed to trustees as a site for the new infirmary, but without any express declaration of trust, & on this site, under the supervision of a building committee appointed by the governors, the new infirmary was built at a cost which absorbed the two sums given by the two individual donors. The plans provided for a chapel, the cost of building which came out of the subscribed funds generally, but the organ, altar, reredos, pulpit, lectern, furnishings & windows were provided by special donations from members of the Church of England. The building committee never considered the question of consecration. On the invitation of the house com-

nittee on the infirmary, & the petition of the trustees the bishop of the diocese consecrated the chapel:—*Held*: as the trustees had the bare legal estate & no powers, & the house committee's functions, under the society's constitution, were confined to the administration & management of the infirmary, the invitation to the bishop would have been *ultra vires* the committee if the old chapel had not been consecrated; but, as the *prima facie* intention of all parties was to reproduce as nearly as might be the state of things existing in the old infirmary, the committee had performed merely the ministerial duty of inviting the bishop to perform the ceremony necessary to give effect to that intention by replacing the old consecrated chapel through the consecration of the new one, & an action for a declaration that the chapel was held on trust for the general purposes of the charity, including the holding therein of religious services, whether of the Church of England or otherwise, failed.—*SUTTON v. BOWDEN*, [1913] 1 Ch. 518; 82 L. J. Ch. 322; 108 L. T. 637; 29 T. L. R. 202; 77 J. P. Jo. 76.

*Annotation*:—*Generally*, *Mentd. Fowke v. Berington*, [1911] 2 Ch. 308.

**1738.** — *Widening highway.*—*EWELL CASE* (circa 1791), cited in 2 Rob. Eccl. 515.

*Annotation*:—*Refd.* *St. Nicholas, Leicester (Vicar) v. Langton*, [1899] P. 19.

**1739.** — *Public safety.*—*Re St. MARY-IN-THE-CASTLE, HASTINGS* (1891), cited [1895] P. 232, n.

*Annotations*:—*Fold.* *St. Andrew, Hove (Vicar, etc.) v. Mawn*, [1895] P. 228, n. *Refd.* *St. Nicholas, Leicester (Vicar) v. Langton*, [1899] P. 19.

— *Utilisation of disused burial grounds.*—*See BURIAL*, Vol. VII., pp. 551 *et seq.*, 555 *et seq.*

— *See, also, BURIAL*, Vol. VII., p. 531 *et seq.*

**1740. Easement—Grant to secure.**—A faculty granted, on the petition of the rector & churchwardens of a city parish, to give effect to an arrangement made between them, the vestry consenting, & the owner of a freehold house which abutted on the churchyard, securing to the owner & his assigns an easement of light & air to certain of the lower windows of the house for 99 years, subject to the payment of a rent of £22 *per annum* to the rector for the time being, in whom the freehold of the church was vested.—*ST. MARTIN ORGANS* (1890), *Trist.* 145.

*Annotation*:—*Consd.* *St. Nicholas, Leicester (Vicar) v. Langton*, [1899] P. 19.

**1741.** — *Interference — Sanction of compensation agreement.*—*ST. MARK'S, OLD STREET* (1909), *Times*, Aug. 6.

**1742.** — *Christ Church, Newgate Street* (1909), *Times*, Nov. 27.

**Burial in churches & churchyards.**—*See BURIAL*, Vol. VII., pp. 528–530.

**Erection of monuments in churches & churchyards.**—*See BURIAL*, Vol. VII., pp. 531 *et seq.*

**Reservation of grave spaces—Non-parishioner—Member of parishioner's family.**—*See BURIAL*, Vol. VII., p. 551, No. 286.

**Cremation—Disposal of ashes—In parish church closed for burials.**—*See BURIAL*, Vol. VII., p. 563, No. 384.

**Removal of remains from church vaults—Faculty in aid of Order in Council—Re-interment.**—*See BURIAL*, Vol. VII., p. 558, Nos. 340–342.

**Removal of bodies from Protestant to Roman Catholic cemetery.**—*See BURIAL*, Vol. VII., p. 561, No. 368.

**Disinterment.**—*See BURIAL*, Vol. VII., p. 560, Nos. 357–360.

#### SUB-SECT. 4.—GROUNDS FOR GRANTING OR REFUSING FACULTIES.

##### A. In General.

**1743. Discretion of ordinary.**—In 1891 a faculty issued from the registry of the Consistory Ct. of London authorising the rector & churchwardens of a parish in the City of London, in conjunction with a co. owning premises abutting on the churchyard of the parish, a churchyard closed for burials under Order in Council, to make a pathway inclosed on the sides by railings, across the churchyard from the co.'s premises to a public thoroughfare on the opposite side of the churchyard, provided a specified rent was paid to the rector & his successors during a term of years. The faculty recited an agreement between the rector & churchwardens & the co. whereby the former agreed to concur in granting to the co. a right of way over the pathway afterwards authorised by the faculty for the term, & on payment of the rent there mentioned; all the works to be done at the co.'s costs, & "such right of footway to be for themselves, their tenants & any others authorised by them in common with the rector & churchwardens & any others authorised by the rector & churchwardens." In 1892, after the co. had done & paid for the works & whilst the term of years was still unexpired, the rector & churchwardens agreed with other owners of premises abutting on the churchyard adjacent to the co.'s premises to concur in granting to such owners a right of footway over the pathway made under the faculty of 1891, subject to the rights of the co., & also over a new footpath to be made over a piece of the churchyard to join the footpath so already made, & petitioned the Consistory Ct. of London for a faculty to make a new footpath & to remove a portion of the above-mentioned railings; the owners of the premises desiring the right of way over the two footpaths intervening in support of the petition.

The Consistory Ct. of London held that the faculty asked for must be refused, as the faculty of 1891 had granted to the co. & their assigns the enjoyment for a term of years not yet expired of the pathway made under that faculty to the exclusion of the other occupiers of premises abutting on the churchyard, & the ordinary ought not to sanction by faculty anything being done in derogation of the exclusive right so granted. On appeal:—*Held*: the construction put on that faculty by the Ct. below was correct, & the grant or refusal of the faculty prayed being in the discretion of the ordinary, by whom that discretion had been properly exercised, the Appellate Ct. ought not to interfere, & the appeal must be dismissed.—*ST. GABRIEL, FENCHURCH STREET (RECTOR, ETC.) v. CITY OF LONDON REAL PROPERTY CO.*, [1896] P. 95.

*Annotations*:—*Refd.* *St. John the Baptist, Cardiff (Vicar) v. Parishioners of Same*, [1898] P. 155; *St. Nicholas, Leicester (Vicar) v. Langton*, [1899] P. 19.

**1744. Faculty derogating from previous grant.**—*ST. GABRIEL, FENCHURCH STREET (RECTOR, ETC.) v. CITY OF LONDON REAL PROPERTY CO.*, No. 1743, *ante*.

**1745.** — *Re St. ALBAN'S CATHEDRAL, GIBBS PETITION* (1889), *Times*, Nov. 25.

*Annotation*:—*Consd.* *L. C. C. v. Dundas*, [1904] P. 1.

**1746. Erection of monument in chancel—Infringement of parishioners' rights.**—*RICH v. BURNELL*, No. 416, *ante*.

**1747.** — *Consent of rector & incumbent.*—Though the ordinary may give permission to erect a monument in the chancel of a church, even if the rector & incumbent dissent, yet their



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assent is always deemed material, & if their objection were well founded it should prevail.—**MOODY v. RANDOLPH** (1874), 38 J. P. 324.

**1748. Rebuilding of church—Reconsecration necessary.]**—(1) A faculty cannot be granted for a church rebuilding, where re-consecration is necessary, till it take place. (2) If altar taken down, a re-consecration necessary.—**TURNER v. HANWELL** (RECTOR) (1842), 1 Notes of Cases, 368.

**Annotations:—**As to (1) **Consd.** **Parker v. Leach** (1866), L. R. 1 P. C. 312. **Refd.** **Ensham** (Churchwarden) v. **Ensham** (Vicar) (1857), 29 L. T. O. S. 402. As to (2) **Consd.** **Hattiscombe v. Eve** (1803), 7 L. T. 697; **Parker v. Leach** (1866), L. R. 1 P. C. 312. **Refd.** **Ensham** (Churchwarden) v. **Ensham** (Vicar) (1857), 29 L. T. O. S. 402.

**To whom granted.]—**See Sect. 11, sub-sect. 2, ante.

**B. Wishes of Parishioners.**

**1749. Whether necessary—Faculty entailing expense.]**—This is an application to the ct. for the grant of a faculty for erecting an organ in the parish church of M. The law respecting church ornaments is now generally understood & settled. The consent of the parishioners is not indispensably necessary, unless to charge the parish with any expense for the support of the ornament after it has been put up. But if there is no such charge incurred, the approbation of the majority of the parishioners is not necessary, nor the disapprobation binding on the ordinary. Then if all objection on ground of expense is removed, the ordinary is not restrained by any want of consent on the part of the parish, which is only requisite when it is put to expense for things not necessary but merely ornamental. It may be difficult indeed in some cases to distinguish, whether an addition of this kind to the service of the church, is to be deemed necessary or ornamental, because organs, in some churches may be necessary, though in others only ornamental. In cathedral churches they would, I conceive, be deemed necessary, & the ordinary might compel the dean & chapter to erect an organ as proper & necessary for the service usually performed in such places. In parish churches it would be otherwise; & though I do not concur in the observation, that organs in such places are to be generally discouraged; it might be proper to do so in some cases, & it would depend on the circumstances of the parish, what judgment the ct. would form on the particular case. There may, however, be the expenses arising out of it, as for erecting & keeping in order, & for an organist; & as these may fall on the parish, it may render the consent of the parishioners necessary. On the effect of consent I am disposed to hold the majority of the parish binding on such a question as this, though it might not bind in all cases, as if an organ was to be voted without the authority of the ordinary. In all cases where the parish is competent to act by its own power, it is the majority which must bind; & the majority of a vestry, in cases fit to be there decided, will bind the minority of the parish, though it will not bind the ordinary, in matters subject to his discretion; & if he sees that many of the parishioners object, though they may be the minority, it may be very proper, that he should not be totally inattentive to their opinion. It is usual, therefore, in cases of mere ornament, to tender affidavits showing what the majority in vestry was, in order that the ct. may ascertain what may fairly be considered the predominant wish of the parish. The consent, how-

ever, of the parishioners is not the only thing that is material, since the measure may be improper, in consideration of the parish or of the church, or private rights may be affected. It might be the duty of the ordinary, therefore, under particular circumstances, to interpose, & protect the parish from its own indiscretion (**SIR WILLIAM SCOTT**).—**ST. JOHN'S, MARGATE** (CHURCHWARDENS) v. **ST. JOHN'S, MARGATE** (PARISHIONERS, ETC.) (1794), 1 Hag. Con. 108; 161 E. R. 524.

**Annotations:—****Consd.** **Kz p. Le Cren** (1844), 2 Dow. & L. 571; **Boyd v. Phillpotts** (1874), L. R. 4 A. & E. 297. **Refd.** **L. C. C. v. Dundas**, [1904] P. 1.

**1750. — Faculty to alter church.]—****PEEK v. TROWER**, No. 3091, *post*.

**1751. How far considered—General rule.]—****CLAYTON v. DEAN**, No. 1730, *ante*.

**1752. — — —.]**—The ct. is at all times reluctant to refuse an application which has received the assent of the parishioners & the patron of the living.—**CAMPBELL v. PADDINGTON** (PARISHIONERS & INHABITANTS) (1852), 2 Rob. Eccl. 558; 19 L. T. O. S. 276; 16 Jur. 646; 163 E. R. 1413.

**Annotations:—****Consd.** **Re Bideford** Parish, **Kz p. Bideford** (Rector, etc.), [1900] P. 314; **Sutton v. Bowden**, [1913] 1 Ch. 518. **Refd.** **It. v. Twiss** (1869), L. R. 4 Q. B. 407; **Re Plumstead Burial Ground**, [1895] P. 225; **St. Nicholas, Leicester** (Vicar) v. **Langton**, [1899] P. 19; **Holy Trinity, Stepney** (1902), 18 T. L. R. 789; **L. C. C. v. Dundas**, [1904] P. 1.

**1753. — — —.]**—The rector & churchwardens of a parish petitioned the ordinary for a faculty enabling them to substitute for the east end window, almost entirely glazed with plain glass, then existing in the chancel of their parish church, a stained glass memorial window, the cost of which was to be paid for by a parishioner subsequently added as a petitioner. No serious objection was raised to the design of the proposed window; but the grant of the faculty was opposed on the grounds that the majority of the parishioners desired that the existing window should remain unaltered, & that by the erection of the stained glass window the ventilation of the church would suffer, & the chancel be darkened so as to render it inconvenient for public worship. The judge of the Consistory Ct. of the diocese found that the last two of these grounds of objection were not sustained by the evidence, decreed the faculty to issue as prayed, & condemned the opponents in costs. On appeal:—**Held**: although it was proposed to place the stained glass window in the chancel the discretion of the ordinary as to granting or refusing the faculty was the same as if it had been proposed to place the window in any other part of the church; (2) assuming the evidence proved that the majority of the parishioners wished that the existing window should be retained, their wishes in no wise fettered the Ordinary in exercising such discretion; (3) the ct. below had come to a right conclusion on the evidence, & the decree appealed from must, so far as it directed the faculty to issue, be confirmed; (1) the decree must be varied as regards costs, & each party be left to bear their own costs both in the Appellate Ct. & the ct. below.

(5) Decision by the Consistory Ct. of Rochester that in a contested cause of faculty memorials signed by parishioners asking that the faculty prayed for be not granted, are inadmissible as evidence.—**NICKALLS v. BRISCOE**, [1892] P. 269.

**Annotation:—**As to (2) **Appl.** **St. Stephen's, Hampstead** (1912), 28 T. L. R. 584.

**1754. — — — Application for confirmatory faculty.]—****MARKHAM v. SHIREBROOK OVERSEERS**, No. 1115, *ante*.

**1755. — — —.]**—Where, on an application for a faculty, a Chancellor has all the materials

before him, it is open to him, if in the exercise of his judicial discretion he comes to the conclusion that he ought to do so, to grant or refuse the faculty in opposition to the wishes of a majority of the parishioners.—*ST. STEPHEN'S, LAMPSTEAD* (1912), 28 T. L. R. 584.

**1756.** ———.]—The rector of a parish church placed a picture of the Crucified Saviour near the pulpit in the parish church without consulting the churchwardens or the congregation. The vestry resolved by 37 votes to 27 that the parishioners should apply for a faculty to remove the picture. On the application for a faculty to confirm the rector's action:—*Held*: as the introduction of such a picture had not been sanctioned by authority, & as it had not been shown by petitioners that there was a general desire on the part of the churchgoing parishioners for its introduction, a faculty must be decreed for the removal of the picture.—*HUDSON v. FULFORD* (1913), 30 T. L. R. 32.

*Annotation*:—*Refd.* *Re St. Luke's, Southport* (1920), 36 T. L. R. 733.

**1757.** ———.]—*In support of faculty.*—*GROVES v. WRIGHT v. HORNSEY* (RECTOR, ETC.), No. 1051, *ante*.

**1758.** ———.]—*Legal flaw in notice summoning vestry.*—*Qu.*: whether the ordinary is absolutely barred in the exercise of his discretion from granting a faculty confirmatory of certain alterations made in a parish church by reason of some omission of legal form in the publication of notice of the vestry at which such alterations were resolved upon by the parish, & the churchwardens were empowered to make them.—*THOMAS v. MORRIS* (1823), 1 Add. 470; 162 E. R. 160.

**1759.** ———.]—Where a vestry adopted on the unanimous report of a committee a plan for levelling the churchyard & no substantial inconvenience was shown by one individual who opposed a faculty was granted with a clause that no expense should fall on individuals.—*SHARPE & SANGSTER v. HANSARD* (1830), 3 Hag. Ecc. 335; 162 E. R. 1177.

*Annotation*:—*Refd.* *Kellett v. St. John's, Burscough Bridge* (1916), 32 T. L. R. 571.

**1760.** ———.]—The rector, unauthorised by a faculty, or even by the vestry, removed the reading desk, the clerk's desk, & certain pews from the church, & placed at the east end of the church, choristers' benches. The churchwardens, with the concurrence of the vestry, petitioned for a faculty directing the replacement of the reading desk, clerk's desk, & the pews, & for the removal of the choristers' benches. The rector asked for a faculty confirmatory of the alterations:—*Held*: the reading desk being directed by Canon 82 to be provided at the charge of the parish, & the clerk's desk & pews being the common property of the parish, & it being the wish of the vestry that they should be replaced, petitioners were entitled to a faculty for their restoration, & also for the removal of the choristers' benches, on their providing convenient seats elsewhere for the choristers.—*SERJEANT v. DALE* (1875), Trist. 33.

**1761.** ———.]—*TETBURY* (VICAR) *v. TETBURY* (CHURCHWARDENS & INHABITANTS) (1885), [1892] P. 271, n.

**1762.** ———.]—*In opposition to faculty.*—A faculty to take down & rebuild part of a parish church, erect a spire on the tower, & make other improvements, opposed by many of the ratepayers, refused.—*HOPTON v. KEMERTON* (MINISTER, ETC.) (1848), 6 Notes of Cases 74.

**1763.** ———.]—At the time of the erection of a new church, which on consecration became

the parish church of A., the foundations were laid & the designs prepared for a stone pulpit, but, from want of funds at the time, a temporary wooden pulpit was placed in the church. Some years afterwards, certain persons connected with the parish gave directions for the execution of the new pulpit, & having raised a portion of the estimated cost of it by voluntary contributions, & given security for the rest, so that the parish could not incur any liability in the matter, they applied to the proper ct. for leave to fix it in the church. Defts., acting on a resolution of the vestry of the parish, refused to consent to the erection of the new pulpit until the debt for the building of the church itself had been paid off. No objection was made to the character or ornamentation of the proposed new pulpit:—*Held*: as the parish had already provided a substantial pulpit, which continued in good order & was in no way dilapidated, the ct. could not, against the expressed objection of the vestry, order the removal of such temporary pulpit, & that it should be replaced by a new one; but it might allow a faculty to issue on the terms proposed by the vestry.—*JACKSON v. SINGER & CARSON* (1808), 37 L. J. Ecc. 9; 32 J. P. 203.

*Annotation*:—*Refd.* *Tottenham* (VICAR) *v. VENN* (1874), L. R. 4 A. & E. 221.

**1764.** ———.]—The rector of a parish church applied for a faculty to make certain alterations, at his own expense, in the furniture & fittings of the church, which were not in a dilapidated state. The churchwardens, acting on behalf of the parishioners, opposed the grant of the faculty. Appt. having failed to show either that the existing arrangements in the fittings of the church were so inconvenient & uncomfortable as to deter the parishioners from attending divine service, or that the proposed alterations were so clearly for the increased comfort & advantage of the parishioners as to induce the ct. to overrule their opposition, the faculty was refused.—*EVANS v. SLACK & SMITH* (1869), 38 L. J. Ecc. 38; 33 J. P. 454.

*Annotation*:—*Refd.* *Nickalls v. Briscoe*, [1892] P. 269.

**1765.** ———.]—*Majority of parishioners not members of Church of England.*—*TOTTENHAM* (VICAR) *v. VENN*, No. 3096, *post*.

**1766.** *Evidence* — *Admissibility* — *Memorials signed by parishioners.*—*TETBURY* (VICAR) *v. TETBURY* (CHURCHWARDENS & INHABITANTS) (1885), [1892] P. 271, n.

**1767.** ———.]—*NICKALLS v. BRISCOE*, No. 1753, *ante*.

**1768.** ———.]—Where the vestry of a parish & petitioners are unanimous, or substantially so, in favour of accepting a presentation picture of merit for the decoration of their parish church, the introduction of the picture into the church may be properly sanctioned by a faculty, unless the picture appears to be likely to be abused by superstitious reverence, or be otherwise inappropriate in a church, or be such as might reasonably give offence to present or future parishioners; but where it was proposed that such a picture should be introduced into the church of an admirably worked parish, & conscientious objections which might be entertained by members of the congregation, without disparagement to the views of others in favour of it, were taken to it as a church decoration by a substantial minority of resident parishioners who were members of the Church of England, & it appeared that its introduction into the church would offend the religious feelings of that minority & introduce discord into the parish where it had never existed before:—

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*Held: to be the duty of the ct. to refuse to grant a faculty for its introduction.*

Instance of a faculty suit in which memorials & counter-memorials signed by parishioners were admitted in evidence by consent.—*ST. BOTOLPH, ALDERSGATE WITHOUT (VICAR) v. ST. BOTOLPH, ALDERSGATE WITHOUT (PARISHIONERS)*, [1900] P. 69.

#### SUB-SECT. 5.—PROCEDURE TO OBTAIN FACULTIES.

##### A. In General.

**1769. Who may promote faculty cause—Parishioner—Tenancy in parish solely for purpose of bringing suit.**—*KENSIT v. ST. ETHELBURGA, BISHOPSGATE WITHIN (RECTOR)*, No. 2892, *post*.

**1770. ———— Residence elsewhere.**—*DAVEY v. HINDE*, No. 2768, *post*.

**1771. Parties—Faculty for restoration of church—Joinder of persons willing to contribute towards expenses of restoration.**—*ST. SEPULCHRE (VICAR) v. ST. SEPULCHRE (CHURCHWARDENS)*, No. 747, *ante*.

**1772. Application for faculty for removal of ornaments—Application by defendants for confirmatory faculty—Whether fresh suit & citation necessary.**—The vicar & one of the churchwardens, & the parishioners & inhabitants of a parish, were cited in the Consistory Ct. to show cause why a faculty should not be granted for the removal of certain additions & articles alleged to have been placed in the church without a faculty. An appearance was entered on behalf of the vicar & the churchwarden. They brought in an Act on petition which concluded with a prayer to the judge to direct the issue of a faculty confirming the placing of the additions & articles in the church. The judge directed this prayer to be struck out of the act on petition:—*Held: the prayer ought not to have been struck out, & defendants were entitled to pray for a confirmatory faculty without the issue of a fresh citation.*—*GARDNER v. ELLIS* (1874), L. R. 1 A. & E. 265. *Annotation: Refd. Batten v. Gedge* (1889), 41 Ch. D. 507.

**1773. By what court faculty issuable—Faculty for taking down parish church—Parish transferred from diocese of London to diocese of Rochester.**—A faculty for the taking down a parish church, in a parish transferred, under Ecclesiastical Comrs. Act, 1836 (c. 77), from the diocese of London to that of Rochester:—*Held: to be issuable by the Ct. of London, not that of Rochester.*—*HAMILTON v. LOUGHTON (PARISHIONERS)* (1817), 5 Notes of Cases, 192.

*Annotation:—Consd. Clayton v. Dean* (1849), Cripps' Church Cas. 207.

**1774. Hearing—Intervention by parochial church council.**—(1) In a cause of faculty commenced by citation in the Consistory Ct., praying for the removal of certain ornaments alleged to have been illegally placed in a parish church, the Chancellor ordered the faculty to issue within one month without informing himself at the hearing of the views of the parochial church council. The parochial church council allowed the month to elapse, & on its expiry applied for prohibition on the grounds that they had not been cited, & that their views had not been considered:—*Held: even if the alleged error were one of jurisdiction, & not merely of procedure, still there had been such unreasonable delay on the part of the council that prohibition should be refused as a matter of discretion.*

(2) *Semble: (per SANKEY, J.), a parochial church council has a right to be heard in a faculty case.*—*ST. MAGNUS, ETC., PAROCHIAL CHURCH COUNCIL v. LONDON DIOCESE (CHANCELLOR)*, [1923] P. 38, D. C.

**1775. Form of grant—Conditional.**—*CLAYTON v. DEAN*, No. 1730, *ante*.

— **To applicant & his heirs.**—*See* No. 1052, *ante*.

**1776. Registration, stamping & enrolment.**—(1) Faculty granted by the Archbishop need not be subscribed, registered, or enrolled by the chief clerk of the faculty but by his deputy.

(2) A faculty may be stamped & thereby rendered valid after it has been enrolled.—*R. v. CHESTER (Bp.)* (1725), 8 Mod. Rep. 364; 1 Stra. 624; 88 E. R. 260.

*Annotation:—As to (2) Refd. R. v. Reeks* (1726), 2 Stra. 716.

**1777. Suspension of decree—Pending application for prohibition.**—*WEST PECKHAM (VICAR & CHURCHWARDENS) v. GEARY, DALISON INTERVENING*, No. 1228, *ante*.

**1778. Costs—Both parties acting without authorisation of faculty.**—*DURST v. MASTERS*, No. 2799, *post*.

**1779. ——— Party having reasonable ground to oppose faculty.**—*LIGHTFOOT v. EASTWOOD & CROSS-STONE (INHABITANTS)*, No. 3183, *post*.

**1780. ——— Confirmation faculty—Vicar having cited without faculty.**—*ST. ANDREW'S, HAVERSTOCK-HILL*, No. 2784, *post*.

**1781. ——— Whether costs for protection of settled land Settled Land Act, 1882 (c. 38), s. 36.**—The costs of petitioners & the fees & expenses of the chancellor of the diocese of a petition for a new faculty made to the Ecclesiastical Cts. by the lord of the manor, which petition alleged a lost faculty, & also that the lord had exercised certain privileges of seating accommodation & burial in the south aisle of his parish church since the year 1710, & which was compromised, the lord being granted certain rights of seating, & of burial, & of erecting memorial tablets in such aisle:—*Held: to be costs for the protection of the settled land within the above sect., & accordingly the ct. could order such costs to be paid out of capital moneys.*

*Qu.:* as to the costs of the vicar on such a petition.—*Re MOSLEY'S SETTLED ESTATES* (1912), 56 Sol. Jo. 325.

##### B. Appeals.

**1782. To what court.**—An appeal lies from the Ordinary to the Metropolitan, in a matter relating to the putting up of a monument in a church.—*CART v. MARSH* (1737), Andr. 69; 2 Stra. 1080; 95 E. R. 302.

*Annotation:—Apld. Bulwer v. Hase* (1803), 3 East, 217.

**1783. Leave to appeal in formâ pauperis—When granted—Prima facie case to be shown.**—*PADINGTON v. SEDGWICK* (1909), *Times*, Dec. 17, P. C.

**1784. Intervention of parishioners—By consent—Confirmatory faculty.**—One of the churchwardens of a parish church applied to the ordinary for a faculty authorising him to remove certain things alleged to have been introduced into the church without the sanction of a faculty. An appearance in the suit was entered on behalf of the vicar of the parish, the remaining churchwarden, & other opponents, who proved that the things in respect of which the faculty was prayed had been in the church for periods varying from two to nine years respectively, but made no application for a confirmatory faculty. The ordinary

decided that it was competent for promövent to promote the suit in opposition to his co-churchwarden, & ordered a faculty to issue as prayed, on the ground that the things had been placed in the church without the authority of a faculty. Amongst the things for the removal of which a faculty was ordered to issue were the following: (a) chancel-screen with gates, the screen made of oak, about thirteen feet in height, with close panels up to the height of two feet & six inches from the ground & open tracery above, & surmounted with a cross over the centre opening; (b) three additional steps, on which the communion table was raised above the floor of the chancel; (c) a wooden screen separating the south transept from the rest of the church. Against the decree of the ordinary, so far as it authorised the removal of the things last above-mentioned, one of the opponents appealed to the Ct. of Arches, & by leave of this ct. & consent of all parties, two of the parishioners who had not appeared in the ct. below were allowed to intervene in the appeal, & prayed that a confirmatory faculty authorising the retention of the things forming the subject-matter of the appeal might issue:—*Held*: (1) a confirmatory faculty should issue to interveners authorising the retention in the church of the chancel-screen, without the gates & with the panels in decent form; (2) in all other material respects the decree of the ordinary should stand.—BRADFORD v. FRY (1878), 4 P. D. 93.

**Annotations:**—As to (1) **Apid.** St. Andrew, Romford (Rector & Churchwardens) *r.* All Persons Having Interest, [1894] P. 220. **Fold.** Richmond (Vicar & St. Matthias, Richmond (Chapelwardens) *r.* All Persons Having Interest, [1897] P. 70. **Reid.** St. John's, Isle of Dogs (1888), 4 T. L. R. 661; St. James, Norland (Vicar & Churchwardens) *r.* St. James, Norland (Parishioners), [1891] P. 256; St. John the Baptist, Timberhill (Vicar, etc.) *r.* St. John the Baptist, Timberhill (Timberchill, etc.), [1895] P. 71; Palsington (Vicar) *r.* All Having Interest, [1905] P. 111. **Generally.** **Mend.** St. Sepulchre (Vicar) *r.* St. Sepulchre (Churchwardens) (1879), 5 P. D. 61; R. *r.* Tristram (1899), 47 W. R. 639; Davey *r.* Hinde, [1901] P. 95.

**1785.** ——.]. The consistory ct. of London granted a faculty for the erection of a rood screen, a new altar, & certain structural alterations in Grosvenor Chapel, but refused a faculty for a proposed baldacchino. After the time for appealing from that decision had expired, an application was made by a parishioner for leave to intervene & to be added as a resp. for the purpose of appealing to the Ct. of Arches from the decision of the consistory ct.: - *Held*: the application must be refused, as the faculty had issued & there was no cause before the ct. in which an appearance could be entered.—GROSVENOR CHAPEL, SOUTH AUDLEY STREET (No. 2) (1913), 29 T. L. R. 411.

**1786. Appeal apud acta—Practice under rules of Arches Court, 1903.]—MARKHAM v. SHIREBROOK OVERSEERS, No. 1115, ante.**

**1787. Hearing—Fresh evidence—Admissibility.**  
—*Re* ST. ANSELM, PINNER, No. 2875, *post*.

**1788. — Grounds for allowing or dismissing appeal—General rule.**—(1) The chancellor of the diocese having decreed a faculty to issue to place two movable benches in the chancel for the use of the vicar & his family, *pltf.* appealed against the decree:—*Held*: the judge of the ct. of appeal would not disturb the decree of a local ordinary in such a matter, unless it were clearly shown that a plain violation of a private right was involved, or that such decree would give rise, actually or probably, to a considerable degree of general inconvenience.

(2) A faculty to place in the chancel movable seats, which may be removed at the discretion of the ordinary, is valid.—*ELD v. PERRY* (1805), 20 J. P. 627; 11 Jur. N. S. 228.

**1789.** ————.]—Where the incumbent has refused to allow a gravestone to be erected & application is made to the ordinary for a faculty for its erection, it is in the discretion of the ordinary to grant or refuse a faculty, & where the bishop has expressed an adverse opinion to the gravestone, & his chancellor has refused a faculty the ct. of appeal will not overrule the decision unless it is clear that the discretion vested in the ordinary has been improperly exercised.—**KERT v. SMITH** (1875), L. R. 4 A. & E. 398; 44 L. J. Eccl. 70; *on appeal* (1876), 1 P. D. 73, P. C.

*Annotation* :—**Mentd.** St. Nicholas, Leicester (Vlear) v. Langton, [1899] P. 19.

**SUB-SECT. B.—ENFORCEMENT OF FACULTIES.**

**1790. Monition.—Deviation from plan sanctioned by faculty.—Condemnation in costs.**—A faculty issued for the restoration of Herne Church in accordance with a plan filed in the registry. In the church there was an old chapel, separated from the nave by two arches, which, by the plan, were to be retained without alteration. In the restoration two additional arches with heavy corbels over the old arches, & a large capital, pillar, & base leading into the nave had been introduced, neither of which additions were shown on the plan. A citation having issued at the instance of the secretary of the Archbishop of Canterbury, calling upon the vicar & churchwardens to show cause why they should not be monitioned to comply with the provisions of the faculty, or to submit to such other order as the ct. might think fit to make upon them in the premises: *—Held:* (1) by allowing the deviations complained of to be made without the leave of the ct. the vicar & churchwardens had been guilty of a contempt of ct.; (2) no deviation from the plans sanctioned by a faculty can lawfully be made without the sanction of the ct.; (3) under the circumstances, the ct. would dispense with making the usual order requiring the vicar & churchwardens to restore the chapel to the condition sanctioned by the faculty; but to mark its disapproval of their infraction of the law, condemned them in costs. *—LEE v. HERNE (VICAR & CHURCHWARDENS) (1802), Trist.* 217.

**SUB-SECT. 7. -REVOCATION AND MODIFICATION  
OF FACULTIES.**

**1791. Grounds for revocation - Surprise---Undue contrivance.** - BUTT v. JONES (1820), 2 Hag. Ecc. 417; 102 E. R. 900.

**Annotations:** - **Consd.** L. C. C. v. Dundas, [1904] P. 1.  
**Reid.** Evans v. Slack & Smith (1869), 38 L. J. Eccl. 38;  
 St. Andrew, Honford (Rector & Churchwardens) v. All  
 Persons having Interest, etc., [1894] P. 220; St. James,  
 Norland (Vicar, etc.) v. St. James, Norland (Parishioners),  
 [1891] P. 256; St. Andrew's, Hove (Vicar & Churchwardens)  
 & Hove Comrs. v. Mawn & Rowe, [1895] P. 228, n.  
**Mentd.** *Re* St. George-in-the-East (1876), 1 P. D. 311;  
*Re* St. Paul's, Wilton Place (1889), Trist. 120; *Re* St.  
 Nicholas Cole Abbey, *Re* St. Benet Fink Churchyard,  
 [1893] P. 58; *Re* Plumstead Burial Ground, [1895] P.  
 225; *St. John the Baptist, Cardiff* (Vicar) v. St. John the  
 Baptist, Cardiff (Parishioners), [1898] P. 155.

**1792. --- Fraud.**—A faculty granted by the ordinary after citation & unappealed against cannot, in the absence of the content of all the parties interested, be revoked for any cause other than fraud.—**LONDON COUNTY COUNCIL v. DUNDAS.** [1903] P. 1; 19 T. L. R. 670.

*Annotations:* **Apid.** Grosvenor Chapel, South Audley Street (No. 2) (1913), 29 T. L. R. 411. **Mentd.** *Re St. Sepulchre, Holborn Viaduct* (1903), 19 T. L. R. 723; *St. Margaret, Lothbury* (Rector, etc.) v. L. C. C., [1909] P. 319.

*See, also, Nos. 1788, 1789, ante.*

## Part V.—Clergy.

## SECT. 1.—ORDERS.

## SUB-SECT. 1.—ORDINATION.

**1793. Service—Objection to candidate—Grounds of objection.**—At the celebration of a service of the rite of ordination of priests, applt., a layman, came forth & objected that one of the deacons presenting himself for ordination had taken part in the services in a church in which adoration of the elements & other breaches of the prescribed ritual had taken place:—*Held*: the matters alleged against the deacon did not, if true, constitute an impediment or notable crime within the words in the Ordination Service, to be said by the bishop, which call upon any person present, who knows any "impediment or notable crime" in any of the persons presenting themselves for ordination, to come forth & show what "the crime or impediment" is.—*KENSIT v. ST. PAUL'S (DEAN & CHAPTER)*, [1905] 2 K. B. 249; 74 L. J. K. B. 454; 92 L. T. 601; 69 J. P. 250; 53 W. R. 622; 21 T. L. R. 420; 20 Cox, C. C. 829, D. C.

**1794. Title should be given.**—By the ecclesiastical law no man ought to be ordained *sine titulo*, that there might not be mendicant preachers (*LORD FINCH, C.*).—*PERNE v. OLDFIELD* (1680), 2 Cas. in Ch. 19; 22 E. R. 826.

**1795. Evidence—Bishop's certificate—Though seal broken off.**—(1) A deed under seal [bishop's certificate], when properly proved, may be read in evidence, though the seal be broken off.

(2) Whoever is admitted, instituted, & inducted, into any ecclesiastical benefice, shall, *ipso facto*, have the cure of souls; & therefore a parson & vicar may have a concurrent cure in the same church; for it may have two patrons, each having an undivided moiety.

Whenever the incumbent comes in by the bishop it is a cure of souls (*per cur.*).—*CLERKE d. PRIN v. HEATH* (1669), 1 Mod. Rep. 11; 2 Keb. 550; 86 E. R. 691; *sub nom.* *CLARKE v. PRYN*, *CLARKE v. HEATH*, 1 Sid. 426; *sub nom.* *CLERKE v. PRINN*, 2 Keb. 484; *sub nom.* *HEATH v. PRYN*, 1 Vent. 14.

*Annotations*:—As to (2) *Reid*, *Portland v. Bingham* (1792), 1 Hag. Con. 157. (*Generally*, *Reid*, *A. G. v. Brereton*, *Brereton v. Tamberlane* (1752), 2 Ves. Sen. 425. *Mentid*, *R. v. Bray* (1736), *Law temp. Hard.* 358.

**1796. ——— Deceased archbishop's letters of ordination—Produced from proper custody—Without proof of seal.**—Where the question was, whether a deceased person who had celebrated a marriage was a clergyman, authorised to celebrate it, papers appearing to be letters of the archbishop, ordaining him, & dated more than thirty years before, were produced from among his papers by his widow:—*Held*: they were admissible in evidence, without proof that the seal they bore was the seal of the archbishop.—*R. v. BATHWICK (INHABITANTS)* (1831), 2 B. & Ad. 639; 3 Bott. 6th ed. 138; 9 L. J. O. S. M. C. 103; 109 E. R. 1280.

*Annotations*:—*Reid*, *R. v. Mills* (1844), 10 Cl. & Fin. 534. *Mentid*, *Stapleton v. Crofts* (1852), 18 Q. B. 367.

**1797. Oath of canonical obedience—Effect of.**—*BARNES v. SHORE*, No. 1836, *post*.

**1798. ———**—*BARNES v. SHORE*, No. 3876, *post*.

## PART V. SECT. 1. SUB-SECT. 1.

**a. Examination of candidate—Discretion of archbishop.**—The curacy of St. J. parish having become vacant, the vicar, in whom the right of nomina-

tion is vested, nominated a layman, who presented himself to the Archbishop of Dublin, for the purpose of being examined previous to ordination. The archbishop having refused to examine him:—*Held*: his refusal was

**1799. ———**—*Applt.*, a clerk in orders officiating as a minister of the Church of England in a colony, was nominated to a church built & endowed by a private individual residing in the colony. *Applt.* was not instituted or inducted into his church & benefice, but he received from the bishop of the colony a licence to officiate, & have the cure of souls within the district assigned to the church, & took an oath of canonical obedience to the bishop. The bishop, without the authority of the Crown or of the local legislature, convened a synod in the colony, to be composed partly of clergy & partly of lay delegates elected in the different parishes of the diocese. *Applt.* was summoned to attend the synod, & was directed to take steps for the election of a lay delegate in his parish; but he refused to attend the synod, & neglected to take any steps to forward the election of a delegate; he was consequently cited to appear before the bishop & for this disobedience he was first suspended, & afterwards deprived of his benefice:—*Held*: the oath of canonical obedience does not mean that the clergyman will obey all the commands of the bishop, against which there is no law, but that he will obey all such commands as the bishop by law is authorised to impose.—*LONG v. CAPE TOWN (Br.)* (1863), 1 Moo. P. C. C. N. S. 411; *Brod. & F.* 293; 2 New Rep. 465; 8 L. T. 738; 9 Jur. N. S. 805; 11 W. R. 900; 15 E. R. 756, P. C.

*Annotations*:—*Reid*, *Re Natal (Lord Bp.)* (1865), 3 Moo. P. C. C. N. S. 115; *Natal*, *Bp. v. Green* (1868), 18 L. T. 112; *Merriman v. Williams* (1882), 7 App. Cas. 484. *Mentid*, *Natal*, *Bp. v. Gladstone* (1866), L. R. 3 Eq. 1; *R. v. Jenkins* (1868), L. R. 2 P. C. 258; *Cape Town*, *Bp. v. Natal*, *Bp.* (1869), L. R. 3 P. C. 1; *Brown v. Montreal* (1874), L. R. 6 P. C. 157; *The Parliament Beige* (1879), 4 P. D. 129; *Read v. Lincoln*, *Bp.* (1889), 14 P. D. 88; *Free Church of Scotland (General Assembly) v. Overtown*, *Macalister v. Young*, [1904] A. C. 515.

**1800. False pretence of Holy Orders—Bishop's licence to curacy—To unordained person—No defence.**—(1) Where a person is indicted for falsely pretending to be in holy orders, & solemnising matrimony according to the rites of the Church of England, the mere licence by the bishop to a curacy, or the institution by him to a benefice, which renders a clergyman compellable to perform the marriage ceremony between competent parties, is no defence if the person charged knows of the invalidity of the letters of orders on which he has been so licensed or instituted.

(2) Where a person is so indicted it is enough for the prosecution to show that the letters of orders which the person charged has held out to be genuine, & has put forward as a justification for presenting himself as a person in holy orders, are spurious, & it is not incumbent on the prosecution to show that he had no other valid orders.—*R. v. ELLIS* (1888), 16 Cox, C. C. 469.

**Forgery of letters of ordination.**—*See CRIMINAL LAW & PROCEDURE*, Vol. XV., p. 1056, No. 11,929.

## SUB-SECT. 2.—PRIESTS AND DEACONS.

**1801. Priest—Issue whether priest when admitted to benefice—Triable by bishop.**—The question

discretionary, & the ct. would not, in such a case, grant a *mandamus* to the archbishop, requiring him to proceed with the examination.—*R. v. DUBLIN (ARCHBP.)* (1833), *Alc. & N.* 244; 1 Ir. L. Rec. N. S. 28.—*IR.*

whether a person was a priest at the time of his admission to a benefice, shall be tried by the bishop & not by the country; for though 13 & 14 Car. 2, c. 4, s. 13, says "that every person not ordained shall be disabled, & *ipso facto* deprived, & his promotion void as if he was naturally dead," yet being declaratory of the common law, he is not disabled until he is deprived, & the act of deprivation belongs to the bishop.—*HILL v. BOOMER* (1679), 2 Show. 52; T. Jo. 131; 3 Keb. 507; 80 E. R. 788; *sub nom. HILL v. BARNE*, 2 Lev. 250.

*Annotation*:—*Reid. Middleton v. Croft* (1736), *Cum.* 55, 114.

**1802. — Age for ordination.**—The ct. will not grant a prohibition to stay a suit against a person for taking orders as a priest under the age of 24, or as a deacon under the age of 23.—*ROBERTS v. PAIN* (1085), 3 Mod. Rep. 67; 87 E. R. 42.

**1803. Deacon—Age for ordination.**—*ROBERTS v. PAIN*, No. 1802, *ante*.

**1804. — May celebrate marriage.**—*R. v. MILLIS*, No. 20, *ante*.

**1805. — Is in Holy Orders.**—The statute which requires a person elected to a fellowship in University College, Oxford, to be constituted *in ordine sacerdotis* within six months after election, is satisfied by his admission into deacon's orders within the prescribed period, the words meaning a person in any kind of holy order, as distinguished from a layman.—*Re UNIVERSITY COLLEGE, OXFORD* (1848), 2 Ph. 521; 11 L. T. O. S. 21; 42 E. R. 1014; *sub nom. Re UNIVERSITY COLLEGE, OXFORD, Ex p. MOORSOM*, 17 L. J. Ch. 208.

*Annotation*:—*Reid. A.-G. v. Powis* (1853), *Kay*, 186.

## SECT. 2.—STATUS AND POWERS.

### SUB-SECT. 1.—IN GENERAL.

**1806. Whether lost by holding cure outside England—Cure within British Empire.**—In 1854 a society, formed in 1849 & called the Friend of the Clergy, obtained a charter of incorporation. Its defined object was to provide permanent pensions for the widows & orphan unmarried daughters of "clergymen of the established church of England & Ireland" & to afford temporary assistance to necessitous "clergymen of such church" & their families. On Jan. 1, 1871, the Irish church was disestablished. On July 2, 1873, the original charter was confirmed with immaterial amendments. On Mar. 31, 1920, the Welsh church was disestablished:—*Held*: clergymen ordained to the ministry of the established church of England retained their status while holding a consistent cure in the disestablished churches of Wales or Ireland, or in the episcopal church of Scotland, or in the British Dominions, & they & their families were within the scope of the charter. *Qu.*: whether clergymen ordained to the ministry of the disestablished Welsh church, or of the episcopal church of Scotland, or of the established church of England exclusively for service in the Dominions, or of a Dominion church, & not licensed to officiate in England, were within the scope of the charter.—*Re FRIEND OF THE CLERGY'S CHARTERS, FRIEND OF THE CLERGY v. A.-G.*,

[1921] 1 Ch. 409; 90 L. J. Ch. 210; 124 L. T. 506.

**1807. Whether temporal rights lost by negligence—One rule applicable to ecclesiastical & lay persons.**—Defts., copyholders of a manor, claimed a custom to dig sand from their copyhold tenements; & the practice of digging for this was carried back by the evidence to 27 years, & no more, before the filing of the bill:—*Held*: (1) Prescription Act, 1831 (c. 72), s. 1, applies only to cases where one man claims, by custom, prescription or grant, some profit or benefit to be taken from or enjoyed upon the land of another; & has no application to the case of a right claimed by a copyholder in his own tenement; (3) the true meaning of sect. 6 of the Act seems to be that no presumption or inference in support of the claim is to be derived from the bare fact of user or enjoyment for less than the prescribed number of years; but where there are other circumstances in addition, the Act does not take away from the fact of enjoyment for a shorter period its natural weight with a jury as evidence; (3) the fact of the late lords of the manor being ecclesiastical persons made no difference.

(4) I cannot listen to the suggestion that the late lords of the manor were ecclesiastical persons & negligent of their rights. There must be one rule applicable to the ecclesiastical person as well as to the layman (*LORD WESTHURST, L.C.*).—*HANMER v. CHANCE* (1865), 4 De G. J. & Sm. 626; 6 New Rep. 4; 34 L. J. Ch. 413; 12 L. T. 163; 20 J. P. 324; 11 Jur. N. S. 307; 13 W. R. 550; 46 E. R. 1061, L. C.

*Annotations*:—*As to* (1) *Reid. Portland v. Hill* (1866), L. R. 2 Eq. 765; *A.-G. for Isle of Man v. Mylchreest* (1870), 4 App. Cas. 201.

**1808. "Reverend"**—Whether belonging exclusively to clergy of Church of England.—The word "Reverend" is nothing more than a laudatory epithet. It is not a title of honour to be exclusively possessed by the clergy of the Established Church, as having episcopal ordination.

*Appl.* was described on a tombstone as "The Rev. H. K., Wesleyan minister":—*Held*: this was not a sufficient reason for refusing a faculty for the erection of such tombstone.—*KERR v. SMITH* (1876), 1 P. D. 73; 45 L. J. P. C. 10; 33 L. T. 794; 40 J. P. 100; 21 W. R. 375, P. C.

*Annotation*:—*Reid. St. Nicholas, Leicester v. Langton*, [1899] P. 19.

**1809. Whether subject to bankruptcy laws.**—A commission of bkcy. was taken out against petitioner, who insisted that, as he was a clergyman, he was not liable to become bkpt. within the intent of any of the bkpt. statutes. The Lord Chancellor would not supersede the commission, or direct an issue, but left petitioner to his action at law.—*Ex p. MEYMOT* (1747), 1 Atk. 106; 26 E. R. 127.

*Annotations*:—*Reid. Arbrook v. Cowtan* (1803), 3 Bos. & P. 321. *Mentd.* *Cobb v. Symonds* (1822), 5 B. & Ald. 516; *Newcastle v. Morris* (1870), L. R. 4 H. L. 661; *Re South Wales Atlantic S.S. Co.* (1876), 2 Ch. D. 763.

**1810. Right to sue for slander—Clergyman without preferment—Special damage.**—In the absence of special damage an action by a person in holy orders is not sustainable for words spoken of him as a clergyman unless he was holding office or was in receipt of professional temporal profit when the

### PART V. SECT. 2, SUB-SECT. 1.

**a. General rule.**—A priest is entitled to have his political opinions, & to exercise his legitimate influence legitimately. It is a mistake to suppose that on a man taking holy orders he ceases to be a citizen, or

ceases to be clothed with all the privileges & rights of a citizen. But a priest has no privilege to violate or abuse the law; he has no right to interfere with the rights & privileges of other subjects. He may exercise his own privileges, but he must forbear in respect of others. It is

also a mistake to suppose that every act of a priest is a spiritual act; an assault by a priest is simply an assault & not priestly intimidation; & the assault of a priest can & ought to be resented & prosecuted & punished like any other individual.—*TITHEBARY CASE* (1870), 2 O'M. & H. 31.—*IR.*

*Sect. 2.—Status and powers: Sub-sects. 1 & 2, A., B. & C. (a), (b) & D.; sub-sects. 3 & 4, A.]*  
words were spoken.—*WAKEFORD v. WRIGHT* (1922), 39 T. L. R. 107, C. A.

#### SUB-SECT. 2.—PRIVILEGES.

##### A. Immunity from Arrest or Civil Process.

**Who are immune—Royal chaplains, etc.]—See CONSTITUTIONAL LAW, Vol. XI., p. 521, Nos. 266-268.**

**1811. Extent of immunity—Going to, attending & returning from—Convocation.]—***PERY'S CASE* (1009), *Freem. Ch.* 132; 22 E. R. 1108; *sub nom. PARY v. JUXON*, 3 Rep. Ch. 38.

**1812. ——— Celebration of divine service.]—PRIESTS' PRIVILEGE CASE** (1550), 12 Co. Rep. 100; 77 E. R. 1375.

*Annotations:—***Reid.** *Cameron v. Lightfoot* (1777), 2 Wm. Bl. 1190. **Mentd.** *Townsend v. Hughes* (1678), 1 Mod. Rep. 232.

**1813. ———.]—***PIT v. WHELEY* (1613), *Cro. Jac.* 321; 2 Bulst. 72; 70 E. R. 275.

*Annotations:—***Reid.** *Cameron v. Lightfoot* (1777), 2 Wm. Bl. 1190. **Mentd.** *Woodward v. Makepeace* (1688), 1 Salk. 164.

**1814. ———.]—**Where a clergyman is arrested in church, or whilst going to or returning from the performance of divine service, the ct. will discharge him.—*GODDARD v. HARRIS* (1831), 7 Bing. 320; 5 Moo. & P. 122; 9 L. J. O. S. C. P. 109; 131 E. R. 124.

##### B. Exemption from Toll's.

**1815. Whilst on parochial duty Turnpike outside parish.]—**Turnpike Roads Act, 1822 (c. 126), s. 32, enacts that no toll shall be demanded or taken, by virtue of any Act, on any turnpike road, "from any rector, vicar or curate going to or returning from visiting any sick parishioner, or on other his parochial duty within his parish": **Held:** this exempts a curate who, in going to perform duty in a parish, passes through a turnpike gate in another parish from payment of toll at such gate.

A clergyman of the Established Church who, during the vacancy, by resignation, of the living of a parish, has been requested by the churchwardens to perform the duty of curate, & has been authorised, by a letter sent by the bishop's direction, but without licence under the bishop's hand & seal, to perform such duty, is a curate within the above enactment.—*DICKINSON v. TEMPLE* (1858), 1 E. & E. 34; 28 L. J. M. C. 10; 32

L. T. O. S. 90; 23 J. P. 227; 5 Jur. N. S. 363; 7 W. R. 13; 120 E. R. 820.

*Annotation:—***Distd.** *Brunskill v. Watson* (1868), L. R. 3 Q. B. 418.

**1816. ——— Accompanied by others in same carriage.]—**A clergyman *bona fide* going to visit a sick parishioner is not, by reason of his having other persons in the carriage with him, disentitled to the exemption from turnpike toll given by Turnpike Roads Act, 1822 (c. 126), s. 32.—*LAYARD v. OVEY* (1868), L. R. 3 Q. B. 415; 37 L. J. M. C. 148; 18 L. T. 632; 32 J. P. 821; 16 W. R. 896.

**Curate temporarily officiating—Without bishop's licence.]—See No. 1815, ante, No. 2649, post.**

##### C. Exemption from Secular Service.

###### (a) In General.

**1817. Expenditor of sewers.]—**An archdeacon cannot be appointed by comrs. of sewers to the office of expeditor.—*LEE'S CASE* (1070), 1 Mod. Rep. 282; 2 Keb. 693; 1 Vent. 105; 86 E. R. 886.

*Annotation:—***Fold.** *Chambers' Case* (1738), Andr. 353.

**1818. ———.]—**A clergyman is not compellable to serve the office of collector & expeditor to the Comrs. of Sewers.—*CHAMBERS' CASE* (1730), Andr. 353; 95 E. R. 431; *sub nom. DARTFORD (VICAR) CASE*, 2 Stra. 1107.

*Annotations:—***Mentd.** *Gerard's Case* (1777), 2 Wm. Bl. 1123; *R. v. Warner* (1799), 8 Term Rep. 375.

**1819. Overseer.]—**A clergyman is exempted from serving the office of overseer.—*ANON.* (1701), 6 Mod. Rep. 140; 87 E. R. 899.

*Annotations:—***Reid.** *Chambers' Case* (1738), Andr. 353. **Mentd.** *R. v. Jackson* (1775), 1 Cowp. 297.

**1820. Service on jury Ordination after impanelment.]—***BEECHER'S CASE* (1577), 4 Leon. 190; 74 E. R. 813.

###### (b) Military Service.

**1821. Who are exempt—Under Military Service Act, 1916 (c. 104), Sched. I. (4)—Lay member.]**

A lay reader of the Church of England who devotes his whole time to his office & has no other profession or living but is not in holy orders is not entitled to the exemption from military service conferred by Military Service Act, 1916 (c. 104), Sched. I., clause 4.—*SIMMONDS v. ELLIOTT*, [1917] 2 K. B. 891; 87 L. J. K. B. 42; 117 L. T. 620; 82 J. P. 37; 15 L. G. R. 816; 26 Cox, C. C. 51, D. C.

*Annotation:—***Fold.** *Robins v. Wood* (1917), 87 L. J. K. B. 224.

**1822. ———.]—**Even if a man who is not in holy orders can be called "a regular

#### PART V. SECT. 2, SUB-SECT. 2. —A.

**a. Extent of immunity—Going to, attending & returning from—Visitation by the ordinary.]—**A clergyman duly cited to attend a visitation by the ordinary of the diocese is privileged from arrest, *cumdo, redeundo, et morando*.—*McGEATH v. GERAUGHTY* (1866), 15 W. R. 127.—**IR.**

**d. ———.]—***BLANK v. GERAUGHTY* (1866), 15 W. R. 133.—**IR.**

**e. ——— Slander.]—**Communications made by a clergyman about a member of his church, to other members of his church are not privileged.—*MELIOR v. PARKER* (1902), 2 N. R. N. S. W. 136.—**AUS.**

**f. ———.]—Where no injury proved.]—***BLANCHARD v. RICHER* (1876), 20 L. C. J. 146.—**CAN.**

**g. ———.]—***VIGNEUX v. NOIRSEUX* (1877), 21 L. C. J. 89.—**CAN.**

**h. ———.]—Address from the altar.]—**To an action for slander, deft.

pleaded that he, as a parish priest, spoke the words from the altar of his chapel to the parishioners by way of admonition of pltf., who was one of the parishioners, relying upon the occasion as privileged.—**Held:** there was no such privilege.—*MAGRATH v. FINN* (1877), 1 L. 11 C. L. 132.—**IR.**

**k. ——— Intimidation of witnesses.]—**The ct. will punish, as an interference with the course of justice & of fair trial, the use of language calculated to affect the minds of persons who might otherwise be willing to give evidence in a pending cause, or to deter them from coming forward as witnesses. The fact that such language was used by a priest at the altar to his congregation does not thereby confer any privilege, or mitigate the contempt.—*Re SOUTH MEATH ELECTION PETITION, FAY'S CASE* (1892), 30 L. R. Ir. 659.—**IR.**

**l. Production of notes of defamatory sermon.]—**In an action of

damages for defamatory words, read by a clergyman from a pulpit, against the schoolmaster of the parish, the ct. found that the clergyman was not bound to produce the paper from which it was alleged that he had read the defamatory expressions.—*COOPER v. GREIG* (1812), 16 Fac. Coll. 598.—**SCOT.**

#### PART V. SECT. 2, SUB-SECT. 2. —C. (b).

**m. Who are exempt—Under Military Service Act, 1916—"Evangelist."]**

A religious denomination which believed it to be unscriptural to have a fixed ministry, that is regular clergymen attached to separate congregations, elected elders from among the members of each congregation, who exercised all the functions usually performed by regular clergymen. In addition two evangelists were appointed to visit the various congregations, & to exercise all the functions usually



minister" of the Church of England, he is not excepted from liability to military service by Military Service Act, 1916 (c. 101), Sched. I, clause 1.—*ROBINS v. WOOD* (1917), 87 L. J. K. B. 224; 81 J. P. 311; 15 L. G. R. 820, D. C.

*Annotation*:—*Mentd.* Gerhold v. Day (1917), 87 L. J. K. B. 659.

**1823.** ——— **Date of ordination.**—The exception from liability to military service of "men in holy orders or regular ministers of any religious denomination" which is contained in Military Service Act, 1916 (c. 101), Sched. I, clause 4, applies only to those persons who were within the scope of the exception on the "appointed date" on which they are to be deemed to have been duly enlisted in His Majesty's Forces. A man, therefore, who takes holy orders or who is appointed the regular minister of any religious denomination after that date is not excepted from liability to service.—*STONE v. WOOD*, [1917] 2 K. B. 885; 87 L. J. K. B. 38; 117 L. T. 604; 82 J. P. 29; 31 T. L. R. 6; 62 Sol. Jo. 35; 15 L. G. R. 836; 26 Cox, C. C. 42, D. C.

*Annotations*:—*Apud.* Simmonds v. Elliott (1917), 87 L. J. K. B. 42; Morris v. Martin, [1918] 2 K. B. 892.

——— **Minister of other religious bodies.**—See Part VIII., Sect. 3, sub-sect. 2, B. (b) ii., *post*.

#### D. As Witness.

**Whether communications to clergyman privileged.**—See EVIDENCE.

#### SUB-SECT. 3.—DISABILITIES.

**1824. Trading—Buying merchandise—For use of family.**—*ANON* (1733), 2 Barn. K. B. 316; 94 E. R. 524.

**1825.** ——— **Contract made in course of trade—Validity—Lease of farm taken for occupation.**—An agreement in 1800 for a lease of a farm to a clergyman for the purpose of occupation is void under 21 Hen. 8, c. 13.—*MORRIS v. PRESTON* (1802), 7 Ves. 517; 32 E. R. 220, L. C.

**1826.** ——— **Where a clergyman engages in trade, contrary to Pluralities Act, 1838 (c. 100), s. 29, & makes a contract in the course of such trade, such contract may, under the proviso in sect. 31, be enforced either against or by the clergyman, though both parties contract with knowledge of the facts constituting the illegality.**—*LEWIS v. BRIGHT* (1855), 4 E. & B. 917; 24 L. J. Q. B. 191; 25 L. T. O. S. 80; 19 J. P. 550; 1 Jur. N. S. 757; 3 W. R. 400; 119 E. R. 341.

**1827. Keeping grammar school—Without licence.**—Prohibition was granted to a suit in the Spiritual Ct. against a clergyman for non-residence & keeping a grammar school without licence.—*JONES v. GEGG* (1740), 7 Mod. Rep. 374; 87 E. R.

exercised by the elders, except the dispensing of the Lord's Supper. The Evangelists were not ordained; they were appointed *ad ritum ad culpam*; they devoted their whole time to the work; & they were supported by voluntary contributions.—*Held*: such an evangelist was not a regular minister, in the sense of Sched. I of the above Act, & accordingly was not exempted from military service.—*MONTGOMERIE v. MACKENNA*, [1918] S. C. (J.) 55.—**SCOT.**

*n.* ——— **Divinity student.**—A third year student of divinity, acting as *locum tenens*, to a minister of the United Free Church, was not a "regular minister" in the sense of Sched. I of the above Act & accordingly

was not exempt from military service.—*HAIG v. MARSHALL*, [1918] S. C. (J.) 47.—**SCOT.**

#### PART V. SECT. 2, SUB-SECT. 3.

*a. Member of parliament.*—According to the constitution of De Nederduitsche Hervormde of Gereformeerde Kerk van Zuid Afrika, each congregation was the owner of its own property & funds, & was represented by a Kerkeraad which was entrusted with the govt. & guidance of such congregation & with the administration of its property & funds, the Kerkeraad also being empowered to represent the congregation at law. In 1915 a congregation & its Kerkeraad respectively

1300; *subsequent proceedings, sub nom.* *GEGG v. JONES* (1741), 2 Stra. 1149.

——— **See, now, Pluralities Act, 1838, (c. 100).**

**1828. Farming—How penalty recovered.**—*R. v. BRIGHT* (1758), 2 Keny. 274; 96 E. R. 1180; *sub nom.* *R. v. WRIGHT*, 1 Burr. 543.

*Annotations*:—*Mentd.* Forster v. Taylor (1834), 5 B. & Ad. 887; R. v. Buchanan (1846), 8 Q. B. 883; R. v. Lovibond (1871), 24 L. T. 357; R. v. Hall, [1891] 1 Q. B. 747; Mullis v. Hubbard, [1903] 2 Ch. 431; Lowe v. Dorling, [1906] 2 K. B. 772.

——— **See, now, Pluralities Act, 1838 (c. 100).**

#### SUB-SECT. 1.—CONDITIONS PRECEDENT TO OFFICIATING.

##### A. Licence of Bishop.

**1829. Necessity for licence—Lecturer.**—*R. v. ST. BARTHOLOMEW'S (CHURCHWARDENS)* (1700), 13 East, 421, n.; 104 E. R. 434; *sub nom.* *ST. BARTHOLOMEW'S (CHURCHWARDENS) CASE*, Holt, K. B. 418; 3 Salk. 87.

*Annotations*:—*Refd.* R. v. London, Bp. (1743), 13 East, 420, n.; Ferguson v. Kinnoull (1812), 9 Cl. & Fin. 251.

**1830.** ——— **None can preach without licence of the ordinary, whose cure it is to prevent heresies & schisms in his diocese; & there is a canon against preaching without licence, & that binds all the clergy. A clerk ordained cannot preach even in the diocese whereof he is, & by whose diocesan he is ordained, without licence; though one would think the very ordination would amount to a licence to preach within that diocese (per CUR.).**—*FITCH v. HARRIS* (1702), 12 Mod. Rep. 640; 88 E. R. 1573.

*Annotation*:—*Refd.* Down & Connor & Dromore (Lord Bp.) v. Miller, Same v. Potter (1801), 5 L. T. 30.

**1831.** ——— **Translation of bishop—No necessity for new licence.**—(1) Though a curate is appointed by a vicar, either generally or expressly for life, yet such appointment is in its own nature revocable at law (*per CUR.*).

(2) If a bishop grants a licence to a curate to preach, & afterwards is translated, there is no necessity for a new licence by the succeeding bishop (*CARTER, B.*).—*PRICE v. PRATT* (1729), Bumb. 273; 1 Barn. K. B. 233; 145 E. R. 671.

**1832.** ——— **Nominee to chapel of ease.**—*ST. JOHN'S CHAPEL OF EASE, ST. ANDREW'S, HOLBORN CASE* (1730), Fitz-G. 158; 94 E. R. 699.

**1833.** ——— **Unbeneficed clergy.**—*TRENEER v. KEITH*, No. 157, *ante*.

**1834.** ——— **It may be very proper that curates should be examined & admitted by the diocesan, in order to prevent persons, not duly qualified from being introduced into parishes in that character. But deft. in the instance in question, did not attend in that character; nor was he acting as curate within the meaning of the canon;**

passed resolutions approving of the candidature of their minister in a parliamentary election. The minister having been elected, continued receiving his salary as minister, but provided for a substitute during his absence, & paid his salary. In an action for a declaration of rights by some members of the congregation:—*Held*: as the relation of a minister towards the congregation was a strictly personal one according to the constitution & regulations of the church, his position as minister was incompatible with that of a member of parliament, & it did not avail him to provide a substitute & pay his salary.—*DE WAAL v. VAN DER HORST* (1918), T. T. D. 75.—**B. AF.**



**1860.**----- **Not parochial**--Rights as to fees, dues, etc.] Under Church Building Act, 1831 (c. 38), s. 14, by which the fees, dues, offerings, or emoluments of right or custom belonging to the incumbent of the parish, chapelry, or place in which the newly-erected church is situate, are to be received on account of such incumbent, except such part as the commrs., with the consent of the bishop, the patron, & the incumbent in some

**Sect. 3.—Nature and tenure of benefices : Sub-sects. 1, 2, 3 & 4.]**

*cases*, & the bishop alone, with the consent of the patron & incumbent, in others, shall assign to the minister of the district church—the term “chapelry” means a legal parochial chapelry, & therefore, one which is immemorial.

Upon a trial, where the question was, whether the chapelry of H. was a legal parochial chapelry :—*Held* : (1) the statement of a witness, that he had heard from a former incumbent of H. that the people of four townships & another parish came to the chapelry, was admissible in evidence, inasmuch as the rights of the chapel in question were sufficiently of a public nature to make reputation admissible; (2) a case stated by a deceased incumbent of H. for the opinion of a proctor, with his opinion thereon, was admissible, on the same principle as the statement of a deceased occupier, which qualified his estate, would be admissible; (3) the answer of the incumbent of H., & other clergymen, to questions sent by the Bishop of C., the diocesan, for the information of the Governors of Queen Anne's Bounty, at the time an augmentation was made, was admissible, as being in the nature of an inquisition on a public matter.—(*ARR v. MORFYN* (1850), 5 Exch. 69; 10 L. J. Ex. 249; 14 L. T. O. S. 506; 14 J. P. 576; 155 E. R. 30.)

*Annotation* :—As to (1) *Refd.* *Fowke v. Berlington*, [1914] 2 Ch. 308.

**1861. Spiritual nature of benefice.**—A benefice is not made spiritual because it can be held only by a person in holy orders; it is the object for which the house is established that makes it a spiritual or lay foundation. If a hospital be established for the relief of the poor, & if there be no cure of souls attached to it, it is a lay foundation, although the founder shall have annexed, as a qualification for the office, that no person shall be master or warden of it except a clerk in holy orders (*SIR JOHN ROMILLY, M.R.*).—A.-G. v. *ST. CROSS HOSPITAL* (1853), 17 Beav. 435; 1 Eq. Rep. 585; 22 L. J. Ch. 703; 22 L. T. O. S. 188; 1 W. R. 525; 51 E. R. 1103.

**1862. Incumbent privy in law to patron.**—An incumbent who comes into a benefice is a privy in law to the patron who appointed him, so as to be entitled to the benefit, & subject to the burden, of the same estoppel as the patron.

R., the incumbent of a living, sent in his resignation of the benefice to the bishop, on the understanding that the resignation was not to be formally accepted, nor the benefice declared vacant, until a date agreed upon between himself & the bishop. Before this date arrived R. withdrew his resignation, but the bishop refused to accept the withdrawal, & at the time agreed upon declared the benefice vacant, after which the patrons appointed another incumbent, who was duly instituted & inducted into the benefice. R. brought an action against the bishop to have his resignation declared null & void. To this action the patrons of the living were parties, & the sole question was whether the resignation was effectual, & it was decided against R. that the resignation was effectual & complete. R. refused to give up the parsonage-house & glebe lands, & in an action, brought against him by the new incumbent, for an injunction to restrain him from continuing in wrongful possession of the premises & for trespass, R. set up, substantially, the same defence as in the former action, namely, that his resignation was not effectual.—*Held* : as the question of the effectuality of the resignation was raised

patrons were parties, & as R. would have been estopped from raising that question again in any proceedings between himself & the patrons, he was also estopped from raising the same question as a defence against the incumbent, who, as being a privy in law to the patrons, was entitled to take advantage of the same estoppel, & such defence should be struck out as frivolous & vexatious.—*MAGRATH v. REICHEL* (1887), 57 L. T. 850, D. C.; *on appeal* (1888), 4 T. L. R. 296, C. A.; *sub nom.* *REICHEL v. MAGRATH* (1889), 14 App. Cas. 665, H. L.

*Annotations* :—*Mentd.* *Barrett v. Day*, *Day v. Foster* (1890), 43 Ch. D. 435; *Macdougall v. Knight* (1890), 25 Q. B. D. 1; *Remington v. Scoles*, [1897] 2 Ch. App. 1; *Stephenson v. Garnett*, [1898] 1 Q. B. 677; *Dunlop Pneumatic Tyre Co. v. Rimington* (1900), 17 R. P. C. 665; *Scott v. Scott*, [1912] P. 241; *Norman v. Mathews* (1916), 85 L. J. K. B. 857.

**Enjoyment of property of benefice.**—*See* Part VII., *post*.

**Functions & duties of incumbent.**—*See* Part III., Sect. 7, sub-sect. 2, *ante*, Part VI., *post*.

**SUB-SECT. 2.—RECTORIES.**

**1863. Necessity of land for existence of rectory—What land sufficient.**—*BERRY v. WHEELER* (1662), 1 Sid. 91; 82 E. R. 989.

*Annotations* :—*Refd.* *Fowke v. Berlington*, [1914] 2 Ch. 308. *Mentd.* *Den v. Abingdon* (1780), 2 Doug. K. B. 473.

**Position of rector—Enjoyment of property.**—*See* Part VII., *post*.

**Functions & duties.**—*See* Part III., Sect. 7, sub-sect. 2, *ante*, Part VI., *post*.

**SUB-SECT. 3.—VICARAGES.**

**1864. Origin.**—(1) A vicarage cannot be dissolved without the act of the ordinary & assent of the King.

(2) The parson, patron, & ordinary, may create a vicarage without the King's assent.

(3) Since 4 Hen. 4, c. 12, a vicarage cannot be dissolved.

(4) The vicarage does not pass by a grant from the King of the rectory or parsonage.

(5) The original of vicarages is uncertain.

(6) The parson & vicar may have the cure of souls, the one *habitualiter*, the other *actualiter*.

(7) A vicar is spiritual as to the cure, & temporal as to the corpore.

(8) The King's assent is necessary to unite a vicarage to a deanery & chapter, or to dissolve it into a parsonage appropriately.

(9) Since 31 Hen. 8, c. 13, the ordinary cannot dissolve a vicarage when the parsonage is in lay hands.—*BRITTON v. WADE* (1620), Cro. Jac. 515; 79 E. R. 440; *sub nom.* *BRITTON v. WARD, Palm.* 113; 2 Roll. Rep. 97, 127; *sub nom.* *WARD v. BRITTON, Palm.* 219, Ex. Ch.

*Annotations* :—As to (6) *Consd.* *Portland v. Bingham* (1792), 1 Hag. Con. 157. *Refd.* *Hine v. Reynolds* (1840), 2 Man. & G. 71. *Generally, Mentd.* *Wallis v. Palm & Underhill* (1739), 2 Com. 633; *Smith v. Wyatt* (1742), 9 Mod. Rep. 336; *Rennell v. Lincoln, Bp.* (1827), 7 B. & C. 113.

**1865.**—*GREENSLADE v. DARBY*, No. 476, *ante*.

**1866. Creation.**—*GRENE v. AUSTEN* (1606), Yelv. 86; 1 Gwill. 226; 80 E. R. 59; *sub nom.* *GREEN v. AUSTEN, Cro. Jac.* 116.

*Annotations* :—*Mentd.* *Byam v. Booth* (1816), 2 Price, 231; *Batchellor v. Smallcombe* (1818), 3 Madd. 12.

**1867.**—*BRITTON v. WADE*, No. 1864, *ante*.

**1868.**—*SAWREY v. COLLINS* (1768), 3 Wood. 181; *on appeal* *sub nom.* *Collins v. Sawrey*, 3 Wood. 181.

**1869. Uniting vicarage to rectory—Evidence—Non-presentation to vicarage.]**—Non-presentation to a vicarage for any length of time is not presumptive evidence of its reunion to the rectory.—*ROBINSON v. BEDEL* (1602), Cro. Eliz. 873; 78 E. R. 1098.

**1870. Uniting vicarage to deanery & chapter—Necessity for assent of Crown.]**—*BRITTON v. WADE*, No. 1864, *ante*.

**1871. Dissolution.]**—*BRITTON v. WADE*, No. 1864, *ante*.

**1872. Whether included in grant of rectory or parsonage.]**—*BRITTON v. WADE*, No. 1864, *ante*.

**1873. Endowment—Necessity for deed.]**—*COPE v. BEDFORD* (1627), Palm. 426; 81 E. R. 1154.

**1874. — When presumed.]**—Where a vicarage hath had long continuance, it shall be presumed to have been endowed.—*CRIMES v. SMITH* (1588), 12 Co. Rep. 4; 77 E. R. 1287, Ex. Ch.

*Annotations:—***Consd.** *Bennett v. Neale* (1811), Wight. 321; *Meade v. Norbury* (1816), 2 Price, 338; *Wolley v. Brownhill* (1824), 13 Price, 500. **Refd.** *Sawbridge v. Benton* (1793), 2 Anst. 372.

**1875. — — —.]**—Where a rectory was granted by the Crown with licence to appropriate, & a direction to appoint a vicar, & endow him with a dwelling-house, & on the appropriation to endow him also with a specified annual pension or portion for his food & sustentation; & it appeared that there had been a vicar through all subsequent time, & that such vicar had for a great number of years back received from the lessees of the rectory for the time being a larger sum than the pension specified by the grant, but no instrument of endowment, nor evidence of the existence of such, was produced, from the absence of which it was contended, that the terms of the grant had not been complied with, & that the payment by the lessees was a voluntary payment by the impropricators, & determinable at their pleasure:—**Held:** after so long a possession, it might be presumed that an endowment had been made according to the terms of the grant, & the vicarage had been subsequently augmented.—*INMAN v. WHORMBY* (1827), 1 Y. & J. 515; 118 E. R. 787.

**1876. Vicarage unendowed—Effect.]**—*PRINCE'S CASE* (1690), 3 Mod. Rep. 295; 87 E. R. 195.

**1877. Position of vicar.]**—*BRITTON v. WADE*, No. 1864, *ante*.

— **Right to tithes.]**—*See* Part VII., Sect. 5, *post*.

**1878. — Is "minister" within eighty-ninth canon.]**—*R. v. ALLEN*, No. 698, *ante*.

**1879. — Is "owner of limited interest in land"—Within private drainage Act.]**—*ACLAND v. NAPLETON* (1888), cited in 36 W. R. at p. 829.

*Annotation:—***Consd.** *Goodden v. Coles* (1888), 36 W. R. 828.

— **Enjoyment of property of benefice.]**—*See* Part VII., *post*.

— **Functions & duties.]**—*See* Part III., Sect. 7, sub-sect. 2, *ante*, Part VI., *post*.

#### SUB-SECT. 4.—PERPETUAL CURACIES.

**1880. How established.]**—(1) The question whether a perpetual curacy or no may be judged of by three concurring circumstances: whether there are parochial rights belonging to the chapel in question; with reference to the rights of the inhabitants within the district; & as to the rights & dues belonging to the curate.

(2) Such a curate not removable at pleasure.

(3) Presentation to a church, or nomination to a perpetual curacy may be by parol.

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(4) A bill is the proper mode of establishing a right to a perpetual curacy.—*A.-G. v. BRERETON* (1752), 2 Ves. Sen. 425; Dick. 783; 28 E. R. 272, L. C.

*Annotations:—***Generally.** *Menid.* *A.-G. v. Foley* (1753), Dick. 363; *Jones v. Ellis* (1828), 2 Y. & J. 265; *Dent v. Itob* (1834), 1 Y. & C. Ex. 1; *It. v. Clayton* (1849), 13 Q. B. 354; *MacAllister v. Rochester*, Bp. (1880), 6 C. P. D. 194.

**1881. Nomination of perpetual curate—By parol.]**—*A.-G. v. BRERETON*, No. 1880, *ante*.

**1882. — Parcel of rectory.]**—The ct. permitted a recovery to be amended by inserting an advowson, which had passed by the general word hereditaments, but refused to insert a curacy, because the right of nominating a perpetual curate was incident to & parcel of the rectory.—*HORNE v. LODGE, PRESTON, VOUCHER* (1811), 3 Taunt. 462; 128 E. R. 183.

**1883. Position of perpetual curate—Is "minister" within eighty-ninth canon.]**—*R. v. ALLEN*, No. 698, *ante*.

— **Emoluments of office.]**—*See* Part VII., *post*.

— **Enjoyment of property.]**—*See* Part III., Sect. 7, sub-sect. 2, *ante*.

— **Functions & duties.]**—*See* Part VI., *post*.

**1884. Rights of perpetual curate—As to church & churchyard—Right to maintain trespass—Against churchwarden unlawfully entering.]**—

(1) The perpetual curate of an augmented parochial chapelry has a sufficient possession whereon to maintain trespass for breaking & entering the chapel & destroying the pews.

(2) A chapelwarden of a parochial chapelry has not, by virtue of his office, any authority to enter the chapel & remove the pews, without the consent of the perpetual curate.—*JONES v. ELLIS* (1828), 2 Y. & J. 265; 148 E. R. 918.

*Annotations:—***As to** (1) **Refd.** *Griffin v. Dighton* (1864), 5 B. & S. 93; *Batten v. Gedyo* (1889), 41 Ch. D. 507; *Fowke v. Berington*, [1914] 2 Ch. 308.

**1885. — Right to possession for performance of duties—Right of lay rector to depauperate churchyard by sheep.]**—*GREENSLADE v. DAUBY*, No. 476, *ante*.

**1886. — Right to bring action as to site of ruins.]**—This action was brought by the perpetual curate & one of the churchwardens of the parish church of M. against the lord of the manor to recover possession of certain ruins which were formerly choir aisles & transepts of the church, but had been in possession of the lord of the manor since the dissolution of the lesser monasteries in 1535. The parish church, as it is now, & had been for generations, used, consisted of the tower & choir only of a larger church, which had been at some time walled off from the ruined aisles & transepts. The question was whether the original church had been a parish church appropriated to the priory, or a conventual church in part of which the parishioners had been allowed to worship. The site of the priory which included the church if it was conventual had been granted by the Crown to depts. predecessors in title, & they had been in possession of the ruins ever since. A preliminary objection was taken that plffs. had no right to sue:—**Held:** (1) one of two churchwardens cannot sue alone, & as against the churchwardens the objection was good; (2) a perpetual curate has sufficient possession of everything which forms part of the parish church to enable him to sue for possession & for rights over the church for the spiritual purposes of his cure, & against him the objection failed.—*FOWKE v. BERINGTON*, [1914] 2 Ch. 308; 83 L. J. Ch. 820, 878; 111 L. T. 440; 58 Sol. Jo. 379, 610.

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**Sect. 3.—Nature and tenure of benefices: Sub-sect. 4.**

**Sect. 4: Sub-sect. 1, A. & B.]**

**1887. — To lease glebe.]—**Where a perpetual curacy has been augmented by Queen Anne's Bounty, a lease made by the curate for three lives, without the consent of the ordinary, is void. If such curate be within 32 Hen. 8, c. 28, s. 1, he is also within sect. 4 of that statute, which prevents vicars & parsons from making leases, without the restrictions required at common law.—*DOE d. RICHARDSON v. THOMAS* (1839), 3 Ad. & El. 556; 1 Per. & Dav. 578; 8 L. J. Q. B. 145; 112 E. R. 1323.

**1888. Perpetual curate not removable at pleasure.]—***A.-G. v. BRERETON*, No. 1880, *ante*.

#### SECT. 4.—PATRONAGE OF BENEFICES.

*See, now, Benefices Act, 1898 (c. 48), (Amendment) Measure, 1923, No. 1.*

##### SUB-SECT. 1.—ADVOWSONS AND RIGHTS OF PATRONAGE.

###### A. In General.

**1889. Nature of advowson—General rule.]—***SHERLEY v. UNDERHILL & BURSEY* (1618), Moore, K. B. 894; 72 E. R. 979; *subsequent proceedings* (1621), 11ob. 327, Ex. Ch.

*Annotations:—Reid. A.-G. v. Stafford* (1796), 3 Ves. 77; *It v. Orton Trustees* (1851), 14 Q. B. 139.

**1890. — May be held of subject.]—***ANON.* (1500), Y. B. 15 Hen. 6, fo. 6, p. 2.

*Annotation:—Reid. Anon.* (1586), Gouldsb. 42.

**1891. — Is devisable—When held in gross.]—**An advowson in gross, held *in capite*, is a valuable hereditament, & devisable by the Statute of Wills, 1540 (c. 1).—*CLERK v. PEACOCK* (1594), Cro. Eliz. 350; 78 E. R. 607.

*Annotations:—Reid. Westfalling v. Westfalling* (1746), 3 Atk. 460; *Re Earnshaw-Wall* (1894), 63 L. J. Ch. 836.

**1892. — Is real assets—For payment of debt.]—**Advowson is assets. Upon debate:—*Held: an advowson in fee was real assets in the hands of the heir for payment of debts.*—*TONG v. ROBINSON* (1730), 1 Bro. Parl. Cas. 114; 1 E. R. 453; *sub nom. ROBINSON v. TONGUE*, 2 Stra. 879, 11 L.; *subsequent proceedings, sub nom. ROBINSON v. TONGUE* (1735), 3 P. Wms. 398, L. C.

*Annotations:—Consd. Westfalling v. Westfalling* (1746), 3 Atk. 460. *Reid. Kingston v. Clark* (1741), 3 Atk. 204; *Barret v. Clubb* (1776), 3 Wm. Bl. 1052; *Ripley v. Waterworth* (1802), 7 Ves. 425. *Mentd. Banks v. Sutton* (1732), 2 P. Wms. 700; *Waghorne v. Langmead* (1796), 1 Bos. & P. 571; *Aldrich v. Cooper* (1805), 8 Ves. 382; *Heath v. Brindley* (1834), 2 Ad. & El. 365; *Re Tristram, Ex p. Hartley* (1835), 2 Mont. & A. 496; *Sproule v. Prior* (1836), 8 Sim. 180.

**1893. — Is tenement—Within Statute of Frauds.]—**This annuity in fee is a personal inheritance, what the law suffers to descend to the heir, but had nothing to do with the realty, & so not within Stat. Frauds; for lands & tenements only are within it. An advowson comes indeed under that description, for it may be held under knight service (LORD HARDWICKE, C.).—*STAFFORD (EARL) v. BUCKLEY* (1750), 2 Ves. Sen. 170; 28 E. R. 111, L. C.

*Annotations:—Mentd. Turner v. Turner* (1783), 1 Bro. C. C. 316; *Buckeridge v. Ingram* (1795), 2 Ves. 652; *Doe d. Chattaway v. Smith* (1816), 5 M. & S. 126; *Radburn v. Jervis* (1841), 3 Beav. 450; *Taylor v. Martindale* (1841), 5 Jur. 648; *Ex p. Wynch* (1854), 5 De G. M. & G. 188; *Re Rivett-Carnac's Will* (1885), 30 Ch. D. 136.

**1894. — Is subject to right of curtesy.]—**A man seised of an advowson or rent in fee has issue a daughter, who is married & has issue, a daughter, who is married & has issue & dies seised; the wife, before the rent became due or the church became

void, dies. She had but a seisin at law, but yet her husband shall be tenant by the curtesy, because he could by no industry attain to any other seisin (JESSEL, M.R.).—*EAGER v. FURNIVAL* (1881), 17 Ch. D. 115; 50 L. J. Ch. 537; 44 L. T. 464; 45 J. P. 603; 29 W. R. 649.

*Annotation:—Mentd. Re Scott*, [1901] 1 K. B. 228.

**1895. — Is "freehold property"—Within Solicitors' Remuneration Act, 1881 (c. 44), Schedule 1., Part 1.]—**An advowson in gross, although an incorporeal hereditament, is freehold property within the above schedule of the General Order under the above Act, & on a sale the scale fee applies.—*Re EARNSHAW-WALL*, [1894] 3 Ch. 156; 63 L. J. Ch. 836; 71 L. T. 173; 42 W. R. 567; 38 Sol. Jo. 549; 8 R. 558.

*Annotation:—Mentd. Re Sanders' Settlement*, [1896] 1 Ch. 480.

**1896. — Is not "land"—Within Real Property Limitation Act, 1833 (c. 27).]**—An advowson is not "land" within the meaning of that term as used in the above Act.—*BROOKS v. MUCKLESTON*, [1909] 2 Ch. 519; 79 L. J. Ch. 12; 101 L. T. 343.

**Vested in corporation on charitable trusts—Within Municipal Corporations Act, 1835 (c. 76).]**—*See CHARITIES*, Vol. VIII., p. 373, No. 1819.

**Is "charity property"—Within City of London Parochial Charities Act, 1883 (c. 36).]**—*See CHARITIES*, Vol. VIII., p. 255, No. 168.

**1897. Proof of right of patronage—By Crown grant—When presumed.]—**A lawful grant of the Crown shall be presumed in respect of ancient & continual possession.

Plff. shall enjoy the said rectory. For although that by anything which can now be shown, the impropriation is defective, for by nothing which now appears the issue in tail had anything in the advowson at the time of his grant to the said Prior, for that the advowson did not pass by the grant of the King, by those words (*cum pertinentibus*), yet it shall now be intended in respect of the ancient & continual possession, that there was a lawful grant of the King to the said Humphrey, who granted in fee, so that he might lawfully grant it to the said priory (*omnia præsumentur solemniter esse acta*). . . . God forbid that ancient grants & acts should be drawn in question, although they cannot be shown, which at first was necessary to the perfection of the thing (*per Cur.*).—*BEDLE v. BEARD & WINGFIELD* (1607), 12 Co. Rep. 4; 77 E. R. 1288.

*Annotations:—Consd. Bennett v. Neale* (1811), Wight. 324; *Moade v. Norbury* (1816), 2 Price, 338. *Reid. Sawbridge v. Benton* (1793), 2 Anst. 372. *Mentd. Kingston-upon-Hull Corpn. v. Horner* (1774), 1 Cowp. 102; *Hillary v. Waller* (1806), 12 Ves. 239; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Halliday v. Phillips* (1889), 23 Q. B. D. 48; *Simpson v. Godmanchester Corpn.* (1895), 64 L. J. Ch. 837; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140.

**1898. — — —.]—**(1) Parsons, etc., need not prove their reading the Articles, etc., till something appears to the contrary.

(2) The question of its [a perpetual cure] being a donative was given up upon producing the presentation of the Crown; & there was exceedingly strong evidence to show that it had always been subject to the visitation of the bishop (LORD MANSFIELD, C.J.).—*POWELL v. MILBANK* (1772), 2 Wm. Bl. 851; 1 Cowp. 103, n.; 3 Wils. 355; 90 E. R. 502; *sub nom. BOWELL v. MILBANK*, 1 Term Rep. 399, n.

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**1899.** ————.]—A grant from the Crown on an advowson, excepted in a former grant under general words, will be presumed after a possession evidenced by title deeds for 133 years & three presentations.—*GIBSON v. CLARK* (1819), 1 Jac. & W. 159; 37 E. R. 336, L. C.

*Annotation* :—*Mentd.* A. G. v. Murdoch (1852), 1 De G. M. & G. 86.

**1900.** ———— *Effect of presentation by lapse.*]

—*THORNETON v. SAVILL* (1622), Palm. 306; 81 E. R. 1095; *sub nom.* *SAVILLE v. THORNTON*, Cro. Jac. 650; W. Jo. 11; Win. 13.

*Annotations* :—*Refd.* R. v. Whaley (1729), 1 Barn. K. B. 170. *Mentd.* R. v. Chester, Bp. (1698), 1 Ld. Raym. 292.

**1901.** ———— *Layman in possession—When validity normally presumed.*—All appropriations in lay hands shall now be intended to have been made with all necessary circumstances.—*HUNSTON v. COCKET* (1610), Cro. Jac. 252; 70 E. R. 216.

*Annotation* :—*Mentd.* *Browne v. Spence* (1683), 1 Sid. 163.

**1902.** ———— *Selsin proved without presentations—If provable in any other way.*—In a *quare impedit* the Crown as well as the subject must allege a presentation. A *commendam relinere* does not amount to one. But where the verdict finds that the Crown was seised in fee *ul de uno grosso* it cures the want of the allegation.

A presentation makes a fee, & proves a fee. To which I may add, that the law requires a plff. to show how his seisin arose, this being incorporeal, & not to be executed by livery. Now a presentation makes a seisin, & shows at the same time how it arose, & is the proper evidence of it. . . . The verdict has cured the not actually alleging a presentation. . . . We think the title being found, which is a seisin, it necessarily follows, that a presentation must have been proved (*per Cur.*).—*R. v. LANDAFF* (Bp.) (1735), 2 Stra. 1006; Kel. W. 275; 93 E. R. 998; *sub nom.* *LANDAFF* (Bp.) v. R., 2 Barn. K. B. 72, 189, 371.

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**1903.** ———— *Advowson in gross—Fine levied by stranger—Effect.*—*WALLWYN v. LANDAFF* (Bp.) (1764), 2 Wils. 233; 95 E. R. 783.

#### B. Advowsons Appendant to Manors.

*See, also,* COPYHOLDS, Vol. XIII., pp. 25, 26, Nos. 196–207.

**1904.** *Life tenant of manor—Right of patronage.*—*R. v. WALSHAY* (1311), Sel. Soc. Y. B., Vol. VI., p. 178.

**1905.** *Whether appendant to manor—Crown manor—Usurpation of right.*—*ANON.* (1572), Ben. 75; 3 Leon. 17; 123 E. R. 285.

**1906.** ———— *Lease—Of manor having advowson.*—*TUCK'S CASE* (1605), Jenk. 310; 145 E. R. 227.

**1907.** ———— *Of manor & advowson—Severance during term.*—In 1700 an advowson appendant to a manor was sold & assigned for the residue of a term of 500 years, created in the manor & advowson in 1745, & which, except as to the advowson, ceased :—*Held* : this did not sever the appendancy, & the advowson passed by a subsequent release of the manor with general words.—*ROOPER v. HARRISON* (1855), 2 K. & J. 86; 69 E. R. 704.

*Annotations* :—*Mentd.* *Thorpe v. Holdsworth* (1868), L. R. 7 Eq. 139; *Ward v. Duncombe*, [1893] A. C. 369; *Taylor v. London & County Banking Co.*, London & County Banking Co. v. Nixon, [1901] 2 Ch. 231.

**1908.** ———— *Grant of manor or advowson separately for life.*—*HARTOPP & COCK'S CASE* (1627), Hut. 88; 123 E. R. 1120.

**1909.** ———— *Mortgage of manor saving advowson.*—(1) Where an advowson is appendant to a

manor, & the owner mortgages the manor in fee excepting the advowson, by this means it is become in gross; but if the money be paid punctually at the day, then it is become appendant again, & if it is paid after the day, it is appendant in reputation, & may pass by the name of an advowson appendant in a grant or other conveyance, though in reality the appendancy is destroyed; for if it is severed one instant from the manor, by the act of the party, it is then in gross, & no appendant (*HOLT, C.J.*).

(2) So where the owner of a manor, to which an advowson was appendant, accepts a fine of the advowson, with a grant & render back of every second turn; now for such turn the advowson is in gross, but for other turns the appendancy still continues; but if a man levy a fine of the advowson, & accepts a grant & render of every other turn, the appendancy is quite gone, because there was an instant of time in which it became severed (*HOLT, C.J.*).

(3) So where there are two coparceners of a manor, to which an advowson is appendant, & they make partition of the manor, without taking notice of the advowson, at every other turn it is still appendant; but if there had been an express exception of the advowson, it would then be in gross (*HOLT, C.J.*).—*R. v. CHESTER* (Bp.) (1696), 3 Salk. 24; Skin. 651; 1 Ld. Raym. 292; 5 Mod. Rep. 297; 91 E. R. 660; *on appeal* (1697), Show. Parl. Cas. 212, H. L.

*Annotations* :—*Mentd.* *R. v. Blunt* (1738), Andr. 293; *Wolferstan v. Lincoln, Bp. & Whitehead* (1763), 2 Wils. 174; *King v. Norman* (1847), 4 C. B. 884.

**1910.** ———— *Fine & regrant of alternate turn.*—*R. v. CHESTER* (Bp.), No. 1009, *ante*.

**1911.** ———— *Partition by coparceners.*—*R. v. CHESTER* (Bp.), No. 1009, *ante*.

**1912.** ———— *Services severed from demesne—Afterwards reunited.*—Where there are two coparceners of a manor, to which an advowson is appendant, & the whole demesne are allotted to one, & the services to another, by this means the manor is destroyed, & the advowson becomes in gross; but if one of them die without issue so that the demesnes descend to him who had the services, the manor is now revived, & the advowson is appendant again, because this was a severance by act of law (*per Cur.*).—*REYNOLDS v. BLAKE* (1697), 3 Salk. 25; 91 E. R. 660.

*Annotation* :—*Mentd.* *Shortridge v. Lamplugh* (1702), 1 Ld. Raym. 798.

**1913.** ———— *Advowson of vicarage.*—(1) If the presentee to an advowson be admitted, instituted & inducted, the King cannot take advantage of his having been corruptly presented, until he be removed.

(2) Simony without the privy of the incumbent renders the presentation void.

(3) A corrupt contract with the wife of the patron is simony, although the patron himself be not privy thereto.

(4) An incumbent instituted by simoniaca contract cannot be presented to the benefice *d. novo*, but is for ever disabled to hold it.

(5) The advowson of a vicarage, though usually appendant to the rectory, may be appendant to a manor.—*R. v. NORWICH* (Bp.), COLE & SAKER (1615), Cro. Jac. 385; Hob. 75; 1 Roll. Rep. 235; 70 E. R. 329; *sub nom.* *R. v. ZAKAR*, 2 Bulst. 88.

*Annotations* :—*Generally, Mentd.* *Knowle v. Harvey* (1615), 1 Roll. Rep. 335; *Thomas v. Norrell* (1673), 3 Keb. 184; *Jefferson v. Durham, Bp.* (1797), 1 Bos. & P. 105.

**1914.** *Is appendant to demesne—Not to rents or services.*—An advowson appendant is appendant to the demesne of the manor, & not to the rents



*Sect. 3.—Nature and tenure of benefices: Sub-sect. 4. Sect. 4: Sub-sect. 1, A. & B.]*

**1887.** — *To lease glebe.*—Where a perpetual curacy has been augmented by Queen Anne's Bounty, a lease made by the curate for three lives, without the consent of the ordinary, is void. If such curate be within 32 Hen. 8, c. 28, s. 1, he is also within sect. 4 of that statute, which prevents vicars & parsons from making leases, without the restrictions required at common law.—*DOE d. RICHARDSON v. THOMAS* (1839), 3 Ad. & Kl. 556; 1 Per. & Dav. 578; 8 L. J. Q. B. 145; 112 E. R. 1323.

**1888.** Perpetual curate not removable at pleasure.]—*A.-G. v. BREKTON*, No. 1880, *ante*.

#### SECT. 4.—PATRONAGE OF BENEFICES.

*See, now, Benefices Act, 1898 (c. 48), (Amendment) Measure, 1923, No. 1.*

##### SUB-SECT. 1.—ADVOWSONS AND RIGHTS OF PATRONAGE.

###### A. In General.

**1889.** Nature of advowson—General rule.]—*SHERLEY v. UNDERHILL & BURSEY* (1618), Moore, K. B. 804; 72 E. R. 979; *subsequent proceedings* (1621), 110b. 327, Ex. Ch.

*Annotations:—Reid. A.-G. v. Stafford* (1796), 3 Ves. 77; *R. v. Orton Trustees* (1851), 14 Q. B. 139.

**1890.** — May be held of subject.]—*ANON.* (1500), Y. B. 15 Hen. 6, fo. 6, pl. 2.  
*Annotation:—Reid. Anon.* (1586), Goulsh. 42.

**1891.** — Is devisable—When held in gross.]—An advowson in gross, held in capite, is a valuable hereditament, & devisable by the Statute of Wills, 1540 (c. 1).—*CLIFFE v. PEACOCK* (1594), Cro. Eliz. 359; 78 E. R. 607.

*Annotations:—Reid. Westfalling v. Westfalling* (1746), 3 Atk. 460; *Re Earnshaw-Wall* (1894), 63 L. J. Ch. 836.

**1892.** — Is real assets—For payment of debt.]—Advowson is assets. Upon debate:—*held: an advowson in fee was real assets in the hands of the heir for payment of debts.*—*TONG v. ROBINSON* (1730), 1 Bro. Parl. Cas. 114; 1 E. R. 453; *sub nom. ROBINSON v. TONGUE*, 2 Stra. 879, II. L.; *subsequent proceedings, sub nom. ROBINSON v. TONGUE* (1735), 3 P. Wms. 398, L. C.

*Annotations:—Consd. Westfalling v. Westfalling* (1746), 3 Atk. 460. *Reid. Kingston v. Clark* (1741), 2 Atk. 204; *Barret v. Glubb* (1776), 2 Wm. Bl. 1052; *Ripley v. Waterworth* (1802), 7 Ves. 425. *Mentd. Banks v. Sutton* (1732), 2 P. Wms. 700; *Waghorne v. Langmead* (1796), 1 Bos. & P. 571; *Aldrich v. Cooper* (1803), 8 Ves. 382; *Heath v. Brindley* (1834), 2 Ad. & El. 365; *Re Tristram, Ex p. Hartley* (1835), 2 Mont. & A. 496; *Sproule v. Prior* (1836), 8 Blm. 189.

**1893.** — Is tenement—Within Statute of Frauds.]—This annuity in fee is a personal inheritance, what the law suffers to descend to the heir, but had nothing to do with the realty, & so not within Stat. Frauds; for lands & tenements only are within it. An advowson comes indeed under that description, for it may be held under knight service (LORD HARDWICKE, C.).—*STAFFORD (EARL) v. BUCKLEY* (1750), 2 Ves. Sen. 170; 28 E. R. 111, L. C.

*Annotations:—Mentd. Turner v. Turner* (1783), 1 Bro. C. C. 316; *Buckeridge v. Ingram* (1795), 2 Ves. 652; *Doe d. Chattaway v. Smith* (1816), 5 M. & S. 126; *Radburn v. Jervis* (1841), 3 Beav. 450; *Taylor v. Martindale* (1841), 5 Jur. 648; *Ex p. Wynch* (1854), 5 De G. M. & G. 188; *Re Rivett-Carnac's Will* (1885), 30 Ch. D. 136.

**1894.** — Is subject to right of curtesy.]—A man seised of an advowson or rent in fee has issue a daughter, who is married & has issue, a daughter, who is married & has issue & dies seised; the wife, before the rent became due or the church became

void, dies. She had but a seisin at law, but yet her husband shall be tenant by the curtesy, because he could by no industry attain to any other seisin (JESSEL, M.R.).—*EAGER v. FURNIVALL* (1881), 17 Ch. D. 115; 50 L. J. Ch. 537; 44 L. T. 464; 45 J. P. 603; 29 W. R. 649.

*Annotation:—Mentd. Re Scott*, [1901] 1 K. B. 228.

**1895.** — Is "freehold property"—Within Solicitors' Remuneration Act, 1881 (c. 44), Schedule I., Part 1.]—An advowson in gross, although an incorporeal hereditament, is freehold property within the above schedule of the General Order under the above Act, & on a sale the scale fee applies.—*Re EARNSHAW-WALL*, [1894] 3 Ch. 156; 63 L. J. Ch. 836; 71 L. T. 173; 42 W. R. 567; 38 Sol. Jo. 549; 8 R. 558.

*Annotation:—Mentd. Re Sanders' Settlement*, [1896] 1 Ch. 480.

**1896.** — Is not "land"—Within Real Property Limitation Act, 1833 (c. 27).]—An advowson is not "land" within the meaning of that term as used in the above Act.—*BROOKS v. MUCKLESTON*, [1909] 2 Ch. 519; 79 L. J. Ch. 12; 101 L. T. 343.

— Vested in corporation on charitable trusts—Within Municipal Corporations Act, 1835 (c. 76).]—*See CHARITIES*, Vol. VIII., p. 373, No. 1819.

— Is "charity property"—Within City of London Parochial Charities Act, 1883 (c. 36).]—*See CHARITIES*, Vol. VIII., p. 255, No. 168.

**1897.** Proof of right of patronage—By Crown grant—When presumed.]—A lawful grant of the Crown shall be presumed in respect of ancient & continual possession.

Plff. shall enjoy the said rectory. For although that by anything which can now be shown, the impropriation is defective, for by nothing which now appears the issue in tail had anything in the advowson at the time of his grant to the said Prior, for that the advowson did not pass by the grant of the King, by those words (*cum pertinentibus*), yet it shall now be intended in respect of the ancient & continual possession, that there was a lawful grant of the King to the said Humphrey, who granted in fee, so that he might lawfully grant it to the said priory (*omnia presumentur solemniter esse acta*). . . . God forbid that ancient grants & acts should be drawn in question, although they cannot be shown, which at first was necessary to the perfection of the thing (*per cur.*).—*BEDLE v. BEARD & WINGFIELD* (1607), 12 Co. Rep. 4; 77 E. R. 1288.

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**1914. Is appendant to demesnes—Not to rents or services.]**—An advowson appendant is appendant to the demesnes of the manor, & not to the rents

**Sect. 4.—Patronage of benefices: Sub-sect. 1, B., C., D. & E.]**

or services.—**LONG v. HEMINGE** (1590), Cro. Eliz. 209; 78 E. R. 466.

**Annotation:—Mentd. Harrison v. Powell** (1894), 10 T. L. R. 271.

**1915. — — — — —**—**ANON.** (circa 1690), 3 Salk. 40; 91 E. R. 879.

**Mortgage—Of manor saving advowson.]—See No. 1900, ante.**

**1916. — — — — —** **Of manor & advowson—Right of mortgagor to present until foreclosure.]—AMHURST v. DAWLING** (1700), 2 Vern. 401; 23 E. R. 859.

**1917. — — — — —** **Nomination by equitable tenant for life—Duty of mortgagee to present nominee.]—DIMOCK'S CASE (OR HOBART v. SELBY)** (1704), Freem. Ch. 273; 22 E. R. 1205.

#### C. Donative Churches.

**1918. Nature & characteristics.]—ANON.** (undated), 3 Salk. 140; **FARCHILD v. GAYRE** (1605), Cro. Jac. 63; **BRITTON v. WADE** (1620), Cro. Jac. 515; **CHERKE d. PRIN v. HEATH** (1669), 2 Keb. 558; **LADD v. WIDDOWS** (1702), 2 Salk. 541; **ALLANE v. EXTON** (1672), 1 Mod. Rep. 90; **A.-G. v. FLOYER** (1716), 2 Vern. 748; **KEPINGTON v. TAMWORTH SCHOOL (GOVERNORS) & COLLINS** (1763), 2 Wils. 150; **RENNELL v. LINCOLN (Bp.)** (1827), 7 B. & C. 113.

*See, note, Benefices Act, 1898 (c. 48), s. 12.*

#### D. Patronage of United Benefices.

**1919. Whether union effected—Benefices held by one patron—Presenting only to one benefice.]—MAIDWELL & KEMBERSHIE CASE** (1581), Sav. 17; 123 E. R. 988.

**Annotation:—Held. Williams v. Llangelwedd Overseers** (1861), 31 L. J. M. C. 54.

**1920. — — — — —** **Deed of consolidation.]—By an act of union or deed of consolidation, dated in 1738, the rectory & parish of P. were incorporated with the vicarage & church of D. to all intents & purposes in law whatsoever, constituting & appointing the church of D. to be the mother church to which, together with the rectory of P., all future incumbents should be promoted, instituted, & inducted. At the date of the union there was only one patron of the two benefices, & no provision was made by the deed for alternate presentation or otherwise. By an order of exchange made in 1890 by the Board of Agriculture under the Inclosure Acts, 1845 to 1878, & Board of Agriculture Act, 1889 (c. 30), certain lands & hereditaments in the two parishes including "the advowson of the vicarage of D.," were ordered to be exchanged:—*Held*: after the union the old advowsons ceased to exist, & what passed by the order of exchange under the description of "the advowson of the vicarage of D." was the advowson of the new united benefice of D.-cum-P.—**ELCHO (LORD) v. ANDREWS**, [1910] 1 Ch. 706; 79 L. J. Ch. 588; 102 L. T. 403, C. A.**

**1921. — — — — —** **Benefices held by several patrons—Deed of consolidation.]—A count in *quare impedit* stated that one A. was seised in fee of a moiety of the advowson of the church of Brauncwell-with-Dunsby-and-Anwick, & was entitled to present to same every alternate turn, the other moiety of the advowson belonging to B.; that A., in his turn, being so seised, presented C., who was on such presentation admitted, instituted, & inducted; that, afterwards, the church became vacant by the resignation of C., whereupon B. presented A., who was admitted, instituted, & inducted; that A., being so seised of the moiety of the advowson,**

**died; that the moiety descended to pltf.; & that, the church having become vacant by the death of A., it belonged to pltf. to present in the turn of A. Deft. pleaded, that A. was not seised of a moiety of the advowson of the church of Brauncwell-with-Dunsby-and-Anwick, *modo et forma*. It was found, by a special verdict, that Brauncwell-with-Dunsby was a rectory, & Anwick a vicarage, the rectory having been theretofore appropriated & the vicarage endowed according to law; that R. being seised in fee of the advowson of the vicarage of Anwick, & the Earl of Bristol of the advowson of the rectory of Brauncwell-with-Dunsby, by deed, dated in Mar. 1703, reciting that the parties were desirous that the cure of the vicarage & rectory should both be supplied by one clerk, it was agreed, that, whenever the churches should be void, the Earl & R., their heirs & assigns, should present their clerks to the same *alterius vicibus*; that, in Apr. 1718, an act of union was made by the bishop of the diocese, with the consent of R., the then patron of the vicarage of Anwick, & the Earl of Bristol, the patron of the rectory of Brauncwell, & sealed with the episcopal seal, whereby the bishop "consolidated, united, & annexed the vicarage & parish church of Anwick, with its rights, etc., to the aforesaid rectory & parish church of Brauncwell, & did, by those presents, commit the cure of the souls of the parishioners of the church of Anwick to the then rector of the parish church of Brauncwell, & the rectors thenceforward for the time being of the church of Brauncwell, & decreed that the united churches should from that time be thereafter held & reputed as one benefice only, & that one fit person, at the alternate presentation of the Earl of Bristol and R., their heirs & assigns, to be canonically instituted, etc., should at all times thereafter possess same," etc. After the making of this act of union, no more separate presentations to the rectory of Brauncwell & vicarage of Anwick respectively were made; but from thenceforth one clerk was presented & instituted to the united benefice, by the name of "the rectory of Brauncwell-with-Anwick," in alternate turns, by the parties claiming title under R. & the Earl respectively. In Dec. 1760, R., son & heir of R. in the act of union mentioned, & S., his wife, conveyed to A. "all that the perpetual advowson, nomination, donation, or alternative right of presentation, & free disposition, of & to the vicarage of the parish church of Anwick aforesaid, & all other the manors or lordships, advowsons, impropriations, tenements, tithes, hereditaments, & parts & shares of manors or lordships, advowsons, etc., of them, the said R., & S., his wife, or either of them, situate & being in Anwick aforesaid." The special verdict further found that the title of A. to the moiety of the advowson of the church of Brauncwell-with-Dunsby-and-Anwick, in the declaration mentioned, was derived in no other way than by that indenture:—*Held*: (1) by the act of union, a new presentation benefice was created, wholly separate & distinct from the former benefices & the patronage of this new presentative benefice was in the owners of the former advowsons in turn—the advowsons remaining for this purpose unchanged in all their qualities, & transmissible as before; (2) the right which R. had was well described in the declaration as a "moiety of the advowson of the church of Brauncwell-with-Dunsby-and-Anwick, as in gross by itself, as of fee & right," & such right was duly conveyed to A. by the deed of Dec. 1760.—**ROBINSON v. BRISTOL (MARQUIS)** (1852), 11 C. B. 241; 22 L. J. C. P. 21; 19 L. T. O. S. 230; 16 J. P. 598; 16 Jur. 889; 138 E. R.**

404, Ex. Ch.; *on appeal, sub nom.* BRISTOL (MARQUIS) v. ROBINSON (1854), 15 C. B. 244, H. L. *Annotations*.—*Distd.* Elcho v. Andrews, [1910] 1 Ch. 706. *Reid.* Carpenter v. Laindon Overseers (1922), 127 L. T. 555.

1922. Effect of union.]—STOUGHTON v. PALMER (1639), W. Jo. 446; 82 E. R. 234.

1923. —.]—Where two churches are united by Act of Parliament after the next avoidance of both, the patron cannot present to the united vicarage upon the next avoidance of one.—HARDINGE v. WINCHESTER (BP.) (1777), 2 Wm. Bl. 1162; 96 E. R. 685.

#### *E. Patronage of New Churches and Chapels.*

1924. Church—Built before Church Building Acts—Rights of patron.]—(1) Building & endowing of a church, did originally entitle the patron to the patronage. (2) The impropiator of a parish has no right to nominate a preacher to every chapel within the parish; it might be a hardship if he should be bound so to do; neither ought it to be at his election. (3) One may build a private chapel for himself & family, or for himself & neighbours, or for himself & twenty neighbours, & this will not give the parson a right to nominate a preacher there.—HERBERT v. WESTMINSTER (DEAN & CHAPTER) (1721), 1 P. Wms. 773; 24 E. R. 608.

*Annotations*.—As to (2) *Consd.* Portland v. Bingham (1792), 1 Hag. Con. 157. As to (3) *Consd.* MacAllister v. Rochester, Bp. (1880), 5 C. P. D. 194. *Reid.* Farnworth v. Chester, Bp. (1825), 4 B. & C. 555. *Generally, Mentd.* Hardman v. Ellames (1834), 2 My. & K. 732; Howicke v. Graham (1881), 7 Q. B. D. 400.

1925. — Under Church Building Acts—Patronage in trustees—Death of trustees.]—(1) By the Church Building Act, 1824 (c. 103), persons subscribing, under that Act, more than £50 towards building a church might elect three life trustees who for forty years might nominate a clerk to serve same.

(2) By sect. 7 of the Act when any of the trustees died, the majority of the subscribers, at a meeting to be called for that purpose, might elect a life trustee in his place, & by sect. 8 of the same Act if the subscribers should not exceed three, they were to be the life trustees.

(3) By sect. 12 if all the trustees should die so that no election could take place, the incumbent of the parish was to present.

A church was built by subscriptions raised in accordance with the Act, trustees were appointed, & all died but one. There was also a surviving subscriber who had not been a trustee. He did not then know that there was a surviving trustee, & called in due form a meeting of subscribers. The surviving trustee did not attend it; the subscriber did, & elected himself. He pursued the same course after becoming aware of the death of the last trustee. After each election of himself as trustee he nominated a clerk:—*Held*: he had not under the statute any title to make such nomination, which, therefore, conferred no title to admission.—ALLEN v. GLOUCESTER (BP.) (1873), L. R. 8 H. L. 219; 42 L. J. C. P. 299; 22 W. R. 193, H. L.; *affg.* S. C. *sub nom.* FOWLER v. GLOUCESTER (BP.) (1869), L. R. 4 C. P. 668, Ex. Ch.

1926. Chapels—Generally—Rights of Impropiator of parish.]—HERBERT v. WESTMINSTER (DEAN & CHAPTER) (1720), Fortes. Rep. 345; 92 E. R. 883; *sub nom.* WESTMINSTER (DEAN & CHAPTER) v. HERBERT, 11 Mod. Rep. 315.

1927. — Private chapel—Rights of Impropiator of parish.]—HERBERT v. WESTMINSTER (DEAN & CHAPTER) (1720), Fortes. Rep. 345; 92

E. R. 883; *sub nom.* WESTMINSTER (DEAN & CHAPTER) v. HERBERT, 11 Mod. Rep. 315.

1928. — Chapel of ease—Rights of Incumbent of parish.]—A.-G. v. LONDON (BP.) (1710), Colles, 390; 1 E. R. 343.

1929. —.]—Of common right, the incumbent has the nomination of the minister to a chapel of ease within his parish.—LINE v. HARRIS (1752), 1 Lee, 140.

*Annotation*.—*Mentd.* Lee v. Fagg (1874), L. R. 6 P. C. 38.

1930. — Nomination given elsewhere by archbishop.]—(1) Vicar of the mother church has the right of nominating to a chapel of ease, though the chapel was erected & endowed by a grant of lands from the lord & freeholders of a manor, & though the right of nomination was given by the archbishop, in his deed of consecration, to the inhabitants & the vicar of the mother church at the time declared he had no right to nominate, & though the inhabitants have repaired & nominated for ninety years.

(2) Rector or vicar cannot lose the right but by agreement between patron, parson, & ordinary, & on a compensation made to such rector or vicar.

(3) Prescription presupposes agreement by deed, not by parol.—DIXON v. KERSHAW (1766), Amb. 528; 27 E. R. 341; *sub nom.* DIXON v. METCALER, 2 Eden, 300.

*Annotations*.—As to (1) *Apld.* Portland v. Bingham (1792), 1 Hag. Con. 157. *Expld.* Farnworth v. Chester, Bp. (1825), 4 B. & C. 555. *Apld.* Bliss v. Woods (1831), 3 Hag. Ecc. 486. *Distd.* MacAllister v. Rochester, Bp. (1880), 5 C. P. D. 194. As to (2) *Reid.* Moysey v. Hillecoat (1828), 2 Hag. Ecc. 30. *Generally, Mentd.* Jones v. Ellis (1828), 2 Y. & J. 265.

1931. — How rights lost.]—DIXON v. KERSHAW, No. 1930, *ante*.

1932. —.]—(1) In a declaration in *quare impedit* the right of presentation to a perpetual curacy was stated to be "in all the householders & heads of families in a township & the heirs male of A.'s body, & such other of his kindred or blood as should have any lands in the township, or the greater number of them," & it was averred that the chapel being vacant one B. was duly nominated & elected minister by plffs. being the greater number of the householders & heads of families in the township to whom the nomination & election of the minister then belonged:—*Held*: the declaration was bad, inasmuch as it did not state that the heirs male of A.'s body, & such other of his kindred or blood as had lands in the township concurred in the nomination, or that they were in the minority, or that there were no such persons.

(2) In 1631, A. founded a chapel of ease, & endowed it with lands for the maintenance of a minister, & by his will directed that his son should during his life have the nomination & election of the minister, & might by will or deed set down the order or course for the nomination & election of the minister after his death, & if he should not set down any course or order, then the minister should be nominated & elected by all the householders & heads of families in the township, & the heirs male of A.'s body, & such other of his kindred or blood as should have any land in the township, or the greater number of them. By the instrument of consecration all tithes, fees, & emoluments whatsoever on burials, marriages, etc., were reserved to the vicar of the parish. The son not having set down any order or course:—*Held*: the householders & heads of families in Astley had no right to present a curate to this chapel without the consent of the vicar.

(3) It is undoubtedly law, that wherever a chapel of ease is erected, the incumbent of the mother church is entitled to nominate the minister, unless

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there is a special agreement to the contrary, to which parson, patron, & ordinary must be parties (ABBOTT, C.J.).—**FAIRWORTH v. CHESTER** (Bp.) (1825), 4 B. & C. 555; 7 Dow. & Ry. K. B. 56; 4 L. J. O. S. K. B. 14; 107 E. R. 1166.

*Annotations:—As to (2) Apud.* **Bliss v. Woods** (1831), 3 Hag. Ecc. 486. **Consd.** **MacAllister v. Rochester**, Bp. (1880), 5 C. P. D. 194. *As to (3) Consd.* **Bliss v. Woods** (1831), 3 Hag. Ecc. 486.

**1933.** ————]—A private Act of Parliament, after providing for a sale of glebe land, & the erection of an additional church with part of the proceeds, directed that the curate of the new church should, during the incumbency of A., the then rector, be appointed by him, & that, after the death, avoidance, or resignation of A., the new church should become the principal church, with all the accustomed rights, immunities, & privileges appertaining to a mother church, & the then church should become & be deemed a chapel of ease thereto, to be served by a minister capable of having cure of souls, & that "the patronage of or right of presentation to the chapel, as well as the patronage of or right of presentation to the new church, should be vested in the patron of the rectory, his heirs & assigns, so, nevertheless, that the minister of the chapel should not be removable at pleasure":—*Held*: the chapel of ease thus created by the Act, was thereby made presentative, & not donative. *Sembla*: if it had been at first donative, it would have ceased to be so, upon a presentation being once made by the patron to the ordinary, followed by the institution & induction of the presentee.—**R. v. FOLEY** (1846), 2 C. B. 684; 15 L. J. C. P. 108; 6 L. T. O. S. 318; 135 E. R. 1167.

**1934.** ————]—**MACALLISTER v. ROCHESTER** (Bp.), No. 305, *ante*.

**1935.** ————]—**Public consecrated chapel—Rights of impropriator of parish—How enforceable.**—**PORTLAND (DUKE) v. BINGHAM**, No. 1361, *ante*.

**1936.** ————]—**Rights of incumbent of parish—To veto to officiate.**—**MACALLISTER v. ROCHESTER** (Bp.), No. 305, *ante*.

**1937.** ————]—**Under Church Building Acts—How right acquired.**—(1) The right of nominating to a chapel under Church Building Act, 1831 (c. 38), cannot be acquired, unless the conditions required by the Act be strictly complied with. The conditions required, are conditions precedent.

(2) It is not competent for any clergyman of the Church of England to enter a parish without leave of the incumbent & to officiate in performing the duties of his vocation (DR. LUSHINGTON).

The sole ground upon which the ordinary grants a licence is, that the right of nomination has vested in the person who has nominated the individual who comes so to be licensed. Where a party has obtained the authority of the ordinary, that authority is not conclusive. It is not competent for the ordinary himself without consent of the incumbent, to licence any person to officiate within the limits of the parish of that incumbent (DR. LUSHINGTON).

(3) It is a sufficient fulfilment of the Act to set apart a space which shall include the accommodation for children; for under this Act, the whole of the accommodation as free seats is not for adult persons only. The children of the poor are as much entitled as grown up persons to have accommodation for attending divine service (DR. LUSHINGTON).—**WILLIAMS v. BROWN** (1835), 1 Curt. 53.

*Annotation:—As to (2) Reqd.* **MacAllister v. Rochester**, Bp. (1880), 5 C. P. D. 194.

**F. Crown Patronage.**

See Part III., Sect. 3, sub-sect. 2, *ante*.

**G. Patronage of Spiritual Patrons.**

**1938. Nomination of vicar—Whether by parson.]**

—A parson inappropriate shall not have the nomination of the vicar.

By finding, was meant maintaining only, & not electing & choosing (LORD NOTTINGHAM, C.).—**MALLET v. TRIGG** (1682), 1 Vern. 42; 23 E. R. 296.

**1939.** ————]—**Whether by rector.]**—**PRINCE'S CASE** (1690), 3 Mod. Rep. 295; 87 E. R. 195.

**1940. Vacancy of benefice—Subsequent to vacancy of spiritual office—Whether late holder or successor presents.]**—**ANON.** (1835), Y. B. 9 Edw. 3, fo. 10.

**1941.** ————]—**Late holder becoming bishop.]**—**ANON.** (1350), cited Fitz. Nat. Brev. 34, n.

*Annotations:—Apprvd.* **Mirehouse v. Rennell** (1832), 8 Bing. 490. *Reqd.* **Russell v. Lincoln**, Bp. (1825), 3 Bing. 223; **Rennell v. Lincoln**, Bp. (1827), 7 B. & C. 113. *Mentd.* **Coke's Case** (1623), Godb. 289; **R. v. Canterbury**, Archbp. (1634), Cro. Car. 354.

**1942.** ————]—**Death of holder—Right of legal personal representatives to present.]**—**MIREHOUSE v. RENNELL**, No. 70, *ante*.

**1943.** ————]—**During vacancy of spiritual office—Right of Crown to present—Archbishop patron.]**—**POTTER v. CHAPMAN**, No. 73, *ante*.

**1944.** ————]—**Bishop patron.]**—**Ex p. TARRANT**, No. 72, *ante*.

**H. Patronage of Coparceners, Joint Tenants and Tenants in Common.**

(a) Coparceners.

**1945. Coparceners not unanimous—Presentation by seniority—Effect of usurpation of turn.]**—**ANON.** (1497), Keil. 1; 72 E. R. 153.

**1946.** ————]—**GULLY v. EXETER** (Bp.), No. 2175, *post*.

**1947.** ————]—**Effect of successful quare impedit against one.]**—(1) If A. & B., coparceners of an advowson, do not agree to present on a vacancy, A. the eldest, or her assigns, may present to the first turn, & B., or her assigns, to the next.

(2) If, when A. & B. do not agree, C., a stranger, implead A. only by *quare impedit* on a vacancy & recover, it is a bar to *quare impedit* brought by B. against C. for that turn, though not for the next turn.—**BARKER v. LOMAX** (1752), Willes, 659; 125 E. R. 1372; *sub nom.* **BARKER v. LONDON** (Bp.), 1 Hy. Bl. 412, n.

*Annotation:—As to (1) Reqd.* **Gully v. Exeter**, Bp. (1830), 10 B. & C. 584.

**1948. Effect of assignment to stranger of coparcener's share.]**—**ANON.** (1503), Keil. 49; 72 E. R. 207.

**1949.** ————]—**Grant by coparceners severally.]**—If coparceners assign their parts of an advowson severally, the grantees shall present by turns.—**HARRIS & HATES v. NICHOLS** (1583), Cro. Eliz. 19; 78 E. R. 285.

*Annotation:—Apprvd.* **Buller v. Exeter**, Bp. (1749), 1 Ves. Sen. 340.

**1950.** ————]—**The privilege of the elder sister to present first in turn goes to her assignee.**—**BULLER v. EXETER** (Bp.) (1749), 1 Ves. Sen. 340; 27 E. R. 1069.

**1951. Presentation in turn by agreement—Effect of usurpation of turn.]**—**DOLMANS CASE** (1583), 4 Leon. 86; 74 E. R. 747.

**1952.** ————]—**A., B., C., D., coparceners, had a successive right of presentation, in turn, to a vicarage; on an objection to C.'s title to sell her turn, usurpations on the rights of D. & A.**

successively:—*Held*: it did not affect the right of O. to present.—**RICHARDS v. MACCLESFIELD (EARL)** (1835), 7 Sim. 257; 4 L. J. Ch. 153; 58 E. R. 836.

*Annotation*:—**Consd.** *Keen v. Denny*, [1894] 3 Ch. 169.

**1953. — No unanimity in choice.**—In pleading a right in coparceners to present to an advowson by turns, it is good to state that such right arose because they did not agree to present. (Which is synonymous to saying they could not agree.)—**THRALE v. LONDON (BP.)** (1790), 1 Hy. Bl. 376; 126 E. R. 221.

*Annotation*:—**Mentd.** *Exeter, Bp. v. Gully* (1830), 5 Man. & Ry. K. B. 457.

**1954. Bill for partition.**—**MATTHEWS v. BATH & WELLS (BP.)** (1785), Dick. 652; 21 E. R. 425.

*Annotation*:—**Mentd.** *Hanbury v. Hussey* (1851), 20 L. J. Ch. 557.

(b) *Joint Tenants and Tenants in Common.*

**1955. Joint tenancy—Advowson in gross—Mutual covenant to present by turn—Amounts to partition.**—**SALISBURY (BP.) v. PHILIPS** (1700), 1 Ld. Raym. 535; 1 Salk. 43; Holt, K. B. 52; Carth. 505; 91 E. R. 1257; *sub nom.* **PHILIPS v. SALISBURY (BP.)**, 12 Mod. Rep. 321.

*Annotations*:—**Consd.** *Johnstone v. Baber* (1856), 22 Beav. 562; *Meredith v. Limerick, Adfert & Aghadoc, Bp.* (1863), 9 L. T. 269. **Refd.** *Grocers' Co. v. Canterbury, Archbp.* (1771), 2 Wm. Bl. 770; *Edwards v. Exeter, Bp.* (1839), 7 Scott. 652.

**1956. How partition effected—In chancery.**—Declare plff. is entitled to have a partition of the vicarage of W. into moieties to present by alternate turns, & decree a partition to be made thereof accordingly between plff. & deft.; & for the making of such partition, plff. & deft. are mutually to execute conveyances to each other, so that plff. may hold one moiety of the advowson to him & his heirs, & deft. the other moiety to her & her heirs, as tenants thereof in severalty respectively; & in such conveyance let a clause be inserted, that plff. & his heirs, & deft. & her heirs shall present by alternate turns; & the Master to settle the conveyance if the parties differ, & the expense & charge of the conveyance to be borne equally, & it appearing that J., under whom deft. claims, had presented upon the last avoidance, let plff. present on the next avoidance, being the first turn from that time; & no costs on either side (*per Cur.*).—**BODICOATE v. STEERS** (1737), Dick. 69; 21 E. R. 193.

*Annotation*:—**Refd.** *Hanbury v. Hussey* (1851), 20 L. J. Ch. 557.

**1957. Tenants in common—Distinguished from coparceny—Turns decided by lot.**—Testator devised & bequeathed all his real & personal estates to trustees, upon trust to sell the same as soon as conveniently might be after his decease, except his advowson of the rectory of C. & certain hereditaments in the same parish, the sale of which he directed should be postponed until after the death of his eldest son W. who was then incumbent. The proceeds of the sale were to be held in trust for his children therein named, as tenants in common:—*Held*: (1) the right of presentation previous to the sale passed by the will & did not descend to the heir of testator; (2) if the children could not agree whom to nominate for presentation by the trustees, the question was to be decided by lot, & being tenants in common, they were not entitled to present successively according to seniority, as in the case of coparceners.—**JOHNSTONE v. BABER** (1856), 6 De G. M. & G. 439; 25 L. J. Ch. 899; 28 L. T. O. S. 110; 20 J. P. 757; 2 Jur. N. S. 1053; 4 W. R. 827; 43 E. R. 1304, L. C. & L. J.

*See, also*, No. 2331, *post*.

**1958. — Effect of prerogative turn by Crown.]**

—Prerogative presentation to a church, of which the advowson is held in common, does not pass for the turn of the otherwise rightful patron.—**GROGERS' CO. v. CANTERBURY (ARCHBP.)** (1771), 2 Wm. Bl. 770; 3 Wils. 214; 96 E. R. 451; *subsequent proceedings*, 3 Wils. 221.

*Annotations*:—**Consd.** *Thrale v. London, Bp.* (1790), 1 Hy. Bl. 376. **Apld.** *Galland v. Troward* (1794), 2 Hy. Bl. 323. **Refd.** *Meath (Bp.) v. Winchester (Marquis)* (1836), 3 Bing. N. C. 183; *Keen v. Denny*, [1894] 3 Ch. 169. **Mentd.** *Wilson v. Van Mildert* (1801), 2 Bos. & P. 394.

**1959. — One being Roman Catholic—Right of Crown.**—**CAMBRIDGE (CHANCELLOR) v. WALGRAVE** (1616), Hob. 126; 80 E. R. 275.

*Annotations*:—**Refd.** *Colt & Glover v. Coventry & Lichfield, Bp.* (1616), Hob. 140; *Edwards v. Exeter, Bp.* (1839), 5 Bing. N. C. 652.

**1960. —**—**EDWARDS v. EXETER (BP.)**, No. 2183, *post*.

—*See, also*, No. 2006, *post*.

(c) *Disturbance of Right of Patronage.*

Disturbance generally, *see* Sub-sect. 3, *post*.

**Usurpation—By one coparcener.**—*See* No. 1945, *ante*, No. 2175, *post*.

**1961. — By one patron.**—In *quare impedit* deft. pleaded that one M., under whom he claimed, being seised in fee of one moiety of the advowson to present to one turn in every two turns, presented one J. in her proper turn; that the church being afterwards vacant, one W. under whom plff. claimed presented in his proper turn; that the church being again vacant, plff. presented; & that the church being a fourth time vacant, it belonged to deft. to present. On demurrer to this plea:—*Held*: deft. had not shown a title to present, since he had not shown whether the third presentation was by usurpation or by agreement, & it could not be presumed that deft. was entitled to present in the first & fourth turn, & plff. in the second & third, since the plea averred that M. had presented to the first turn in her proper turn, & W. in his proper turn. *Semle*: if it had appeared by the plea that plff. had presented to the third turn by usurpation, he would still have been entitled to the fourth turn by right.

Unless some express agreement, showing a different mode of presentation, be brought before the ct., are we not to presume that course to have been pursued which the law points out, viz. that where one party presents to the first turn, he presents to the third turn also? (**LORD ALVANLEY, C.J.**).—**BIRCH v. LITCHFIELD (BP.)** (1803), 3 Bos. & P. 444; 127 E. R. 241.

*Annotation*:—**Consd.** *Keen v. Denny*, [1894] 3 Ch. 169.

**1962. —**—**KEEN v. DENNY**, No. 1963, *post*.

**1963. — By stranger.**—As between patrons with alternate turns of presentation to a benefice, a presentation on an exchange of livings must be reckoned as a turn. If one patron wrongfully usurp the turn of another, the order of turns of presentation is not thereby altered, but the ousted patron after six months loses his turn, & cannot requite by usurping against the wrongdoer by way of retaliation.

On this point there is no distinction between usurpation by a stranger & by a person party or privy to the title.—**KEEN v. DENNY**, [1894] 3 Ch. 169; 64 L. J. Ch. 55; 71 L. T. 566; 43 W. R. 39; 10 T. L. R. 677; 38 Sol. Jo. 716; 8 R. 629.

**Lawful interruption—By exercise of King's prerogative—Incumbent promoted to bishopric.**—*See* No. 1958, *ante*.

**1964. Presentee deprived.**—If two have title to present by turns, & one presents a parson, who is



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admitted, instituted, etc., & afterwards is deprived, he shall not present again, but it shall serve his turn, for it was but voidable; but when the admission & institution are merely void it shall not serve for a turn.—**WINDSOR'S CASE** (1599), 5 Co. Rep. 102 a; 77 E. R. 213; *sub nom.* **WINDSOR v. CANTERBURY (ARCHBP.), LOVEDAY & FLETCHER**, Cro. Eliz. 687; *sub nom.* **LOVEDEN v. WINDSOR & HITCH**, Moore, K. B. 558.

**Annotations:—****Consd.** **Reynoldson v. Blake** (1896), 1 Ld. Raym. 192. **Refd.** **Smith's Case** (1813), 10 Co. Rep. 135 b; **Robinson v. Bristol** (1851), 11 C. B. 208.

**1965. — By bishop—Wrongful collation by bishop.]—**(1) Presentation by turn to a church is a chose in action; if therefore the bishop deprive a clerk, & without notice wrongfully collates, & the patron afterwards grants over the advowson, the grantee cannot present as in his turn, upon the death of the incumbent.

(2) On deprivation, a collation by the bishop without notice is good against all, except the patron.

(3) *In quare impedit*, it is sufficient to say he was seised of every second turn *ut in grosso*.—**LEAK v. COVENTRY (BP.) & BADINGTON** (1601), Cro. Eliz. 811; 78 E. R. 1038.

**Annotations:—***As to* (1) **Consd.** **Alston v. Atlay** (1837), 7 Ad. & El. 289. **Refd.** **Wolferstan v. Lincoln, Bp.** (1763), 2 Wils. 174.

**I. Patronage in Inhabitants or Numerous Class.**

**(a) Ascertainment of Class.**

**1966. Title of class to vote—Must be clearly established.]—****A.-G. v. PARKER**, No. 1008, *ante*.

**1967. Ascertainment of class—Parishioners & inhabitants—Whether limited to ratepayers.]—****A.-G. v. RUTTER, SKELTON v. NICHOLLS** (1708), 2 Russ. 101, n.; 38 E. R. 277.

**Annotations:—****Refd.** **Shaw v. Thompson** (1876), 34 L. T. 721; **Re St. Stephen, Coleman Street, Re St. Mary the Virgin, Aldermanbury** (1888), 39 Ch. D. 492.

**1968. — — — — —.]—**Trust of an advowson to present some fit person, such as the inhabitants & parishioners or the major part of the chiefest & discreetest of them should nominate. The right of election in the inhabitants, paying the church & poor rates, above the age of 21:—**Held**: a popular election by a majority of such voters, & others not so qualified, was established.—**FEARON v. WEBB** (1802), 14 Ves. 13; 33 E. R. 427.

**Annotations:—****Mentd.** **Re St. Stephen, Coleman Street, Re St. Mary the Virgin, Aldermanbury** (1888), 39 W. R. 837.

**1969. — — — — — Whether by assessment or payment.]—**Purchase of the inappropriate rectory of Clerkenwell, for the use of the parishioners & inhabitants. The nomination of the curate had been by decree declared to be in the parishioners & inhabitants, paying to church & poor. The Lord Chancellor expressed an opinion that assessment gave the right, though actual payment had not been made, but an election, on that principle, was not disturbed on the ground of common consent, no objection having been made at a general meeting, & the parish having no representative meeting in vestry for this purpose.—**A.-G. v. FOSTER** (1804), 10 Ves. 335; 32 E. R. 874.

**Annotations:—****Refd.** **Davis v. Jenkins** (1814), 3 Ves. & B. 151; **Re St. Stephen, Coleman Street, Re St. Mary the Virgin, Aldermanbury** (1888), 39 Ch. D. 492. **Mentd.** **Carter v. Cropley** (1857), 36 L. J. Ch. 246.

**1970. — — — — —.]—**Purchase of the inappropriate rectory of Clerkenwell for the use of

the parishioners & inhabitants. The nomination of the curate had been by decree declared to be in the parishioners & inhabitants, paying to church & poor. Whether that qualification is satisfied by assessment only, not followed by actual payment, or not, an election on that principle was established upon common consent to that among other regulations; a case of strong & high probability being required for an issue or inquiry; & the ct. declining to give prospective directions as to the future, the information & bill was dismissed; & with costs; except as to keeping up the number of trustees, with reference to the only proper subject of the information, the stipend of the curate: all the rest, as to the nomination, etc., being the subject of a private suit. An informality in the bill, not stating plffs. as suing on behalf of all the other parishioners, might have been cured by amendment.—**A.-G. v. NEWCOMBE** (1807), 14 Ves. 1; 33 E. R. 422.

**Annotations:—****Mentd.** **Milligan v. Mitchell** (1835), 4 L. J. Ch. 281; **R. v. Davie** (1837), 6 Ad. & El. 374; **Nightingale v. Goulburn** (1848), 12 Jur. 317; **Re St. Stephen, Coleman Street, Re St. Mary the Virgin, Aldermanbury** (1888), 39 Ch. D. 492.

**1971. — — — — — Evidence of usage.]—**

(1) Where the advowson of a parish is vested in trustees for the benefit of the parishioners, an election of a vicar by ballot is not valid, & the election must be by voting openly. In such a case, the right of voting at the election of a vicar may be limited by long usage to parishioners who pay church rates & poor rates.

(2) Costs as between solr. & client allowed to the archbishop & bishop, when made parties to a suit respecting the validity of the election of a vicar.—**EDENBOROUGH v. CANTERBURY (ARCHBP.)** (1820), 2 Russ. 93; 38 E. R. 271.

**Annotations:—***As to* (1) **Refd.** **R. v. Hammersmith (Vicar & Churchwardens)** (1852), 3 B. & S. 504, n. *As to* (2) **Consd.** **Saunders v. Saunders** (1857), 5 W. R. 479. **Fold.** **Turner v. Collins** (1871), L. R. 12 Eq. 438. **Refd.** **Andrews v. Barnes** (1888), 39 Ch. D. 133.

**1972. — — — — —.]—****R. v. DAVIE**, No. 2642, *post*.

**1973. — — — — —.]—**(1) In an action for a false return to a writ of *mandamus* it was alleged to be a custom in a parish that whenever a certain perpetual curacy should be vacant by reason of the death of the curate or otherwise, the parishioners should elect a fit person to succeed him; & that a vacancy having occurred, plff. was duly elected by the parishioners according to the custom. At the trial it appeared that at a meeting of the parishioners duly convened for the purpose of such an election, it was decided before the election began that parishioners who had not paid church rates should not be allowed to vote. In consequence of this resolution, several persons who had the legal right of voting did not tender their votes, & the votes of others who did tender their votes, were rejected, on the ground that they had not paid the church rate:—**Held**: a party elected by the majority of the persons whose votes were received at this meeting was not duly elected by the parishioners according to the custom.

(2) At the election every parishioner tendering a vote gave a card containing only the name of the candidate for whom he voted:—**Seemle**: this mode of election was illegal.—**FAULKNER v. ELGER** (1825), 4 B. & C. 449; 6 Dow. & Ry. K. B. 517; 3 Dow. & Ry. M. C. 203; 107 E. R. 1127.

**Annotations:—***As to* (1) **Consd.** **Story v. Colk** (1848), 6 Notes of Cases Supp. xxviii; **Shaw v. Thompson** (1876), 3 Ch. D. 233. **Refd.** **R. v. Hammersmith (Vicar & Churchwardens)** (1852), 3 B. & S. 504, n. *Generally, Mentd.* **R. v. Marshland Smeeth & Fen District Councils**, [1920] 1 K. B. 155.



(b) *Mode of Election.*

**1974. Necessity for notice of election.]**—A.-G. v. RUTTER, SELLON v. NICHOLLS (1768), 2 Russ. 101, n.; 38 E. R. 277.

*Annotations:*—*Reid.* Shaw v. Thompson (1876), 34 L. T. 721; *Re* St. Stephen, Coleman Street, *Re* St. Mary the Virgin, Aldermanbury (1888), 39 Ch. D. 492.

**1975. Mode of voting—Handing in card containing name of candidate.]**—FAULKNER v. ELGER, No. 1973, *ante*.

**1976. — Ballot.]**—EDENBOROUGH v. CANTERBURY (ARCHBP.), No. 1971, *ante*.

**1977. — Departure from usual mode of voting—With consent of candidates & voters—Validity.]**—The bill stated, that the inhabitants of B. were entitled to elect a minister to a chapel there, within the jurisdiction of the Dean of W., & that the custom of electing a minister, when the office was contested, was for the votes to be taken either in the chapel or an adjoining school house, & in one place only, & in the presence of the chapelwardens, who were to provide a parchment roll, duly stamped, for each candidate, on which the voters entered their names in their own writing, with a seal on the same line with every name; that the poll was kept open for an indefinite time, & that the roll of the successful candidate was signed at the foot of it by the wardens, & attested by two witnesses, & then formed the official instrument of nomination; that an election had lately taken place, in which the wardens appointed four polling places, of which the school house was one; that the names of the voters were entered in polling books by assessors, appointed by the wardens; that there were no parchment rolls; that the poll was kept open for five days only, & that the result of the election was reported to the Dean of W. by a letter signed by the wardens only, & unattested. On a motion to dissolve an injunction, which had been obtained *ex p.* to restrain the Dean of W. from licensing the minister, whose name had been so returned by the chapelwardens when it appeared, that the mode in which the election was taken, had been previously agreed on by the candidates, & approved of by a resolution at a public vestry meeting of the voters, & that nearly all the voters polled:—*Held:* the injunction should be dissolved with costs. — DAVIES v. BANKS (1836), 5 L. J. Ch. 274.

**1978. — Nomination by trustees Subsequent ratification or rejection by voters.]**—R. v. DAVIE, No. 2612, *post*.

(c) *Other Cases.*

**1979. Effect of Metropolis Management Acts.]**—Where the right of electing the minister of a parish had been by deed vested in trustees in trust for the parishioners:—*Held:* it was not transferred to the vestry or otherwise affected by Metropolis Management Act, 1855 (c. 120), & Metropolis Management Act, 1856 (c. 112), or either of them.—CARTER v. CROPLEY (1857), 8 De G. M. & G. 680; 26 L. J. Ch. 246; 28 L. T. O. S.

PART V. SECT. 4, SUB-SECT. 1.—  
I. (a).

**p. Patronage vested in diocesan church society—Bishop subsequently vested with power to appoint.]**—By 31 Geo. III. c. 31, H. M. & his successors were empowered to authorise the governor of the province of Quebec to erect parsonages or rectories therein according to the establishment of the Church of England; & in pursuance thereof, in 1836, the then lieutenant-governor, erected & endowed the rectory of K. By a subsequent

provincial statute the church society of the diocese of T. was incorporated, & by a later statute the right of presentation was vested in it. Subsequently the legislature erected the diocese of O. out of the diocese of T., & the bishop, clergy, & laity of the diocese were incorporated under the name of the "Incorporated Synod of the Diocese of Ontario," who, by a bye-law in 1862, invested the then bishop with the right to appoint to all rectories during his incumbency. The bishop afterwards, on the death of the incum-

bent, presented to the rectory of K.; whereupon an information was filed by the attorney-general, on the relation of parishioners, against the bishop & the rector, praying to have such bye-law of the synod declared void & set aside. A demurrer by the bishop & rector for want of equity was allowed, the *et. c.* considering that under the several Acts & proceedings which had been passed & taken the right of presentation was vested in the bishop during his incumbency.—A.-G. v. LAUDER (1862), 9 Gr. 461.—*CAN.*

347; 21 J. P. 135; 3 Jur. N. S. 171; 5 W. R. 248; 44 E. R. 552, L. JJ.

*Annotations:*—*Apld.* A.-G. v. Draper's Co. (1858), 4 Drew. 299. *Distd.* *Re* Hayle's Estate (1862), 31 Beav. 139.

**1980. Patronage vested in landowners in parish—Whether trustees bound to present landowners' nominee.]**—The advowson of a vicarage was vested in trustees upon right to present such person as should be elected by a majority of landowners in the parish:—*Held:* (1) a person elected by the landowners had no such legal right to the vicarage that he could by *mandamus* compel the trustees to present him; (2) the landowners themselves could not by *mandamus* compel the trustees to present, for that, if they had any legal right, their remedy was by *quare impedit*, & if their right was merely equitable, then their remedy would be in equity.—R. v. ORTON VICARAGE TRUSTEES (1840), 14 Q. B. 130; 18 L. J. Q. B. 321; 13 J. P. 551; 13 Jur. 1049; 117 E. R. 57; *sub nom.* R. v. BARRE, 3 New Mag. Cas. 200; 13 L. T. O. S. 528.

**1981. Not held on charitable trust.]**—Although parishioners may hold an advowson for their general benefit, & nominate their vicar, this is an exception to the general law, & other property held upon trust for a parish or parishioner is charity property.—A.-G. v. WEBSTER (1875), L. R. 20 Eq. 483; 44 L. J. Ch. 706.

*Annotations:*—*N.F.* *Re* St. Stephen, Coleman Street, *Re* St. Mary the Virgin, Aldermanbury (1888), 39 Ch. D. 492. *Reid.* *Re* Church Patronage Trust, Laurie v. A.-G., [1904] 2 Ch. 643. *Mentd.* *Re* St. Bride's Church, Fleet Street (1877), 35 Ch. D. 117; A.-G. v. Dartmouth Corp. (1883), 48 L. T. 933; *Re* St. Botolph Without Bishopsgate Parish Estates (1887), 35 Ch. D. 142; Fell v. Charity Lands Official Trustee, [1898] 2 Ch. 44.

*See, generally,* CHARITIES, Vol. VIII., pp. 255 *et seq.*

*J. Patronage Vested in Trustees.*

**1982. How trust created—By parol.]**—A trust may arise by parol.—PARY v. JUXON (1669), 3 Rep. Ch. 38; 21 E. R. 722.

**1983. — By will—Devise on trust for sale—On death of incumbent.]**—JOHNSTONE v. BABER, No. 1957, *ante*.

**1984. — — — — —.]**—A testatrix devised her advowson of E. to her trustees upon trust for sale on the death of H., the then incumbent, but on no account to sell it to anyone of his family—the proceeds of the sale to fall into the general residue. The residuary legatees asked that the next presentation might be sold, as a thing undisposed of by the will:—*Held:* the next presentation was vested in the trustees, & that they would have to present.—BRISTOW v. SKIRROW (No. 2) (1859), 27 Beav. 590; 1 L. T. 180; 5 Jur. N. S. 1379; 54 E. R. 234.

— — — — —.]—*See, further,* Sub-sect. 2, *post*.

**1985. Breach of trust—Assignment of right of nomination.]**—A. being impropriator of a parish, demised part of the tithes to certain parishioners as trustees for 1,000 years, who redemised same to him for 999 years, under a yearly rent of £50 payable to the trustees as a provision for a preacher

**Sect. 4.—Patronage of benefices: Sub-sect. 1, J., K. & L.; sub-sect. 2, A. & B. (a).]**

to be nominated by the trustees. The heir of A. afterwards sold the rectory to B. & the representative of the surviving trustee was prevailed upon to assign to B. the right of nominating the preacher. From the date of the original demise & for forty years & upwards after the latter transaction, the preacher was constantly nominated by the parishioners. Upon a contest between them & B.:—*Held*: (1) the right of nomination was absolutely in the trustees, & the assignment of that right was a breach of trust; (2) directions were given for the re-establishment of the trust in trustees to be impartially chosen.—**FOLEY v. A.-G.** (1721), 7 Bro. Parl. Cas. 249; 3 E. R. 162.

*Annotations*:—As to (1) **Apld.** *Wilson v. Dennison* (1749), 1 Amb. 82. As to (2) **Apld.** *A.-G. v. Scott* (1750), 1 Ves. Sen. 413. **Refd.** *Re St. Stephen, Coleman Street, Re St. Mary the Virgin, Aldermanbury* (1888), 39 Ch. D. 492.

**Trust for benefit of parishioners.**—*See* Sub-sect. 1, l., *ante*.

**Who may be presented.**—*See* Sect. 6, sub-sect. 1, b. (b), *post*.

**Mode of presentation.**—*See* Sect. 6, sub-sect. 1, c. (b) (ii.), *post*.

*K. Patronage where Advowson Mortgaged.*

**1986. Next presentation mortgaged.—By owner incumbent.—Whether redeemable by executor.**—**THREXTON v. BETTS** (1683), *Freem. Ch.* 87; 22 E. R. 1075.

**1987. Right of mortgagor to nominate.—Mortgage in possession.—Redemption decreed.**—Decree was made against a mtgee. in possession to redeem, but before the account was taken, on a church becoming void, mtgee. presented. On petition:—*Held*: he would be ordered to revoke his presentation.—**JONY v. COX** (1697), *Prec. Ch.* 71; 24 E. R. 34, L. C.

*Annotation*:—**Refd.** *Dincocks' Case* (or *Hobart v. Selby*) (1704), *Freem. Ch.* 273.

**1988. ———.**—(1) If an advowson only be mortgaged & becomes void:—*Semble*: the mtgee. is to present, especially if in the deed the agreement be that the mtgee. shall present.

(2) One mortgages a manor with an advowson appendant, & the church becomes void, mtgee., though in possession, shall not present to the church till the mtge. is foreclosed.

(3) If a mtgee. of an advowson presents, the bill by the mtgor. must be brought within six months, in the same manner as a *quare impedit*.—**GARDINER v. GRIFFITH** (1726), 2 P. Wms. 404; 24 E. R. 787, L. C.; *affd.*, cited 3 Atk. 559, II. L.

*Annotations*:—As to (2) **Consd.** *Mackenzie v. Robinson* (1747), 3 Atk. 569. As to (3) **Refd.** *Hotelet v. Allington* (1746), 3 Atk. 453; *Mutter v. Chauvel* (1816), 1 Mer. 475.

**1989. ———.**—A mtgee. shall not be allowed to present to a living which becomes vacant, because nothing can be taken for it, but shall be looked upon as a trustee for the mtgor. or his grantee, & shall present such person as they shall name.—**GAILY v. SELBY** (1720), 1 Com. 343; 1 Stra. 403; 92 E. R. 1103, L. C.

*Annotation*:—**Refd.** *Gardiner v. Griffith* (1726), 2 P. Wms. 404.

**1990. ———.**—A mtgee. cannot make a lease of a house in mtge. before foreclosure, nor present on an avoidance.—**HLUNGERFORD v. CLAY** (1722), 9 Mod. Rep. 1; 88 E. R. 275, L. C.

**1991. ———.**—The mtgor. of an advowson shall present to the church.—**ROBINSON v. JAGO** (1723), *Bunb.* 130; 145 E. R. 621.

**1992. ———.**—**Terms of mortgage deed.**—**GARDINER v. GRIFFITH**, No. 1988, *ante*.

**1993. ———.**—If an advowson is mortgaged, &

the church becomes void, the right of presentation is in the mtgor.—**GARDINER v. COOK** (1726), *Mos.* 16; 25 E. R. 243, L. C.

**1994. ———.**—Since a presentation is gratuitous, & the mtgee. cannot account for any benefit from it a ct. of equity will compel the mtgee. to present the nominee of the mtgor. (*per cur.*)—**CROFT v. POWELL** (1738), 2 Com. 603; 92 E. R. 1230.

*Annotation*:—**Mentd.** *James v. Kerr* (1889), 40 Ch. D. 449.

**1995. ———.**—**Mortgagee's remedies.**—A mtgee. must accept of a mtgor.'s nominee, to an avoidance of an advowson, for, instead of bringing a bill of foreclosure, he should have prayed a sale of the advowson.—**MACKENSIE v. ROBINSON** (1747), 3 Atk. 559; 26 E. R. 1122, L. C.

*Annotation*:—**Mentd.** *Drinkwater v. Falconer* (1755), 2 Ves. Sen. 623.

**1996. Mortgagor's nomination simoniacal.—Lapse to Crown.—Whether mortgagee allowed to defeat appointment.—By his legal estate.**—Mtgee. of a manor & advowson being in possession, the church became vacant. The mtgor. made a simoniacal presentation of A. which was rejected by the Bishop. Then the mtgor. & mtgee. joined in presenting B. C. got the title of the Crown, & brought an information in the name of the A.-G., to remove the mtgee.'s title, & that it might not be set up at law:—*Held*: it would be so decreed.—**A.-G. v. HESKETH** (1700), 2 Vern. 549; 23 E. R. 950; *sub nom.* **A.-G. v. SUDELL, HESKETH & SCARSBICK**, *Prec. Ch.* 214.

*Annotation*:—**Mentd.** *Re Aaron, Ex p. Lowe* (1832), 1 L. J. Rep. 54.

**1997. Lapse of equity by laches.**—Pltf. claimed the advowson of a vicarage as mtgor., insisting that it was inserted fraudulently in a particular of a trust estate, directed by decree to be sold for payment of debts:—*Held*: the equity of redemption of an advowson lapsed, & the plea would be allowed without prejudice, etc.

Length of time is as much a bar to the equity of redemption of an advowson, as of any other estate (*per cur.*)—**MALLOCK v. SALTER** (1753), 3 Keny. 49; 90 E. R. 1303, L. C.

**1998. ———.**—When the mtge. merely of an advowson is become absolute in the mtgee., he may present.—**DYER v. CRAVEN (LORD)** (1786), *Dick.* 662; 21 E. R. 429, L. C.

*Annotation*:—**Refd.** *Welch v. Peterborough, Bp.* (1885), 15 Q. B. D. 432.

**1999. ———.**—**Union of benefices.—Veto on sale under statute.**—**WELCH v. PETERBOROUGH (Bp.)**, No. 2089, *post*.

#### L. Other Cases.

**2000. Advowson in lease.—Vacancy during term.—Not filled at expiration.—Whether lessor or lessee presents.**—**BACON v. WETTEWELL** (1309), Y. B., 2 Edw. 2, fo. 33; *Sel. Soc. Y. B. Vol. I.*, p. 130.

**2001. Patronage in infant.**—**DE B. v. W.** (1309), Y. B., 2 Edw. 2, fo. 33; *Sel. Soc. Y. B. Vol. I.*, p. 130.

**2002. ———.**—An advowson was conveyed to trustees in trust to present such person as the grantor, his heirs or assigns should nominate in writing under his hand & seal. The grantor died, leaving his heir an infant, six months old. The guardian of the infant guided his pen while he made his mark to a nomination to the living:—*Held*: the nomination was good.—**ARTHINGTON v. COVERLEY** (1733), 2 Eq. Cas. Abr. 518, 675; 22 E. R. 437, 567, L. C.

**2003. ———.**—It is said an infant may present to a church. What is the reason? Because a presentation is not a thing of profit, of which the guardian can make any benefit; but the strong

ground the law goes on is, there can be no inconvenience, because the bishop is to judge of the qualification of the clerk presented (LORD HARDWICKE, C.).—*HEARLE v. GREENBANK* (1749), 3 Atk. 695; 1 Ves. Sen. 298; 26 E. R. 1200, 1 L. C.

*Annotations*.—*Mentd.* Boughton v. Boughton (1750), 2 Ves. Sen. 12; Farquharson v. Colville (1772), Rom. 129; Frank v. Standish (1772), 15 Ves. 391, n.; Cull & Hay v. Showell (1773), Amb. 727; Whistler v. Webster (1794), 2 Ves. 367; Crickett v. Dolby (1795), 3 Ves. 10; Mitchell v. Bower (1796), 3 Ves. 283; Sheddon v. Goodrich (1803), 8 Ves. 481; Crauford v. Coutts (1806), 2 Bl. 655; Murray v. Ellbank (1806), 13 Ves. 1; Thellusson v. Woodford (1806), 13 Ves. 209; Lloyd v. Williams (1816), 1 Madd. 450; Morgan v. Morgan (1820), 5 Madd. 408; Dundas v. Dundas (1830), 2 Dow. & C. 349; Festing v. Allen (1844), 5 Hare, 573; Donovan v. Needham (1846), 9 Beav. 164; Stikeman v. Dawson (1847), 1 De G. & Sm. 90; Blacket v. Lamb (1851), 14 Beav. 482; Moore v. Webster (1866), L. R. 3 Eq. 267; Appleton v. Rowley (1869), L. R. 8 Eq. 139; *Re* George's Estate, George v. Turnell (1876), 25 W. R. 182; Cooper v. Macdonald (1877), 7 Ch. D. 288; May v. Potter (1877), 25 W. R. 507; *Re* Cardoso's Settlement (1878), 7 Ch. D. 728; *Re* D'Angiban, Andrews v. Andrews (1880), 15 Ch. D. 228; *Re* De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson (1885), 55 L. J. Ch. 46; *Re* Bowly, Bowly v. Bowly (1904), 73 L. J. Ch. 810; *Re* Anderson, Pogler v. Gillatt, [1905] 2 Ch. 70; *Re* Harris, Leacroft v. Harris, [1909] 2 Ch. 206; *Re* De Virte, Valani v. De Virte, [1915] 1 Ch. 920; *Re* Ogilvie, Ogilvie v. Ogilvie, [1918] 1 Ch. 492; *Re* Wernher, Wernher v. Belt, [1918] 1 Ch. 339.

**2004. Forfeiture of advowson—Presentation by Crown—Forfeiture reversed—Whether presentation good.**—(1) After avoidance by plurality if a stranger presents, the King's prerogative dies with the incumbent.

(2) If a patron be outlawed pending a *quare impedit*, the King shall present though the patron recovers; but on reversing the outlawry he shall have execution of his judgment, & the King's incumbent shall be removed.—*BEVERLEY v. CORNEWALL* (1588), Cro. Eliz. 44; 1 And. 179; 1 Leon. 63; Moore, K. B. 269; Sav. 80; 78 E. R. 308.

*Annotations*.—As to (2) *Reid*, Wallop's Case (1618), Palm. 19; R. v. Baden (1694), Show. Parl. Cas. 72; Fitzherbert v. Oxford University (1709), 1 Com. 181; Mirehouse v. Rennell (1833), 7 Bl. N. S. 241. *Generally, Mentd.* Bentley v. Ely, Bp. (1731), Fitz-G. 305.

**2005. Severance of next presentation—Nature of right.**—*HARPER v. DERRY* (BAYLIVES & BURGESSSES) (1639), W. Jo. 425; 82 E. R. 223.

*Annotations*.—*Reid*, Woodward v. Fox (1691), 2 Vent. 267. *Mentd.* R. v. Toole (1867), 11 Cox, C. C. 75.

**2006. Several parties claiming sole right to advowson—Agreement to present in turn—Remedies on breach.**—If three persons, each claiming a sole right to an advowson, enter into an agreement by indenture to present by turns, they have no remedy against each other but upon the covenants; but if an Act of Parliament is made confirming this indenture, & ordaining that they shall be tenants in common, an interest is vested in each till partition made.—*CROSSMAN v. CHURCHILL* (1676), 2 Mod. Rep. 97; 86 E. R. 962.

*Annotation*.—*Reid*, Salisbury, Bp. v. Phillips (1698), 1 Ld. Raym. 535.

**2007. Patronage in municipal corporation—Whether exercised by mayor & aldermen—Or by corporation at large.**—*GAPE v. HANLEY* (1777), 3 Term Rep. 288, n.; 100 E. R. 579.

*Annotations*.—*Reid*, Rennell v. Lincoln, Bp. (1825), 3 Bing. 223; Arnold v. Bath & Wells, Bp. (1829), 2 Moo. & P. 559; R. v. Salway (1829), 4 Man. & Ry. K. B. 314. *Mentd.* Hankley v. Winstanley (1789), 3 Term Rep. 279.

**2008.**—Queen Elizabeth, for the advancement & better maintenance of the Free Grammar School of Shrewsbury, granted to the bailiffs & burgesses of Shrewsbury, & their successors, amongst other hereditaments, the advowson of the vicarage of C. By an Act of Parliament, afterwards passed, all the hereditaments & real & personal estates belonging to the school were

vested in a corporate body, called "The Governors & Trustees of the School," who were to hold same in trust for the benefit & maintenance of the school, except the right of presentation, nomination, & appointment to those ecclesiastical benefices which were thereafter declared to be in the mayor, aldermen, & assistants of the town of Shrewsbury. By a subsequent sect. of the Act, the mayor, aldermen, & assistants were directed to fill up vacancies in the vicarage of C., by nominating, appointing, or presenting a fit person; provided that such person should be preferred, *ceteris paribus* who should have been brought up in the school, & a graduate of one or other of the Universities, & born within the parish of C.; except that it should be lawful to give such benefice to either of the masters of the school after he should have vacated his office of master, notwithstanding any such claim or preference as last aforesaid:—*Held*: the right of presentation to the vicarage of C. was vested in the mayor, aldermen, & assistants, as charitable trustees, within the meaning of 5 & 6 Will. 4, c. 76, for the regulation of municipal corps.—*RE SHREWSBURY SCHOOL* (1836), 1 My. & Cr. 632; 40 E. R. 518, L. C.

*Annotations*.—*Apld.* *Re* St. John's Hospital (1851), 3 Mac. & G. 235. *Consd.* *Re* Huntingdon Municipal Charities (1859), 27 Beav. 214; A.-G. v. St. John's Hospital, Bedford (1865), 34 L. J. Ch. 441. *Reid.* *Re* Shrewsbury Municipal Charities, *Re* Shrewsbury Free Grammar School (1849), 1 H. & Tw. 204; A.-G. v. Powis (1853), Kay, 186; *Re* Llewellyn's Estate, Llewellyn v. Llewellyn (1911), 104 L. T. 279.

**2009.**—Vacancy after Municipal Corporations Act, 1835 (c. 76)—Before sale by corporation

—*Vesting of right in bishop.*—The appointment of a reader or lecturer in a parish church, formerly in the gift of a corp., vests in the bishop of the diocese, if vacancy before sale by the corp. under 5 & 6 Will. 4, c. 76; & a *mandamus* will lie to the clerk appointed by the corp. to deliver up the register books.—*R. v. REYNOLDS* (1839), 3 J. P. 752.

—[*See, generally*, CHARITIES, Vol. VIII., pp. 372 *et seq.*]

## SUB-SECT. 2.—TRANSFER AND TRANSMISSION OF PATRONAGE.

*See, now*, Benefices Act, 1898 (c. 48), (Amendment) Measure, 1923, No 1.

### A. Form of Instrument of Transfer.

**2010. Whether deed necessary—Benefice full—Livery in sight of church.**—*PANNELL v. HODGSON* (1576), Cary, 52; 21 E. R. 28.

**2011.**—[Grant of an advowson pleaded without alleging to be by deed, good if the issue be taken upon collateral matter.—*LIGHTFOOT v. BRIGHTMAN* (1622), Hut. 64; 123 E. R. 1096.

*Annotations*.—*Mentd.* Pollitt v. Forest (1848), 11 Q. B. 962; Foquet v. Moor (1852), 7 Exch. 870; Young v. Austen (1869), L. R. 4 C. P. 553.

—[*Compare* No. 2062, *post*.]

### B. What Words operate to Pass Right.

#### (a) In General.

**2012. "Hereditaments"—Lease.**—By a lease of all hereditaments situate, lying & being in T. the advowson in the vicarage of T. passes.—*ANON.* (1573), 3 Dyer, 323 b; 73 E. R. 731.

*Annotations*.—*Expld. & Distd.* Crompton v. Jarratt (1886), 30 Ch. D. 298. *Reid.* Turner v. Palmer (1827), Cro. Car. 74; Pocock v. Lincoln, Bp. (1821), 5 Moore, C. P. 159; Robinson v. Bristol (1851), 11 C. B. 208.

**2013.**—[*LONDON v. SOUTHWELL COL-*

**Sect. 4.—Patronage of benefices: Sub-sect. 2, B. (a) & (b).]**

**LEGHATE CHURCH (CHAPTER) (1618),** Hob. 303; 80 E. R. 447.

**Annotations:—***Consd.* Crompton v. Jarratt (1885), 30 Ch. D. 298. *Reid.* R. v. Rochester, Bp. & Clark (1675), 2 Mod. Rep. 1; Barret v. Glubb (1776), 2 Wm. Bl. 1052; Mirehouse v. Rennell (1833), 7 Bl. N. S. 241.

**2014.** ———. *—* **SAVIL v. SAVIL (1737),** Fortes. Rep. 351; 92 E. R. 886.

**2015.** ———. *—* **An advowson in gross will not pass by the word lands, but by the words tenements & hereditaments it will.—WESTFALING v. WESTFALING (1740),** 3 Atk. 400; 26 E. R. 1064, L. C.

**Annotations:—***Consd.* Gully v. Exeter, Bp. (1827), 4 Bing. 290. *Mentd.* Ripley v. Waterworth (1802), 7 Ves. 425.

**2016.** ———. *Devise.* *—* Under a devise of manors, lands, tenements & hereditaments to A. his exors. & administrators for a term of eleven years, in trust, to receive the rents, issues & profits of the premises that should from time to time accrue & become due, & dispose of same for the benefit of a *cestui que trust*, A. may, by the directions of the *cestui que trust*, & for his benefit, assign the advowson of a rectory appendant to a manor, to a purchaser for the term of eleven years, to the intent that such purchaser may present for the next turn in case of an avoidance, before the expiration of the term, & in case of such avoidance, the purchaser may present accordingly. — **ALBEMARLE (EARL) v. ROGERS (1796),** 7 Bro. Parl. Cas. 522; 3 E. R. 330, H. L.

**Annotation:—***Consd.* Cust v. Middleton (1861), 34 L. J. Ch. 185.

**2017.** ———. *—* Where a testator, after directing by his will that the repairs of his mansion-house & the costs of carrying out the trusts of his will should be paid out of the rents & profits of his real estate, devised all his manors, lands, tenements, & hereditaments whatsoever & wheresoever to his trustees, upon certain trusts for his wife & daughter; bequeathed an annuity of £2,000 a year out of the rents & profits to his daughter, & the surplus of the rents & profits also for the benefit of his wife & daughter, as in his will mentioned; the testator died seized of four advowsons, which were not referred to in the will; & the estate was insufficient, without a sale of some portion of it, to meet all the expenses provided for by the testator. On the questions to what amount, & from what funds, a supply was to be obtained for making the repairs, whether the advowsons passed by the general words of the will, & ought or not to be sold to meet the expenses of the trusts, & whether the deficiency (if any) in the daughter's annuity for any one year ought not to be made good out of the surplus (if any) of any succeeding year:—*Held:* there could be no declaration but only a reference to chambers as to the amount for the repairs; & the advowsons passed under the general devise in the will & ought to be sold; & the purchase-money was profits of real estate within the meaning of the testator. But no declaration could now be made as to the deficiency in the daughter's annuity, as the question might possibly never arise.—**COOKE v. CHOLMONDELEY (1854),** 3 Drow. 1; 24 L. T. O. S. 68; 3 W. R. 1; 61 E. R. 800.

**2018.** ———. *—* (1) The words "freehold hereditaments situate in the parish of D." are not apt & proper words in a conveyance to pass an advowson, though they may be sufficient to do so when there are in the parish no corporeal hereditaments to satisfy the words.

(2) By his will, made in 1827, a testator

appointed, under a statutory power, the advowson of a church in the parish of D., to certain persons for life, with remainder to the son of G. J. H. in tail. Real estate, consisting of land, etc., was by the will devised to similar uses. On Apr. 16, G. J., the son of G. J. H., attained the age of 21 years, the tenants for life having previously died. By a deed dated Apr. 17, 1875, G. J. disentailed "all & singular the manors, farms, hereditaments, & premises comprised in & devised by "the will (which was recited so far as the devise, but not the appointment was concerned), " & all other the lands, hereditaments, & premises whatsoever which G. J. was seized of or entitled to as tenant in tail in possession or in anywise howsoever." By a deed dated Apr. 18, 1857, reciting that G. J. was seized of or entitled to the several manors described in the schedule thereto for an estate in fee simple in possession, subject to certain charges, & that he was desirous of settling the same in manner thereafter mentioned, G. J. conveyed "all & singular the manors, messuages, farms, lands, hereditaments, & premises comprised & described in the schedule, etc., & all other freehold hereditaments of G. J., situate in the several parishes of D., W., & C., in the county of York," to certain trustees. The advowson was not mentioned in the schedule, & it was not subject to the charges which affected the property therein specifically mentioned:—*Held:* the advowson passed by the disentailing deed, but not by the resettlement.—**CROMPTON v. JARRATT (1885),** 30 Ch. D. 298; 54 L. J. Ch. 1109; 53 L. T. 603; 33 W. R. 913, C. A.

**Annotations:—***As to (1) Distd.* *Re* Hodgson, Taylor v. Hodgson, [1898] 2 Ch. 545. *Reid.* *Re* Durham, Grey v. Durham (1887), 57 L. T. 164; *Early* v. Rathbone (1888), 57 L. J. Ch. 652. *As to (2) Reid.* *Re* Hodgson, Taylor v. Hodgson, [1898] 2 Ch. 545. *Generally, Mentd.* Southport & West Lancashire Banking Co. v. Thompson (1887), 58 L. T. 143.

**2019.** ———. *—* Recovery. Affidavit of presentation necessary to admit the word "advowson" in an amendment.—**HOLMES v. SETON (1825),** 3 Bing. 176; 10 Moore, C. P. 585; 130 E. R. 481.

**2020.** *"Tenement."* — **LONDON v. SOUTHWELL COLLEGIATE CHURCH (CHAPTER) (1618),** Hob. 303; 80 E. R. 447.

**Annotations:—***Reid.* R. v. Rochester, Bp. & Clark (1675), 2 Mod. Rep. 1; Barret v. Glubb (1776), 2 Wm. Bl. 1052; Mirehouse v. Rennell (1833), 7 Bl. N. S. 241; Crompton v. Jarratt (1885), 30 Ch. D. 298.

**2021.** ———. *—* **WESTFALING v. WESTFALING, No. 2015, ante.**

**2022.** ———. *Devise.* *—* **ALBEMARLE (EARL) v. ROGERS, No. 2016, ante.**

**2023.** ———. *—* An advowson in gross passes in a will under the word tenement.—**GULLY v. EXETER (Bp.) (1827),** 4 Bing. 290; 12 Moore, C. P. 591; 5 L. J. O. S. C. P. 178; 130 E. R. 779.

**Annotations:—***Consd.* Crompton v. Jarratt (1885), 30 Ch. D. 298. *Mentd.* McGahey v. Alston (1836), 2 M. & W. 206; Doe d. Sams v. Garlick (1815), 14 M. & W. 698; Beauchamp v. Winn (1869), 4 Ch. App. 562.

**2024.** ———. *—* **COOKE v. CHOLMONDELEY, No. 2017, ante.**

**2025.** *"Commodities, emoluments, profits, & advantages."* — **LONDON v. SOUTHWELL COLLEGIATE CHURCH (CHAPTER), No. 2020, ante.**

**2026.** *"Lands."* — **SAVIL v. SAVIL (1737),** Fortes. Rep. 351; 92 E. R. 886.

**2027.** ———. *—* **WESTFALING v. WESTFALING, No. 2015, ante.**

**2028.** *"Vicarage"* — **Whether advowson of vicarage included.** — **ASHEGILLS & DENNIS CASE (1589),** 1 Leon. 191; 74 E. R. 176; *sub nom.* ANON., Cro. Eliz. 163.

**2029.** *Rectory.* *—* Fine amended by inserting the word advowson, the word rectory being thought

insufficient.—**MANLEY v. TATTERSALL** (1812), 4 Taunt. 257; 128 E. R. 328.

*Annotation*.—**Reid**. Rowlett v. Orlebar (1815), 1 Marsh. 152.

**2030.** —[—]—Recovery amended by substituting the words "advowson of the church" for the word "rectory."—**COORE v. SPRAGG** (1818), 8 Taunt. 333; 129 E. R. 410.

**2031.** —[—]—In a deed to lead the uses, the premises were described as "the advowson & right of patronage of the rectory of A. & tithes thereto belonging"; & in the recovery as, "the rectory & tithes, together with the advowson of A.":—**Held**: the description in the recovery was sufficient; the ct. refused to amend it to make it conformable to the deed.—**DOWNES v. DOWNES** (1827), 6 L. J. O. S. C. P. 1.

**2032.** "Manors."—**COOKE v. CHOLMONDELEY**, No. 2017, *ante*.

**2033.** "Living"—Whether advowson or next presentation.—Devise of real estate to one & her children:—**Held**: (1) although there were children *in esse* at the date of the will, to create an estate tail; that being the only mode of carrying into effect the whole intention of the will.

(2) The word "living" is sufficient to pass the advowson, but it may be restricted to the next presentation. The context must determine which is its meaning.

(3) Devise to a minor of "the livings of Q. & C. should he like the profession & be qualified for them":—**Held**: to show an intention to confer on the devisee a personal benefit; therefore, the devise was confined to a single presentation, & did not extend to the advowson.—**WEBB v. BYNG** (1850), 2 K. & J. 609; 4 W. R. 657; 69 E. R. 951; *affd.* 8 De G. M. & G. 633, L. J.J.; *affd.* *sub nom.* **BYNG v. BYNG** (1862), 10 H. L. Cas. 171, H. L.

*Annotations*.—As to (1) **Reid**. Grieve v. Grieve (1867), L. R. 4 Eq. 180; Roper v. Roper (1867), 36 L. J. C. P. 270; *Re* Wilmot, Wilmot v. Betterton (1897), 76 L. T. 415. *Generally*, **Mentd.** De Windt v. De Windt (1864), 4 New Rep. 184; Forsbrook v. Forsbrook (1867), 16 W. R. 290; Allgood v. Blake (1872), L. R. 7 Exch. 339.

**2034.** "Situate in"—Whether applicable.—**ANON.** (1573), No. 2012, *ante*.

**2035.** —[—]—A., seised in fee, devised his lands & tenements in B. to trustees, to apply part of rents for charitable uses. Testator died; the church of B. became void:—**Held**: the heir at law should present.

An advowson being but a right of presenting, cannot be said to be situate (LORD TALBOT, C.).—**KENSEY v. LANGHAM** (1735), Cas. temp. Talb. 143; 25 E. R. 707, L. C.

*Annotations*.—**Consd.** Gully v. Exeter, Bp. (1827), 4 Bing. 290; Crompton v. Jarratt (1885), 30 Ch. D. 208.

**2036.** —[—]—**CROMPTON v. JARRATT**, No. 2018, *ante*.

**2037.** —[—]—G., who owned two advowsons, both situate in the county of L. & close to an estate which he had purchased there, gave one of his sons the option of acquiring this estate, " & all other my real estate in the county of L." at a certain price, as part of his share under the will, & in the event of his exercising that option devised to him the estate absolutely. The son having exercised the option, the question was now raised whether these advowsons, which were in gross, passed under the will:—**Held**: upon the general tenor of the will construed with reference to the surrounding circumstances, the advowsons passed under these words.—**Re HODGSON, TAYLOR v. HODGSON**, [1898] 2 Ch. 545; 67 L. J. Ch. 591; 79 L. T. 345; 47 W. R. 44.

**2038.** Exception of "churches & vicarages"—Whether perpetual curacy within exception.—

Where the grant of a rectory by the Crown contained an exception of all churches & vicarages thereto belonging, a perpetual curacy belonging to the rectory passed by the grant, not being included in the exception.—**ARTINGTON v. CHESTER** (Bp.) (1790), 1 Hy. Bl. 418; 126 E. R. 243.

What words pass right of next presentation.—**See** Sect. 4, sub-sect. 2, E. (b), *post*.

(b) Where Advowson Appendant to Manor.

**2039.** Crown grant—"With appurtenances."—Right vested in Crown.—On exception from previous grant.—Queen Elizabeth being seised in fee *jure coronæ* of the manor of W. to which an advowson was appendant, demised the manor, with the appurtenances for 21 years excepting the advowson, & afterwards reciting the demise & exception, made another demise in reversion to the same grantee for another term of years with the like exception. James I. in consideration of services, *ex certa scientia*, etc., granted the manor, *cum suis juribus*, etc. to G., *exceptis quæ in eisdem litteris patentibus excipiuntur*, & mentioned the lease in reversion & the like exception therein; then followed this clause: *Et ulterius de uberiori gratia nostra & ex certa scientia*, etc., *damus omnia tenementa prædicta manerio quoque modo spectantia*, etc. *et uberiori damus*, etc., to G. & his heirs the manor *ac cætera omnia et singula præmissa cum earum pertinentiis adeo plene*, etc., as the same came to him & they were in his hands:—**Held**: the advowson passed by the grant of James I. When the King's charter in general terms refers to a certainty, it contains an express mention as if the certainty had been expressed in the same charter, although the certainty to which the reference is, be not of record, but lies in averment by matter in *pais* or in fact. If the words *adeo plene et integre* had been omitted, then the advowson would not have passed by the first clause; but by the addition of the last clause, all the parts of the patent taking effect at one & the same time, the advowson passed as appendant. The exception "*exceptis quæ in eisdem litteris patentibus excipiuntur*" extended only to leases recited, & not to any exception out of the letters patent of the fee simple.—**WHISTLER v. OXFORD** (Bp.) (1613), 10 Co. Rep. 63 a; 77 E. R. 1021.

*Annotations*.—**Distd.** R. v. Rochester, Bp. (1675), 2 Mod. Rep. 1. **Consd.** A-G. v. Ewelme Hospital (1853), 17 Beav. 366. **Reid**. Stukely v. Butler (1614), Hob. 168; Holland v. Fisher (1602), O. Bridg. 181; Doe d. Devine v. Wilson (1855), 10 Mod. P. C. C. 502. **Mentd.** Stonehouse v. Corbet (1635), Cro. Car. 400; Jervison v. Dyson (1842), 6 State Tr. N. S. 1; *Re* Hollday, [1922] 2 Ch. 698.

**2040.** — Advowson formerly appendant.—Described in grant as still appendant.—If a manor formerly in the possession of an abbot, & to which manor an advowson was appendant, be granted to an archbishop, with an exception of the advowson, the appendancy is thereby destroyed; but if the archbishop re-convey the manor to the king, describing the advowson as appendant, a subsequent grant of the manor & advowson to the archbishop formerly belonging, & which was re-granted to the king by the archbishop, & lately in the possession of the abbot "*adeo plene*, as the archbishop or abbot had it, or as it was in our hands by any ways & means whatsoever," will pass the advowson, although it never did belong to the archbishop.—**R. v. ROCHESTER** (Bp.) & **CLARK** (1675), 1 Mod. Rep. 195; 2 Mod. Rep. 1; 3 Keb. 412; 1 Freem. K. B. 172, 178; 86 E. R. 821, 906.

*Annotations*.—**Reid**. R. v. Kempe (1695), 1 Ld. Raym. 49; R. v. Chester, Bp. (1697), 1 Ld. Raym. 292; Delacherols v. Delacherols (1664), 4 New Rep. 501.

**Sect. 4.—Patronage of benefices: Sub-sect. 2, B. (b), C., D. & E. (a), (b), (c), (d) & (e).]**

Effect of false recitals, generally, *see* CONSTITUTIONAL LAW, Vol. XI., pp. 559, 560, Nos. 596–601.

— **During vacancy of living.]—See** Nos. 2056, 2057, *post*.

— **]**—*See, also*, CONSTITUTIONAL LAW, Vol. XI., pp. 569, 570, 573, Nos. 697, 698, 730.

**2041. Disposition by subject—With general words—Of part of manor.]—ANON.** (1557), Ben. 18; 123 E. R. 239.

**2042. ——— Whether advowson severed previously included.]—A** grant of a manor with all advowsons, etc. thereunto belonging, will not extend to an advowson severed in ancient times, though it was appendant to the manor 300 years ago.—*It. v. DURHAM* (Bp.) (1720), 1 Com. 301; 92 E. R. 1112.

**2043. ——— ]—MILBANKE v. JOLLIFFE** (1772), 2 Bos. & P. 580, n.; 126 E. R. 1450.

*Annotations:—Mentd.* Owen v. Owen (1819), 3 Moore, C. P. 70; Lloyd v. Nicholas (1838), 6 Scott, 355.

**2044. ——— Of component parts of manor—Manor not specifically granted.]—LONG v. GLOUCESTER** (Bp.) (1588), Sav. 103; 123 E. R. 1037.

— **]**—*See, also*, CORYHOLDS, Vol. XIII., pp. 13, 15, Nos. 50, 69–72.

### C. Transfers by Spiritual Corporations.

**2045. Lease—Whether binding on successor—Grant of advowson to bishop after death of incumbent—Lease to commence when advowson falls in.]—On** the grant of an advowson to a bishop & his successors after the death of the then incumbent; a lease by the bishop to commence when the advowson falls in, is void against his successor if the incumbent survive him.—*MONTGOMERY'S CASE* (1506), 2 Dyer, 244; 73 E. R. 540.

*Annotations:—Refd.* Lamport's Case (1612), 10 Co. Rep. 46 b. *Mentd.* Fiddle v. Napper (1612), 11 Co. Rep. 8 b.

**2046. ——— ]—(1)** A grant of a next avoidance is good against the bishop who grants it, but not against his successor.

(2) *A quare impedit* lies by exors. for disturbance in presenting to an archdeaconry void in the time of their testator; but if they allege it in *nunc retardationem* it shall abate.—*SMALWOOD v. COVENTRY, ETC.* (Bp.) & *MARSH* (1590), Cro. Eliz. 141, 207; Sav. 94, 118; 1 Leon. 205; 1 Lut. 1; 78 E. R. 398, 403; *sub nom.* *SALE v. COVENTRY & LICHFIELD* (Bp.), 1 And. 241; Owen, 90.

*Annotations:—As to* (1) *Refd.* Lincoln College's Case (1596), 3 Co. Rep. 58 b; Salisbury's Bp., Case (1614), 10 Co. Rep. 58 b. *As to* (2) *Refd.* Mirehouse v. Rennell (1833), 7 Bl. N. S. 241.

**2047. ——— Whether binding on lessor.]—SMALWOOD v. COVENTRY, ETC.** (Bp.) & *MARSH*, No. 2046, *ante*.

**2048. Grant—Whether binding on successor.]—A** bishop cannot grant an advowson appendant to a manor held in right of his bishopric for a longer term than while he fills the see.—*ARMIGER v. NORWICH* (Bp.) & *HOLLAND* (1599), Cro. Eliz. 690; 78 E. R. 920.

*Annotation:—Refd.* Mirehouse v. Rennell (1833), 7 Bl. N. S. 241.

**2049. ——— ]—BYNG v. LINCOLN** (Bp.) (1620), Winch Entries 853.

*Annotation:—Refd.* Mirehouse v. Rennell (1833), 7 Bl. N. S. 241.

**2050. ——— Whether binding on Crown.]—BYNG v. LINCOLN** (Bp.) (1620), Winch Entries 853.

*Annotation:—Refd.* Mirehouse v. Rennell (1833), 7 Bl. N. S. 241.

**2051. ——— Whether binding on grantor.]—BYNG v. LINCOLN** (Bp.) (1620), Winch Entries 853. *Annotation:—Refd.* Mirehouse v. Rennell (1833), 7 Bl. N. S. 241.

— **Grant of right of next presentation.]—See** No. 2068, *post*.

### D. When Benefice Vacant.

**2052. Validity—Whether simoniacal.]—(1)** Sale of an advowson during vacancy is not within the stat. of Simony, but is void at common law.

(2) Resignation bonds are good at law & also in equity, unless an ill use is attempted to be made of them, in which case the ct. will interfere.

(3) In case of a resignation bond, the bishop's refusal to accept the resignation is no excuse for not resigning.—*GREY v. HESKETH* (1755), Amb. 208; 27 E. R. 178, L. C.

*Annotations:—As to* (2) *Refd.* Lough v. Lewis (1801), 1 East, 391. *As to* (3) *Refd.* Itchel v. Oxford, Bp. (1887), 35 Ch. D. 48. *Generally, Mentd.* Fox v. Chester, Bp. (1824), 2 B. & C. 635.

Simony generally, *see* Sect. 5, *post*.

**2053. ——— Grant saving next presentation.]—A** grant of an advowson, except the next presentation, made during a vacancy is good. A., seised in fee of an advowson, except the next presentation, which B. had under the same title, in consideration of natural love & affection, conveyed the advowson in fee to his son upon a vacancy happening, C. claiming title to the advowson contested the next presentation against B. in a *quare impedit*. A., B. & C. entered into a compromise, upon the terms that C. should release his claims to A. & B. according to their respective interests, & that A. should convey to C. the then next following presentation, which he did:—*Held*: the grant of that presentation was a conveyance for a valuable consideration, & was paramount to the grant made to the son of A.—*HILL v. EXETER* (Bp.) (1809), 2 Taunt. 69; 127 E. R. 1001.

*Annotations:—Mentd.* Gully v. Exeter, Bp. (1830), 10 B. & C. 584; Doe d. Richards v. Lewis (1852), 11 C. B. 1035; *Re* Lulham, Brinton v. Lulham (1884), 53 L. J. Ch. 928.

**2054. ——— Transfer by patron to trustee—Trust to appoint nominee—Patron nominating himself.]—The** patron of a donative benefice, being a qualified clergyman & officiating curate of the church, by deed-poll, executed during a vacancy of the benefice, granted the advowson to a trustee in trust to present whomsoever the patron should nominate; the patron then by word of mouth nominated himself, & the trustee by deed-poll granted the office of rector to him:—*Held*: the transaction was valid, & thereupon [patron] became rector & entitled to the profits of the benefice.—*LOWE v. CHESTER* (Bp.) (1883), 10 Q. B. D. 407; 48 L. T. 790; 47 J. P. 375.

**2055. Crown grant—Crown having two titles—By lapse & fee—First presentation in Crown.]—WESTON'S CASE**, No. 65, *ante*.

**2056. ——— Of manor—With advowson appendant—First presentation in crown.]—BEDMINSTER MANOR CASE** (1571), 3 Dyer, 300 a; 73 E. R. 674.

*Annotation:—Refd.* R. v. Dover Corpn. (1835), 5 Tyr. 279.

**2057. ——— ]—GORGE'S CASE** (1587), Moore, K. B. 249; 72 E. R. 560.

**2058. Acceptance by clerk of other preferment—Induction therein.]—Grant** of an advowson after institution of the clerk to a second living is void, but no lapse incurs till after induction to the second.—*LINCOLN* (Bp.) v. *WOLFERSTAN* (1704), 1 Wm. Bl. 490; 3 Burr. 1504; 96 E. R. 284; *affy. S. C. sub nom.* *WOLFERSTAN v. LINCOLN* (Bp.), 2 Wils. 174.

*Annotations:—Refd.* Alston v. Atlay (1836), 3 Har. & W.

166. *Mentd.* Barret v. Glubb (1776), 2 Wm. Bl. 1052; Greenwood v. London, Bp. (1814), 1 Marsh. 292; Rennell v. Lincoln, Bp. (1827), 7 B. & C. 113; Mirehouse v. Rennell (1832), 8 Bing. 490.

**2059.** —[Pltf., being incumbent of the living of C., which was under the annual value of £8, accepted the living of O., with cure of souls. Afterwards, the patron of C. sold the advowson to L.; & L. presented a clerk, who was instituted & inducted, & subscribed the Articles:—*Held*: the living, as against the patron, was void by pltf.'s acceptance of O., & disannexed from the advowson; consequently, it did not pass by the sale; L.'s presentee was not incumbent; pltf., not having been ousted *de facto*, might sue for the tithes. It made no difference, as to this, whether the patron of C., or his vendee, knew or did not know of pltf.'s acceptance of O.—*ALSTON v. ATLAY* (1837), 7 Ad. & El. 280; 2 Nev. & P. K. B. 402; Will. Woll. & Dav. 602; 7 L. J. Ex. 302; 112 E. R. 480, Ex. Ch.

**2060. Vacancy pendente lite—Suit to set aside conveyance—Presentation by vendor—Whether revocable.**—A lay patron may revoke his presentation & such revocation cannot be void for simony.

A. contracts with B. for the purchase of an advowson at a certain price, & a conveyance is accordingly executed. There being afterwards some suspicion of fraud on the part of A., B. files his bill to set aside the conveyance on that ground. Pending the suit, the church becomes vacant, & both parties present, but neither of their clerks is instituted. Afterwards a compromise takes place, & B., in consideration of a further sum, executes a deed of confirmation, & also an instrument revoking his presentation. Upon a question between B.'s clerk & A.:—*Held*: the deed & instrument were not in law a good revocation, but the clerk of B. was entitled to the benefit of his presentation.—*ROGERS v. HOLLED* (1775), 2 Wm. Bl. 1039; 1 Bro. Parl. Cas. 117; 96 E. R. 611.

**2061. Living unlawfully held—By presentee of usurper.**—*WALKER v. HAMERSLEY* (1684), Skin. 90; 3 Lev. 115; 90 E. R. 43.

*Annotations.*—*Consd.* Alston v. Atlay (1837), 7 Ad. & El. 289. *Mentd.* Barret v. Glubb (1776), 2 Wm. Bl. 1052.

**Grant of Right of next Presentation.**—See Sect. 5, sub-sect. 2, *post*.

### *E. Transfer of Right of Next Presentation.*

#### *(a) Form of Instrument.*

**2062. Whether deed necessary.**—The next avoidance of a church must be granted by deed.—*CRISP'S CASE* (1589), Cro. Eliz. 164; 78 E. R. 122.

#### *(b) What Words operate to Pass Right.*

**2063. Crown grant—"Goods & chattels of felon."**—*R. v. CANTERBURY (ARCHBP.), FANE & HUDSON* (1589), 1 Leon. 201; 4 Leon. 107; Owen, 155; 74 E. R. 185, 761.

*Annotation.*—*Refd.* Mirehouse v. Rennell (1832), 1 Cl. & Fin. 527.

**2064.** —[—]*HOLLAND v. SHELLEY* (1619), Hob. 302; 80 E. R. 446.

*Annotations.*—*Refd.* Rennell v. Lincoln, Bp. (1825), 3 Bing. 223. *Mentd.* Orby v. Mohun (1706), 2 Freem. Ch. 291; Rennell v. Lincoln, Bp. (1827), 7 B. & C. 113.

#### *(c) When Benefice Vacant.*

See Sect. 5, sub-sect. 2, *post*.

#### *(d) Right vested in Several Persons.*

**2065. Release by one to other co-owner—Validity—During vacancy.**—*BROKESBY & WICKHAM'S CASE* (1590), 3 Leon. 256; 74 E. R. 669;

*sub nom.* *BROKESBY v. LINCOLN (BP.)*, 1 And. 223; *sub nom.* *BROOKSBIE'S CASE*, Cro. Eliz. 174. *Annotations.*—*Refd.* Lennason & Dickson's Case (1626), Poph. 189; Wolferstan v. Lincoln, Bp. (1763), 2 Wils. 174; Mirehouse v. Rennell (1832), 8 Bing. 490.

**2066.** —[When living full.]—If the next avoidance of a church be granted to two, one of them may release to the other before the avoidance happens.—*BROOKSBIE'S CASE* (1590), Cro. Eliz. 174; 78 E. R. 431; *sub nom.* *BROKESBY v. LINCOLN (BP.)*, 1 And. 223; *sub nom.* *BROKESBY & WICKHAM'S CASE*, 3 Leon. 256.

*Annotations.*—*Refd.* Lennason & Dickson's Case (1626), Poph. 189; Wolferstan v. Lincoln, Bp. (1763), 2 Wils. 174; Mirehouse v. Rennell (1832), 8 Bing. 490.

**2067.** —[—]—One of two grantees of the next avoidance of a church may release to the other before the avoidance happens.—*BENNETT v. NORWICH (BP.)* (1598), Cro. Eliz. 600; 78 E. R. 843.

#### *(c) Other Cases.*

**2068. Grant by bishop—Whether binding on grantor.**—*BATH & WELLS (BP.)'S CASE* (1572), Pal. 82; Rast. 522; 123 E. R. 292.

*Annotations.*—*Refd.* Mirehouse v. Rennell (1832), 1 Cl. & Fin. 527. *Mentd.* Bully v. Palmer (1698), 12 Mod. Rep. 247.

**2069. Grant by tenant in tail—Vacancy after grantor's death.**—*BOWLES v. WALTER* (1615), 1 Roll. Rep. 190; 81 E. R. 423.

**2070. Grantor having no title to next presentation—But entitled to subsequent presentation in turn.**—*ANON.* (1537), 1 Dyer, 35 a; 73 E. R. 78.

*Annotations.*—*Refd.* Williams v. Lincoln, Bp. (1600), Cro. Eliz. 790; Comendani's Case, Woodley v. Exeter, Bp. & Mannerling (1624), Wils. 94.

**2071. Grant by lessee—If vacancy during term—Subsequent surrender of lease by lessee.**—If A., lessee for years of an advowson, grants the next avoidance to B., if it shall happen to become void during the term, & then surrenders the term to C. who has the inheritance, & the church becomes void before the end of the term, the grant to B. is good, & he shall have the next avoidance, for a man cannot derogate from his own grant.

If a lessee for years grants a rent-charge to a stranger, & after surrenders his term to the lessor, the stranger shall have the rent during the term.—*BRADSHAW v. DAVENPORT* (1610), 8 Co. Rep. 144 b; 77 E. R. 693.

*Annotations.*—*Refd.* Comendani's Case, Woodley v. Exeter, Bp., & Mannerling (1624), Wils. 94; Doe d. Beardon v. Pyke (1816), 5 M. & S. 146. *Mentd.* Fisher v. Wigg (1709), 1 P. Wms. 14; Piggott v. Stratton (1859), 1 De G. F. & J. 33; Harding v. Proce (1882), 9 Q. B. D. 281; David v. Sabin, [1893] 1 Ch. 523.

**2072. Grant by tenant for life—With covenants for title—Validity as against remainderman.**—A., tenant for life, & B., a mtgee. (not in possession), sell the next presentation to a church to C., who takes a covenant from A. that if he cannot present, she, her executors, etc., shall repay him the purchase money. This grant is void as against the remainderman, & the purchaser shall recover his money from the administrators of the tenant for life.—*DYMOKE v. HOBART* (1701), 1 Bro. Parl. Cas. 108; 1 E. R. 448.

**2073. Grant for life.**—*MANN v. BRISTOL (BP.)* (1638), Cro. Car. 505; 79 E. R. 1036.

*Compare* No. 2099, *post*.

**2074. Exercise of Crown's prerogative—On incumbent becoming bishop—Whether grantee prejudiced.**—If, after a grant of a next presentation of a living, the incumbent be made a bishop, by which the living becomes vacant & the King is entitled to present, the grantee may present on the next vacancy occasioned by the death or resignation of the King's presentee.—*TROWARD v.*





**2087.** — — — **After death of incumbent.]**—**JOHNSTONE v. BAKER**, No. 2101, *post*.

**2088.** — — — **Of advowson when church full — Vacancy before sale.]**—Testator, the owner of an advowson, after directing that £13,000 should be invested & the interest paid to his wife for her life for the support of herself & their children, directed his exors., when the church was full, to sell the advowson & also certain freehold land, & invest the proceeds for the same purpose as before directed with respect to the sum of £13,000, & after the death of his wife then for the purposes in the will mentioned. Testator died in Sept. 1874, the church then being full, & he left a widow & five infant daughters, his co-heiresses-at-law, him surviving. The exors. did not sell the advowson, & on the death of the incumbent in Feb. 1875, the question arose who was entitled to nominate to the vacant benefice:—*Held*: the right to nominate was in the widow.—**BURGES v. SHARP** (1875), L. R. 20 Eq. 317; 41 L. J. Ch. 510; 33 L. T. 154; 23 W. R. 806.

*Annotation*:—**Folld.** **Welch v. Peterborough**, Bp. (1885), 15 Q. B. D. 432.

**2089.** — — — **To pay income to widow of patron incumbent.]**—A vicarage consisted of two mediety, the advowson of one of which was vested in the Lord Chancellor & of the other in W.

In Aug. 1878, the Lord Chancellor, under Lord Chancellor's Augmentation Act, 1863 (c. 120), sold the advowson of the first mediety to W., sect. 21 of that Act providing that it should not be lawful for the purchaser to sell or contract for the sale of the advowson or next presentation till the expiration of five years from the date of the sale to such purchaser. By Ord. in Council of May, 1879, ratifying a scheme prepared under Eccles. Comrs. Act, 1840 (c. 113), (a) the two mediety became one undivided benefice; (b) W. became incumbent thereof; (c) the advowson was vested in W., his heirs & assigns. In Aug. 1879, W. mortgaged the advowson of the consolidated benefice to H., to whom, prior to his purchase from the Lord Chancellor of the first mediety, he had mortgaged the second. All the mtges. contained the usual powers of sale. In Mar. 1882, H. died, & in Mar. 1883, his exors. contracted to sell the whole advowson to his widow under the power of sale in the mtge., & in Apr. 1883, the widow of H. contracted to sell it to E. In June, 1883, W. died insolvent (the mtge. debt being still unpaid), having by his will devised all his real estate to trustees in trust to receive the income thereof, & pay it over to his wife for her life. In Dec. 1883, the exors., on the nomination of H.'s widow, presented a person designated by E. to the bishop for induction:—*Held*: (1) the right of nomination & presentation was in W.'s widow under his will & not in the exors. of H.; (2) the Ord. in Council of May, 1879, did not avert the operation of the prohibition on sale for five years contained in sect. 21 of the 1863 Act; (3) the presentation of the person designated by E. by the exors. could not operate as a new contract of sale, though after the expiration of five years from Aug. 1878, as the living being vacant at the time of such presentation, the contract would be invalid.—**WELCH v. PETERBOROUGH** (Bp.) (1885), 15 Q. B. D. 432; 1 T. L. R. 471; 1 Cab. & El. 534.

**2090.** **Contingent devise — To son of A. who should become clergyman.]**—A. devised an advowson to the first or other son of B., that should be bred a clergyman, & be in holy orders, in fee, but in case B. should have no such son, then to C. in fee. Both devises are void, as depending on too

remote a contingency; therefore though B. dies without having had a son, the heir at law of the devisor & not C. is entitled.—**PROCTOR v. BATH & WELLS** (Bp.) (1794), 2 Hy. Bl. 358; 120 E. R. 594.

*Annotations*:—**Consd.** **Tollemache v. Coventry** (1834), 8 Bl. N. S. 547; **Monypenny v. Dering** (1852), 2 De G. M. & G. 145; **Hancock v. Watson**, [1902] A. C. 14. **Refd.** **Dunannon v. Smith** (1846), 12 Cl. & Fin. 546; **Catlin v. Brown** (1853), 11 Hare, 372; **Egerton v. Brownlow** (1853), 4 H. L. Cas. 1; **Evers v. Challis** (1859), 7 H. L. Cas. 53; **Re Bence, Smith v. Bence**, [1891] 3 Ch. 242.

(b) *Devise of Right of Next Presentation.*

**2091. Validity.]**—(1) If one presents unto my benefice, & I bring a *quare impedit* against the ordinary, & the disturber, & leave out the incumbent, yet by this I shall recover my patronage, but not to remove the incumbent (**DODDERIDGE, J.**).

(2) A next presentation may be devised. Where the next presentation is devised to three exors., two of them may present the third (**DODDERIDGE, J.**).—**HARRIS v. AUSTIN** (1615), 3 Bulst. 36; 1 Roll. Rep. 211; 81 E. R. 31.

*Annotations*:—**Generally.** **Refd.** **Ashburnham v. Bradshaw** (1740), West. temp. Hard. 505; **Wolferstan v. Lincoln**, Bp. & Whitehead (1763), 2 Wils. 174; **Alston v. Atlay** (1837), 7 Ad. & El. 289.

**2092. Construction — Whether devise absolute — Or limited to devisee presenting himself.]**—Devise to A. of "the next turn or presentation of the church of B., after the death of the present possessor, & after the death of A., the living to revert to the testator's heir," is a devise of the next turn of presenting absolutely, & not merely of getting himself presented. **LAW v. LINCOLN** (Bp.) (1778), 2 Wm. Bl. 1240; 96 E. R. 731.

**2093.** — — — **Extension of clear gift by doubtful words.]**—After a clear gift to a college of three presentations to a living their interest cannot be extended by doubtful words. **EMANUEL COLLEGE v. NORWICH** (Bp.) (1793), 4 Bro. C. C. 481; 20 E. R. 999.

**2094.** — — — **Next presentation in another.]**

(1) A., by will, directed trustees, "upon the death of the present incumbent," to present X. to the living of S., in case he should take orders; & if he should not, or, taking orders, should die in the lifetime of B., then to present B., in case he should take orders; & after their several deceases, or of such of them as should take orders & be presented, or in the event of neither taking orders, she devised the advowson to C. in fee:—*Held*: the gifts in favour of A. & B. were in succession & not alternative, & on the death of X., B. was entitled to be presented.

(2) A testator having the power of disposing of an advowson (subject to the existing incumbency of A., & a contingent right of B. to be afterwards presented), devised "the next avoidance thereof" in favour of C.:—*Held*: "the next" meant the next the testator had power to dispose of, viz. that following the incumbency by A. & of B. **HATCH v. HATCH** (1855), 20 Beav. 105; 3 W. R. 354; 52 E. R. 542.

**2095.** — — — **"Living" — Whether next presentation or advowson.]** **WEBB v. BYNG**, No. 2033, *ante*.

**2096.** — — — **"Rents, issues & profits."]**—A testator who was entitled to various rectories in S., devised his manors, advowsons, messuages & hereditaments in S. to trustees upon trust to make certain payments out of the rents, issues & profits, & subject thereto to accumulate the "residuary or surplus rents, issues & profits" of the same property for 21 years on specified trusts. A claim by the heir-at-law to the proceeds of sale of a next presentation to one of the testator's

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rectories, on the ground that the next presentations were not disposed of under the trust of "rents, issues & profits," was disallowed, on the construction of the whole will. *Semble*: the words "rents, issues & profits" were of themselves sufficient to include the proceeds of sale of the next presentation.—*CUST v. MIDDLETON* (1864), 34 L. J. Ch. 185; 11 L. T. 552; 10 Jur. N. S. 1227; 13 W. R. 249, L. J.J.

**2097. Rights of devisee—Devise to executors—Right to present one executor.]—***HARRIS v. AUSTIN*, No. 2091, *ante*.

(c) *Other Cases.*

**2098. Devise of advowson in gross—Validity.]—***CLERKE'S CASE* (1591), Owen, 24; 74 E. R. 873.

**2099. Devise for life—Validity.]—**A devise, introduced by the words "I do give & dispose of all my worldly goods" & preceded by a devise immediately following those words of a manor & lands, of "the perpetual advowson of H. B. in L., & my manor of S. & all my lands in N.":—*Held*: not sufficient to carry a fee in the lands in N. to a devisee who was one of three residuary legatees, for want of words of inheritance or perpetuity; he only took an estate for life in the lands so devised, the ct. giving no opinion as to what estate he took in the advowson, holding that, even if he had taken a fee therein it would not have altered or extended the effect of the subsequent devise of the lands: but the rule of law must prevail against the apparent hypothetical intention of the testator.—*DOE d. CRUTCHFIELD v. PEARCE* (1815), 1 Price, 353; 145 E. R. 1427.

*Annotation:—Reid. Pocock v. Lincoln*, Bp. (1821), 3 Brod. & Bing. 27.

**2100. —What words create—Devise to incumbent son Without words of inheritance.]—**"I do give to my son R. the perpetual advowson of H. B. in Leicestershire, & my manor of S., & all my lands in Northamptonshire":—*Held*: this devise gave only an estate for life in the advowson to R., though he, at the time of making the will, was incumbent of the living.—*Pocock v. LINCOLN* (Bp.) (1821), 3 Brod. & Bing. 27; 6 Moore, C. P. 159; 129 E. R. 1193.

*Annotations:—Reid. Dover v. Alexander* (1843), 2 Hare, 275; *Sayer v. Sayer*, *Imies v. Sayer* (1848), 7 Hare, 377.

**2101. Devise on trust for sale—On death of incumbent—Whether court can order sale before death of incumbent.]—**A testator devised his advowson to trustees, to sell on the death of A. & divide the produce amongst certain persons. A. was the incumbent, so that on his death no sale could be made until the vacancy was filled up:—*Held*: the ct. had no jurisdiction to authorise a sale in the lifetime of A. on the ground that it would be beneficial to the parties.—*JOHNSTONE v. BAKER* (1845), 8 Beav. 233; 4 L. T. O. S. 392; 50 E. R. 91.

*Annotation:—Reid. Want v. Stallibrass* (1873), L. R. 8 Exch. 175.

(d) *Other Cases.*

**Transfer when incumbent in extremis.]—***See* No. 2234, *post*.

**2102. When simoniacal—Who entitled to present after presentation by Crown.]—**A., the incumbent of a living & owner of the advowson, agreed with B. for the sale of the advowson, & for the immediate resignation of the living, & accordingly, tendered his resignation to the bishop, who refused to accept it. Another agreement was then entered into between the same parties for the sale

of the advowson only, without any contract for the resignation, & at the same time, by a separate agreement, A. granted a lease of the tithes & profits to B. for 99 years, if A. should so long live, under which lease B. received the profits till A.'s death. On A.'s death, the Crown presented for that turn only by reason of simony. The incumbent presented by the Crown died, whereupon B. claimed the right to present. It was objected by A.'s heir, that the second contract for the sale of the advowson, & the lease of the tithes of the same date, being for the purpose of carrying the former simoniacal contract into effect, was also simoniacal & void:—*Held*: whether the second agreement were simoniacal or not, the illegality, if any, extended to the next presentation only, & therefore, the Crown having presented for one turn, B. had a good title to the advowson, & had a right to present on the present vacancy.—*GREENWOOD v. LONDON* (Bp.) (1814), 5 Taunt. 727; 1 Marsh. 292; 128 E. R. 877.

*Annotations:—Reid. Apperley v. Hereford*, Bp. (1833), 3 Me. & S. 102. *Mentd. Doe d. Broughton & Stow v. Culley* (1829), 4 Man. & Ry. K. B. 249.

**2103. Vacancy before conveyance—Purchaser's delay in completing—Purchaser's equity to present—Whether enforceable against vendor's devisee.]—**

A party had contracted with a person, since deceased, for the purchase of an advowson, but had taken no steps during the lifetime of the vendor to enforce the contract, or for a considerable time after her death (objecting to the title on the ground of outstanding judgments & a creditor's bill pending):—*Held*: not entitled as against a devisee to present, if a vacancy occur in the meantime, though he has not renounced his contract but insists on having it completed. If in consequence of his insisting on such right a bill become necessary to ascertain in the true claim to the next presentation, which is thereby put in danger of lapse, a decree in favour of plff. will carry costs as far as his claim came in question, although it be part of the decree that, subject to the next presentation, he be permitted to complete his contract.—*WYVILL v. EXETER* (Bp.) (1815), 1 Price, 292; 145 E. R. 1406.

**2104. Whether conveyed for valuable consideration.]—***GULLY v. EXETER* (Bp.) No. 2175, *post*.

—*J.—Compare* No. 2053, *ante*.

**2105. Interest on purchase-money—Payable by**

**vendor till vacancy—Vendor not incumbent.]—**An agreement for the sale of an advowson, containing a stipulation that the vendor should pay interest until the benefice became vacant, the incumbent being a son of the vendor, but not a party to the contract:—*Held*: it was not simoniacal.—*SWEET v. MEREDITH* (1862), 3 Giff. 610; 31 L. J. Ch. 817; 6 L. T. 413; 26 J. P. 356; 8 Jur. N. S. 637; 10 W. R. 402; 66 E. R. 551; *subsequent proceedings* (1863), 4 Giff. 207.

*Annotation:—Mentd. Corless v. Sparling* (1873), 21 W. R. 876.

SUB-SECT. 3.—DISTURBANCE OF RIGHT.

A. *What amounts to.*

**2106. Mere presentation.]—***HARPER v. DERBY* (BAYLIVES & BURGESSES) (1639), W. Jo. 425; 82 E. R. 223.

*Annotations:—Mentd. Woodward v. Fox* (1691), 2 Vent. 267; *R. v. Toole* (1867), 11 Cox, C. C. 75.

B. *Effect of.*

(a) *In General.*

**2107. At common law.]—**(1) At the common law, before Stat. Westminster 2, 1285, if one had

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*C. Remedies.*

*(a) Action of quare impedit.*

*i. In General.*

**2120. Whether remedy available.—Whether after induction.**—HUTTON'S CASE, No. 1211, *ante*.

**2121. ————**—OLIVER v. HUSSEY (1624), Lat. 205; 82 E. R. 348.

**2122. ———— Church & hospital.**—A *quare impedit* may be brought for a church & an hospital. — BEDFORD CORPN. v. LINCOLN (Bp.) (1746), WILLIAMS, 608; 125 E. R. 1345.

*Annotation:—Mentd.* A-G. v. St. John's Hospital, Bedford (1865), 34 L. J. Ch. 441.

**2123. ———— Whether alternative or concurrent.—Action of quare impedit & suit of duplex querela begun at same time.—Election.**—A writ was issued out of the Ct. of Common Pleas, in an action of *quare impedit*, against the Bishop of Lincoln at the suit of W., who claimed to be instituted to a living within the diocese of Lincoln, of which he was himself the patron. Whilst this action was proceeding W. instituted a suit of *duplex querela* in the Arches Ct. of Canterbury, calling upon the said bishop to show cause why W. should not be instituted to the living:—*Held*: if W. did not elect to abandon the action of *quare impedit* within ten days, the suit of *duplex querela* should stand dismissed.—WALSH v. LINCOLN (Bp.) (1874), L. R. 4 A. & E. 242; 43 L. J. Eccl. 13; 38 J. P. 602.

*Annotations:—Mentd.* The Caterina C. iazzare (1876), 1 P. D. 368; McHenry v. Lewis (1882), 47 L. T. 519; The Christiansburg (1885), 53 L. T. 612.

**2124. Extent of remedy Right to damages.**—HENSLOW & STANSHY v. SARUM (Bp.) & KEBLE, No. 2141, *post*.

**2125. ———— Crown.**—The King shall not recover damages in a *quare impedit*; for he is not within Stat. Westminster. —BUGHERD v. R. (1580), Cro. Eliz. 162; 78 E. R. 420.

**2126. ————**—BOSWELL'S CASE, No. 2107, *ante*.

**2127. ————**—BOSWELL'S CASE, No. 2107, *ante*.

**2128. ———— Delay in appealing.**—LONDON (Bp.) v. MERCERS' Co. (1732), Kel. W. 215; Fitz.-G. 169, 247; 2 Stra. 925; 2 Barn. K. B. 145, 157, 170; 25 E. R. 575.

*Annotations:—Reid.* Bodily v. Bellamy (1760), 2 Burr. 1094. *Mentd.* Grocers' Co. v. Canterbury, Archbp. (1771), 2 Wm. Bl. 770.

**2129. Effect of action Whether plaintiff entitled to mesne profits.**—If the incumbent be removed in a *quare impedit* pltf. shall not have the mesne profits. GRAINGE v. HOWLETT (1614), 1 Roll. Rep. 61; 81 E. R. 327.

**2130. ———— By stranger.—Whether rightful patron prejudiced.**—ANON. (1503), Keil. 49; 72 E. R. 207.

**2131. ———— Clerk presented by Crown by usurpation.—Avoidance of usurpation.**—A recovery in *quare impedit* against a clerk whom the King presented by usurpation avoids the usurpation.—R. v. THORNEROUGH & STUDLY (1678), 1 Mod. Rep. 253; 86 E. R. 803.

**2132. Stay of proceedings.—Writ of right by Crown.**—(1) If the King brings a writ of right pending error in *quare impedit*, the proceedings shall stay till trial had. (2) In writ of right the

suit abates by death of tenant after verdict. Whenever a clear title appears upon record for the King, the ct. shall, *ex officio*, give judgment in his favour.—YATES v. DRYDEN (1640), Cro. Car. 589; 79 E. R. 1106; *previous proceedings, sub nom.* R. v. DRYDEN (1638), Cro. Car. 511. *Annotations:—As to* (1) *Consd.* Stanley of Alderley v. Wild, [1900] 1 Q. B. 256. *Generally, Mentd.* Lethleuier v. Tracy (1753), 3 Keny. 40.

*ii. Who may bring.*

**2133. Party having right of nomination.**—ANON. (1563), Moore, K. B. 49; 72 E. R. 433.

*Annotation:—Reid.* R. v. Orton, Trustees (1849), 14 Q. B. 139.

**2134. Party having right of presentation.**—ANON. (1563), No. 2133, *ante*.

**2135. Patron's executors.**—SMALWOOD v. COVENTRY, ETC. (Bp.), & MARSH, No. 2046, *ante*.

**2136. ————**—The son of a patron may bring error on judgment in *quare impedit*, as both heir & exor.—PIPE v. R. (1594), Cro. Eliz. 325; 78 E. R. 574.

**2137. Patron's heir.**—PIPE v. R., No. 2136, *ante*.

**2138. When benefice held in mediety.**—None shall have a *quare impedit presentare ad mediety ecclesie*, but only when there are two several patrons, & two several incumbents of the church, within one & the same town. If in *quare impedit*, pltf. declares that W. was seised of a manor *ad quod advocatio mediety, etc., pertinuit, et adhuc pertinet, etc.*, it implies two several patrons, & two incumbents.—SMITH'S CASE (1611), 10 Co. Rep. 135 b; 77 E. R. 1132.

*Annotation:—Mentd.* Reynoldson v. Blake (1697), 1 Ld. Rayn. 192.

**2139. Co-heirs.—Effect of release from one.**—A release in *quare impedit* from one co-heir pltf., does not bar the rest.

In all cases of things entire & in the reality the release of one shall enure to the benefit of the others.

A presentation by the grantee of the next avoidance is a sufficient title for the heirs of the grantor; the co-heirs need not allege any presentment by their ancestor.

The same law of lessee for years, for life, tenant in dower, by the curtesy, etc.

Presentment alleged in lessor or donor, & also in lessee or donee is not double, the presentment of the lessor or donor only is traversable.—NORTHUMBERLAND'S (COUNTESS) CASE (1598), 5 Co. Rep. 97 b; Moore, K. B. 455; 77 E. R. 206; *sub nom.* CECIL & CORNEWALLIS v. HALL, 2 And. 48; *sub nom.* FITTON v. HALL, Cro. Eliz. 518.

*Annotations:—Consd.* Gully v. Exeter, Bp. (1830), 10 B. & C. 584. *Reid.* R. v. Landaff, Bp. (1735), 2 Stra. 1006; Barker v. London, Bp. (1790), 1 Hy. Bl. 412.

**Crown.—On usurpation.**—See Nos. 1631, 2117, *ante*.

*iii. Against whom Action may be brought.*

**2140. Patron.—Patronage in Crown.**—ANON. (1504), Keil. 53; 72 E. R. 211.

**2141. ————**—In *quare impedit* the patron's not being made a party to the writ is not error; nor that damages were adjudged for half a year's value under Stat. Westminster (2), 1285 (c. 5), where it appeared that the presentation was not deraigned within the six months.—HENSLOW &

**PART V. SECT. 4, SUB-SECT. 3. — C. (a) iii.**

**a. Bishop as ordinary.**—The clerk of a patron who had recovered in

*quare impedit* filed a bill under 1 Geo. 2, c. 23, against the bishop presenting & his clerk, for an account of the profits of the benefice pending the litigation; & it contained charges of acts of

interference with the profits & of waste by the cutting of trees & otherwise, "by debts, or one of them, & of a conversion of a portion of the profits to their own use." Upon a general

STANSBY v. SARUM (BP.) & KERLE (1552), 1 Dyer, 76 b; 73 E. R. 161.

*Annotations*:—**Mentd.** Williams v. Williams (1597), Cro. Eliz. 557; Andrews v. Cromwell (1602), Cro. Eliz. 891; Anon. (1628), Cro. Car. 143.

**2142.** — **Whether inheritance, estate or interest of patronage divested by judgment.**—When by the judgment in a *quare impedit*, the inheritance, estate or interest of the patronage is to be divested, he who presented (& his clerk received) ought to be named in the writ; but when the inheritance, estate or interest of the patron shall not be divested by the judgment, then, if another disturber be named in the writ, it is not necessary to name the rightful patron.—**HALL v. BATH & WELLS (BP.) & MAUNTON (1589)**, 7 Co. Rep. 25 b; Sav. 107; 2 Leon. 58; 77 E. R. 449.

*Annotations*:—**Refd.** R. v. Sowton (1681), 2 Show. 167. **Mentd.** Manby v. Scot (1662), 1 Keb. 361; Apperley v. Hereford, Bp. (1833), 2 L. J. C. P. 105.

**2143.** — **ELVIS v. YORK (ARCHBP.), TAYLOR & BISHOP (1619)**, Hob. 315; 80 E. R. 458; *sub nom.* HELLWAYES v. YORKE (ARCHBP.), W. Jo. 4.

*Annotations*:—**Refd.** Anon. (1681), Freem. K. B. 535. **Mentd.** Hemming v. Brabason (1660), O. Bridg. 1; Cornwallis v. Hood (1665), Cart. 33; Turner v. Sterling (1671), Freem. K. B. 15; Symonds v. Cudmore (1692), 12 Mod. Rep. 32; R. v. Chester, Bp. (1697), 1 Ld. Raym. 292; Reynolds v. Blake & London, Bp. (1697), 1 Ld. Raym. 192; Muchil v. Clerk (1702), 7 Mod. Rep. 18; Ashby v. White (1703), 2 Ld. Raym. 938; Smith d. Dormer v. Parkhurst (1738), Andr. 315; Taylor v. Horde (1757), 1 Burr. 60; Apperley v. Hereford, Bp. (1833), 9 Bing. 681; Meath, Bp. v. Winchester (Marquess) (1836), 3 Bing. N. C. 183; Storie v. Winchester, Bp. (1850), 17 C. B. 653.

**2144.** — **Effect of omission to cite—Writ not void but voidable.**—**THORNETON v. SAVILL (1622)**, Palm. 306; 81 E. R. 1095; *sub nom.* SAVILE v. THORNTON, W. Jo. 11; Cro. Jac. 650; Win. 13.

*Annotations*:—**Mentd.** R. v. Chester, Bp., Piers & Scroope (1697), 1 Ld. Raym. 292; R. v. Whaley (1729), 1 Barn. K. B. 170.

**2145.** — (1) It is never necessary that the patron should be made a party for his own sake, but merely for the sake of the clerk, whose right depends upon the patron's title (PARKER, C.J.).

(2) A *quare impedit* differs from a writ of right of advowson in this, that the last lies against the patron as patron, but the first against a deferrer only (PARKER, C.J.).

(3) He that brings a *quare impedit* can by his writ suppose nobody to be patron but himself, for that would be repugnant, & though the count names another patron, yet it is not necessary to suppose him dead, in the case of lapse (PARKER, C.J.).

(4) When the incumbent pleads if he does not show himself to be rightful patron of the advowson, but only his patron, & that he is in by him, ought not to be sued without him (PARKER, C.J.).

At common law, nobody was admitted to plead to the title of the patronage, but one that made title to it himself, & if the patron was made party, & would not come in or colluded, the incumbent is without remedy; but this was helped by 25 Edw., stat. 6 & 7, which enabled the ordinary or possessor to counterplead the title in such case.

The import of this plea at common law, as it was pleaded *ore tenus* at the Bar, was, I claim nothing in the advowson, all my concern is, that I am presented by J. who is still alive; whether you or he have a right, I know not, but he does; & therefore he ought to be brought in to answer for that which he was to do, & which can properly lie in nobody's conscience but his own. This

plea is proper where (a) the incumbent's title depends upon the right of patronage; (b) the acts of the incumbent are joined to the patron's & depend upon them, the patron makes himself a disturber by the presentation, & the incumbent's advantage of the patron's not being brought in, is only because he would not plead to the title at common law, & therefore where his right depended on the title of patronage, he should have that privilege in order to supply his defect (PARKER, C.J.).

(5) Whoever pleads in abatement of a writ must show how plff. may have a better writ, & in order to make writ maintainable against the patron, he must be a disturber, so that in whatever want the incumbent may be of the patron's aid, & though his right appear to be in question, yet deft. cannot take exception to the writ, that he is not named, without showing him a disturber, for otherwise plff. can have no cause of action against him (PARKER, C.J.).—**R. v. PETERBOROUGH (BP.) & PETTIFER (1713)**, Gilb. 67; 93 E. R. 262.

— **In quare impedit by Crown For removal of simoniacally promoted clerk.**—*See* Sect. 5, subsect. 4, B., *post*.

**2146. Incumbent - Effect of omission to cite - Recovery of patronage but not removal of incumbent.**—**HARRIS v. AUSTIN**, No. 2091, *ante*.

**2147. Wrongful admission by bishop - Bishop or metropolitan.**—**GRANGE v. DENNY**, No. 201, *ante*.

**2148. When church full.**—**ELVIS v. YORK (ARCHBP.), TAYLOR & BISHOP (1619)**, Hob. 315; 80 E. R. 458; *sub nom.* HELLWAYES v. YORKE (ARCHBP.), W. Jo. 4.

*Annotations*:—**Mentd.** Hemming v. Brabason (1660), O. Bridg. 1; Cornwallis v. Hood (1665), Cart. 33; Turner v. Sterling (1671), Freem. K. B. 15; Anon. (1681), Freem. K. B. 535; Symonds v. Cudmore (1692), 12 Mod. Rep. 32; R. v. Chester, Bp. (1697), 1 Ld. Raym. 292; Reynolds v. Blake & London, Bp. (1697), 1 Ld. Raym. 192; Muchil v. Clerk (1702), 7 Mod. Rep. 18; Ashby v. White (1703), 2 Ld. Raym. 938; Smith d. Dormer v. Parkhurst (1738), Andr. 315; Taylor v. Horde (1757), 1 Burr. 60; Apperley v. Hereford, Bp. (1833), 9 Bing. 681; Meath, Bp. v. Winchester (Marquess) (1836), 3 Bing. N. C. 183; Storie v. Winchester, Bp. (1850), 17 C. B. 653.

**2149. When church not full.**—**ELVIS v. YORK (ARCHBP.), TAYLOR & BISHOP**, No. 2148, *ante*.

**2150. Corporation.**—**PETRE (LORD) v. CAMBRIDGE UNIVERSITY & WOODHOFFE (1692)**, 3 Lev. 332; 2 Lut. 1100; 83 E. R. 715.

*Annotations*:—**Refd.** Yarrowburgh v. Bank of England (1812), 16 East, 6. **Mentd.** Edwards v. Exeter, Bp. (1839), 5 Bing. N. C. 652.

**2151. When defendant lunatic - Not committee.**—It seems that if deft. in *quare impedit* be a lunatic the action is properly brought against him & not against his committee. **TYRELL v. JENNER (1829)**, 6 Bing. 283; 3 Moo. & P. 618; 8 L. J. O. S. C. P. 57; 130 E. R. 1289.

#### iv. Pleading.

**2152. By bishop—That presentee schismatic.**—**SPECTOR'S CASE**, No. 2342, *post*.

**2153.** — **That nothing claimed but as ordinary.**—**BOSWELL'S CASE**, No. 2107, *ante*.

**2154.** — **No allegation of notice of refusal—Presentation by Crown.**—In *quare impedit* the bishop pleaded, that he claimed nothing but as ordinary:—**Held**: bad, for want of alleging notice of the refusal, though in a case where the Crown presented.—**R. v. Hereford (BP.) (1720)**, 1 Com. 385; 92 E. R. 1110.

**2155.** — **That another writ pending—For same disturbance.**—**BEDFORD (EARL) v. EXETER**

demurrer by the bishop which was allowed:—**Held**: a bishop as ordinary is not liable to any account at common

law, or under West. 2, c. 5, giving damages in *quare impedit*; or to the account of the profits given under

1 Geo. 2, c. 23. **CRAMPTON v. MEATH (BP.) (1837)**, 1 Sau. & Sc. 297.—**IR.**

**Sect. 4.—Patronage of benefices: Sub-sect. 3, C. (a) v., vi. & vii. & (b).]**

In all the entries in the same book, where a party was admitted to a vicarage, the word "*institutus*" was used after the word "*admissus*" & in all but one instance the word "*inductus*" also. Upon a trial at bar, the judges directed the jury that this, in legal construction, was to be taken to mean in the present case that Henry Compton, in the entry named, was admitted & instituted by the then Bishop of Elphin, to the vicarage of Kilglass, on a presentation by some other person to the bishop; & that the only question for the consideration of the jury respecting the entry was, by whom the presentation was made; & that if upon the whole of the evidence the jury should believe that such presentation of H. C. was made by P. B., & that the advowson of the vicarage had been originally appendant to the rectory, & had not been disappended therefrom, they should find a verdict for plffs. Defts. having excepted to this direction of the judge:—*Held*: it was a misdirection, & a *venire de novo* [was] awarded.—*COOKE v. ELPHIN* (Bp.) (1831), 5 Bli. N. S. 103; 2 Dow. & Cl. 247; 5 E. R. 251, 11. 1.

*Annotation*:—*Mentd.* Rumsey v. Nicholl (1877), 2 C. P. D. 179.

**2178. ——— Ancient case for counsel—Coming from proper custody.]—MEATH (Bp.) v. WINCHESTER (MARQUIS), No. 2168, *ante*.**

**2179. ———.]—(1) In a *quare impedit*, where the Bishop of Derry claimed the right of patronage of a living in the county of Lon Jonderry, which was within the diocese of Derry, a surrender made by a former bishop to the Crown, of all the livings in that county, was tendered in evidence. This surrender was coupled with a grant by the Crown, dated two days afterwards, of the livings which had been so surrendered. Taken together, these documents were held to be admissible in evidence; & as the grant recited that all the livings in the county had anciently belonged to the see, such evidence was, for the purpose of proving the title of the bishop, received as an admission by the Crown of that fact. The value of such evidence was still open to dispute. Before the date of the grant, the Crown had entered into articles of agreement with persons now represented by the Governor & Assistants of the Irish Society, to grant to them the livings in the county of which the living in question was named as one:—*Held*: this agreement did not prevent the grant from being receivable in evidence, however its value might be thereby affected.**

(2) Two letters from the Crown to two successive Bishops of Derry, directing them to perform the covenants & directions contained in the grant, were tendered in evidence as recognitions by the Crown of its previous grant:—*Held*: they were admissible for this purpose.

(3) Entries in the books kept at the First Fruits' Office are admissible to show the fact of a collation to a living made by the bishop at a particular time. Returns made by the bishop, in obedience to writs from the Exchequer, requiring him to state the vacancies of & presentations & collations to the livings in his diocese, are admissible in evidence as statements made by a public officer in the discharge of a public duty. Though such returns may contain statements of a kind unusual in such documents, which statements were in favour of the right of the bishop who made them, they are nevertheless admissible, provided that the statements are within the scope of the inquiry in the writ. An original collation from

the registry of the bishopric, & appearing on the face of it to be *pleno jure*, is admissible to show that the right claimed has in fact been exercised.

(4) An objection was taken that certain documents tendered in evidence were not admissible for a particular purpose. The ct. decided that they were admissible. An exception was taken to this decision:—*Held*: if the documents were admissible on any ground, the exception could not be sustained.—*IRISH SOCIETY v. DERRY* (Bp.) (1840), 12 Cl. & Fin. 641; 8 E. R. 1561, H. L.

*Annotations*:—*As to* (3) *Consd.* *Sturla v. Freccia* (1880), 5 App. Cas. 623. *Reid.* *Reed v. Lamb* (1860), 6 H. & N. 75; *Neill v. Devonshire* (1882), 8 App. Cas. 135; *Mercer v. Denne*, [1905] 2 Ch. 538. *As to* (4) *Consd.* *Milne v. Leisler* (1862), 7 H. & N. 786. *Reid.* *Marianski v. Cairns* (1852), 19 L. T. O. S. 277; *It. v. Colelough* (1882), 15 Cox, C. C. 92. *Generally, Mentd.* *Hutchinson v. Ferrier* (1852), 19 L. T. O. S. 116.

— — —.]—*Sec, generally, EVIDENCE.*

**vi. Judgment.**

**2180. Inquiry after judgment—Scope of inquiry.]**

—In *quare impedit*, if the jury neglect to find whether the church be full, & of whose presentation, & whether six months are passed. *Qu.*: whether plff. may have a writ to the sheriff to inquire of these points?—*POYNER v. CHORLETON* (1550), 2 Dyer, 135 a; 73 E. R. 295.

*Annotation*:—*Mentd.* *Mirehouse v. Rennell* (1833), 7 Bli. N. S. 211.

**Damages.]—See Nos. 2107, 2125, 2128, 2141, *ante*.**

**vii. Costs.**

**2181. Right to costs—Plaintiff.]—HOLT v. HOLLAND** (1680), Skin. 25; 90 E. R. 13.

**2182. ——— Defendant—Judgment in case of non-suit.]—In *quare impedit*, deft. is not entitled to costs on a judgment as in case of a non-suit.—*WYNDOWE v. CARLISLE* (Bp.) (1820), 3 Bing. 404; 11 Moore, C. P. 269; 4 L. J. O. S. C. P. 112; 130 E. R. 568.**

*Annotations*:—*Reid.* *Edwards v. Exeter, Bp.* (1839), 7 Scott, 652; *Cannon v. Rimington* (1852), 12 C. B. 511.

**2183. Liability for costs—Defendant—Exemption from costs.]—*Quare impedit* is within Civil Procedure Act, 1833 (c. 42), s. 34; but that clause is over-riden by the proviso in Prisons Act, 1835 (c. 38), which enables the ct., or the judge who tries the cause, to certify to exempt defts. from costs.**

Tenants in common of an advowson, one being a Protestant the other a Roman Catholic, the church being vacant, the former presented alone; the ordinary refused to admit the clerk so presented, on the ground that the sole right of presentation was not in the Protestant co-patron, & after a lapse, collated:—*Held*: this was a proper case for a certificate under 1835 Act, to exempt defts. from costs.

*Seemle*: the ordinary was, under the circumstances, an "ecclesiastical patron" within the meaning of the proviso in the last-mentioned statute.—*EDWARDS v. EXETER* (Bp.) (1839), 6 Bing. N. C. 140; 7 Scott, 679; 9 L. J. C. P. 87; 4 J. P. 60; 3 Jur. 1000; 133 E. R. 57.

*Annotation*:—*Reid.* *Cannon v. Rimington* (1852), 12 C. B. 514.

**(b) Suit of duplex querela.**

**2184. When remedy available—Refusal of bishop to institute.]—(1) In a proceeding by *duplex querela* by a clerk, presented to a benefice, against his diocesan for refusing him institution, it was alleged, in return to a monition with intimation, by the bishop, called upon to show a reasonable & lawful cause why the clerk should not be instituted, that the presentee was of unsound**



doctrine respecting the efficacy of the sacrament of baptism, inasmuch as he held in his examination that spiritual regeneration is not conferred in that sacrament—that infants are not made therein members of Christ & children of God, contrary to the teaching of the Church of England in her arts. & liturgy:—*Held*: baptismal regeneration is the doctrine of the Church of England, & infants immediately at baptism receive spiritual regeneration, & the bishop had shown sufficient cause why he should not institute the presentee.

(2) The space of 28 days, specified in Canon 95 for a bishop to inquire into “the sufficiency & qualities of every minister after he hath been presented unto him to be instituted into any benefice,” is not an absolute limitation rendering an examination after that period void. A bishop is entitled to a reasonable time for such examination. The canon is directory; there are no prohibitory words to confine a bishop to the space of 28 days.

(3) The form of proceeding by *duplex querela* is the only one which can afford a remedy to a clerk aggrieved by a refusal of institution to a living to which he has been duly presented (SIR HERBERT JENNER FUST).

(4) It is a duty incumbent on the bishop to take care that he is satisfied of the sufficiency & qualities of the candidate for the benefice. It is not a mere right & privilege which the bishop possesses, it is a trust which he is bound to execute for the public benefit, & if he have any doubt on the matter, it is his duty, according to the Canon 39, to ascertain, “upon due examination,” that the party is worthy of the office. The bishop is not precluded from commencing or continuing the examination in question after the 28 days has elapsed (SIR HERBERT JENNER FUST).

(5) There are no words which say the bishop shall not after the 28 days examine. The meaning of the 28 days in Canon 95 is that, until that number of days has expired after a tender of a presentation, a clerk cannot obtain a *duplex querela*, but after that interval if a bishop refuse or delay the institution he may be called upon to assign the reason. As far as the bishop is concerned in the matter of the examination, the canon is directory, there are no prohibitory words to confine him to the particular space of 28 days, & it is contrary to reason that such an examination should be so restricted (SIR HERBERT JENNER FUST).

(6) Proceeding by Act on Petition is neither convenient nor consistent with practice. The formal proceeding, by plea & proof, is not only the most proper mode, but it is the best calculated to bring the real question immediately before the ct. Pleading in an Act on Petition, is vague & loose (SIR HERBERT JENNER FUST).

(7) Where the clerk has alleged that his presentation was offered to the bishop, that the bishop delayed to institute him, though he was qualified by age, by ordination, by presentation, by an offer to do all that he was required by law to do before he was instituted to that living, the *onus probandi* lies on the bishop to justify his refusal to institute him (SIR HERBERT JENNER FUST).

(8) *Primâ facie* the 39 Articles are the standard of doctrine (SIR HERBERT JENNER FUST).

(9) The word regeneration does not mean & imply such a total change of character as to preclude persons baptised from ever or finally falling, but the word means such a change of station, character, & relation as places them in a new situation—from children of wrath to children of

grace—whereby they become members of Christ & inheritors of the kingdom of Heaven (SIR HERBERT JENNER FUST).

(10) To the private views of individuals, however eminent, I am not at liberty to attend. Their opinions can have no binding effect upon my judgment. So long as the Articles & the Services of the Church are reconcilable, & not only reconcilable, but necessarily consistent, I must construe them together. If a doctrine is laid down in the baptismal & other services, & in the rubrics, all of which were confirmed by Act of Parliament & adopted by convocation, I must look to that source for my guide, if the Articles are silent on the point—& not indulge in fancy, explaining it by the opinions expressed by private individuals (SIR HERBERT JENNER FUST).—*GORHAM v. EXETER* (BP.) (1849), 2 Rob. Eccl. 1; *Cripps' Church* Cas. 223; 7 Notes of Cases, 157; 13 L. T. O. S. 26; 14 L. T. O. S. 227; 13 Jur. 238, 887; Moore's Special Rep. 1; 163 E. R. 1221; *on appeal* (1850), 7 Notes of Cases, 413, P. C.; *subsequent proceedings*, 15 Q. B. 52; *sub nom. Ex p. EXETER* (BP.), 10 C. B. 102; *sub nom. GORHAM v. EXETER* (BP.), 5 Exch. 630.

*Annotatious*:—As to (1) *Refd.* *Exeter*, Bp. v. Marshall (1868), L. R. 3 H. L. 17; Walsh v. Lincoln, Bp. (1874), L. R. 4 A. & E. 212; Willis v. Oxford, Bp. (1877), 2 P. D. 192. *Generally, Mntd.* *Re Beloved Wilkes's Charity* (1851), 3 Muc. & G. 410; *Re Denison* (1856), 27 L. T. O. S. 300; Liddell v. Westerton, Liddell v. Beule (1857), 29 L. T. O. S. 54; Heath v. Burder (1862), 15 Moo. P. C. C. 1; Williams v. Salisbury, Bp. (1861), 2 Moo. P. C. C. N. S. 375; Sheppard v. Bennett (Second Appeal) (1872), L. R. 4 P. C. 371; Martin v. Mackonochie (1879), 4 Q. B. 11, 697; Merriman v. Williams (1882), 7 App. Cas. 481; R. v. West Riding of Yorkshire County Council, [1906] 2 K. B. 676.

--- Whether alternative or concurrent.]—See No. 2123, *ante*.

**2185. Whether suit tried by act on petition & answer—Or by plea & proof.**—In the affidavit to lend the monition in a suit of *duplex querela* it was alleged that the promovent had been refused institution to a benefice by the bishop of the diocese on the ground of insufficiency of learning. On application on behalf of the bishop the ct. ordered that the suit should be tried not by act on petition & answer, but by plea & proof, & that the promovent should bring in his libel. The libel of the promovent having been subsequently brought in, a responsive plea was filed on behalf of the bishop, alleging in fact that the promovent on applying to be instituted had been examined by direction of the bishop, & that the result of the examination had conscientiously satisfied the bishop that the promovent was *non idoneus & minus sufficiens in literaturâ*. Thereupon the promovent applied to the Court to reject the responsive plea: *Held*: the ct. would direct that the responsive plea be amended, & there should be on the face of the amended responsive plea such a statement of the grounds on which institution was refused as would enable the ct., assuming the facts to be true, to decide upon the validity of the objection taken to the promovent, & would enable the promovent to take issue on the truth of such facts.

Where in a suit of *duplex querela* the bishop justifies his refusal to institute on the ground that the promovent is *minus sufficiens in literaturâ*, it is for the ct. to determine whether the standard up to which the bishop considers the ability of the promovent ought to come is such a standard as is required by law.—*WILLIS v. OXFORD* (BP.) (1877), 2 P. D. 192; 41 J. P. 590.

**Appeal—To Judicial Committee of Privy Council.**—See No. 1132, *ante*.

*Sect. 4.—Patronage of benefices: Sub-sect. 3, C. (c) & (d); sub-sect. 4, A. (a) & (b), B. & C. Sect. 5: Sub-sects. 1 & 2, A.]*

*(c) Jus patronatus.*

**2186. When remedy available.]—**ELVIS v. YORK (ARCHBP.), TAYLOR & BISHOP (1619), Hob. 315; 80 E. R. 458; *sub nom.* HELLWAYES v. YORKE (ARCHBP.), W. Jo. 4.

*Annotations:—*Reid. Ashby v. White (1703), 2 Ld. Raym. 938. *Mentd.* Hemming v. Brabason (1660), O. Bridg. 1; Cornwallis v. Hood (1665), Cart. 33; Turner v. Sterling (1671), Freeman. K. B. 15; Anon. (1681), Freeman. K. B. 535; Symonds v. Cudmore (1691), 12 Mod. Rep. 32; R. v. Chester, Bp. (1697), 1 Ld. Raym. 292; Reynoldson v. Blake & London, Bp. (1697), 1 Ld. Raym. 192; Machill v. Clerk (1702), 7 Mod. Rep. 18; Smith d. Dormer v. Parkhurst (1738), Andr. 315; Taylor v. Horde (1757), 1 Burr. 60; Apperley v. Hereford, Bp. (1833), 9 Bing. 681; Meath, Bp. v. Winchester (Marquess) (1836), 3 Bing. N. C. 183; Storie v. Winchester, Bp. (1850), 17 C. B. 653.

**2187. Effect of suit.]—**ELVIS v. YORK (ARCHBP.), TAYLOR & BISHOP (1619), Hob. 315; 80 E. R. 458; *sub nom.* HELLWAYES & YORKE (ARCHBP.), W. Jo. 4.

*Annotations:—*Reid. Ashby v. White (1703), 2 Ld. Raym. 938. *Mentd.* Hemming v. Brabason (1660), O. Bridg. 1; Cornwallis v. Hood (1665), Cart. 33; Turner v. Sterling (1671), Freeman. K. B. 15; Anon. (1681), Freeman. K. B. 535; Symonds v. Cudmore (1691), 12 Mod. Rep. 32; R. v. Chester, Bp. (1697), 1 Ld. Raym. 292; Reynoldson v. Blake & London, Bp. (1697), 1 Ld. Raym. 192; Machill v. Clerk (1702), 7 Mod. Rep. 18; Smith d. Dormer v. Parkhurst (1738), Andr. 315; Taylor v. Horde (1757), 1 Burr. 60; Apperley v. Hereford, Bp. (1833), 9 Bing. 681; Meath, Bp. v. Winchester (Marquess) (1836), 3 Bing. N. C. 183; Storie v. Winchester, Bp. (1850), 17 C. B. 653.

*(d) Mandamus.*

**Whether granted.—Action of quare impedit available.]—**See CROWN PRACTICE, Vol. XVI., pp. 209, 300, Nos. 1126-1131.

— **At instance of party claiming right to present.—To enforce inspection of bishop's register of presentations.]—**See No. 210, *ante*.

**SUB-SECT. 4.—LAPSE.**

*A. To Bishop.*

*(a) In General.*

**2188. When patronage lapses.]—**BATH & WELLS (BP.) CASE (1572), Dal. 82; Rast. 522; 123 E. R. 202.

*Annotation:—*Reid. Mirehouse v. Rennell (1833), 1 Cl. & Fin. 527.

**2189. Effect of feigned action of quare impedit.]—**BRICKHEAD v. YORK (ARCHBP.) (1617), Hob. 197; 80 E. R. 344.

*Annotations:—*Mentd. Cole v. Hawkins (1717), 1 Stra. 21; Erving v. Peters (1790), 3 Term Rep. 685.

**2190. Election of canon by dean & chapter.—Whether within rules.]—**CHICHESTER (BP.) v. HARWARD & WEBBER, No. 186, *ante*.

**2191. Bishop restrained pending litigation as to right of next presentation.]—**NICHOLSON v. KNAPP, No. 2076, *ante*.

— **From what date time runs.]—**See Sect. 4, sub-sect. 4, A. (b), *post*.

**2192. Effect of collating by lapse.—Right of bishop to reject patron's clerk.]—**The bishop, after collating by lapse, & before induction, may refuse to admit the patron's presentee.—ANON. (1508), 3 Dyer, 277 a; 73 E. R. 619.

**2193. Death of bishop.—Whether presentation by lapse in bishop's executor or in Crown.]—**COMMENDAM CASE, COLT & GLOVER v. COVENTRY &

LICHFIELD (BP.) (1617), Hob. 140; Moore, K. B. 898; 80 E. R. 290; *sub nom.* COLT v. GLOVER, 1 Roll. Rep. 451; *sub nom.* COLT'S CASE, Jenk. 300, Ex. Ch.

*Annotations:—*Reid. Edes v. Oxford, Bp. (1667), Vaugh. 18; R. v. Worcester, Bp., Jervason & Hinkley (1670), 1 Mod. Rep. 276; R. v. London, Bp. (1694), Comb. 300; Reynoldson v. Blake (1697), 1 Ld. Raym. 192; Wolferstan v. Lincoln, Bp. (1763), 2 Wils. 174; Mirehouse v. Rennell (1833), 1 Cl. & Fin. 527; Rumsey v. Nicholl (1877), 2 C. P. D. 179. *Mentd.* Manby v. Scott (1662), O. Bridg. 229; Thomas v. Sorrell (1673), Freeman. K. B. 85; Shatter v. Friend (1690), 1 Show. 172; Hornbee, Williamson, Smith & Stone's Petn. (1691), Freeman. K. B. 331; Harcourt v. Fox (1693), 4 Mod. Rep. 167; Owen v. Saunders (1697), 1 Ld. Raym. 158; Cole v. Hawkins (1717), 1 Stra. 21; Thornby v. Fleetwood (1720), 1 Stra. 318; Bellamy v. Burrow (1735), Cas. temp. Talb. 97; Roe d. Berkeley v. York, Archbp. (1805), 6 East, 86; Denn d. Nowell v. Rouke (1826), 5 B. & C. 720; Re Gibbs (1845), 5 L. T. O. S. 475; Osgood v. Nelson (1869), 10 B. & S. 119; Roberts v. London Corp'n. (1882), 30 W. R. 637.

**2194. Contract not to exercise right of presentation.—Whether binding.]—**COMMENDAM CASE, COLT & GLOVER v. COVENTRY & LICHFIELD (BP.) (1617), Hob. 140; Moore, K. B. 898; 80 E. R. 290; *sub nom.* COLT v. GLOVER, 1 Roll. Rep. 451; *sub nom.* COLT'S CASE, Jenk. 300, Ex. Ch.

*Annotations:—*Reid. Edes v. Oxford, Bp. (1667), Vaugh. 18; R. v. Worcester, Bp., Jervason & Hinkley (1670), 1 Mod. Rep. 276; R. v. London, Bp. (1694), Comb. 300; Reynoldson v. Blake (1697), 1 Ld. Raym. 192; Wolferstan v. Lincoln, Bp. (1763), 2 Wils. 174; Mirehouse v. Rennell (1833), 1 Cl. & Fin. 527; Rumsey v. Nicholl (1877), 2 C. P. D. 179. *Mentd.* Manby v. Scott (1662), O. Bridg. 229; Thomas v. Sorrell (1673), Freeman. K. B. 85; Shatter v. Friend (1690), 1 Show. 172; Hornbee, Williamson, Smith & Stone's Petn. (1691), Freeman. K. B. 331; Harcourt v. Fox (1693), 4 Mod. Rep. 167; Owen v. Saunders (1697), 1 Ld. Raym. 158; Cole v. Hawkins (1717), 1 Stra. 21; Thornby v. Fleetwood (1720), 1 Stra. 318; Bellamy v. Burrow (1735), Cas. temp. Talb. 97; Roe d. Berkeley v. York, Archbp. (1805), 6 East, 86; Denn d. Nowell v. Rouke (1826), 5 B. & C. 720; Re Gibbs (1845), 5 L. T. O. S. 475; Osgood v. Nelson (1869), 10 B. & S. 119; Roberts v. London Corp'n. (1882), 30 W. R. 637.

**2195. When patron may present notwithstanding lapse.]—**ANON. (1503), Keil. 50; 72 E. R. 208.

*Annotation:—*Reid. Colt & Glover v. Coventry & Lichfield, Bp. (1616), Hob. 140.

— **To Archbishop.]—**See No. 2211, *post*.

*(b) Computation of Time.*

**2196. How calculated.—Action of quare impedit pending.]—**BOSWELL'S CASE, No. 2107, *ante*.

**2197. Calendar months or number of days.]**

—The six months in presenting to a benefice shall be estimated by calendar months, & not by the number of days.—CATESBY v. PETERBOROUGH (BP.) & BAKER (1600), Cro. Jac. 141; 79 E. R. 123; *sub nom.* CATESBY'S CASE, 6 Co. Rep. 61 b; *sub nom.* BAKER & PETERBOROUGH (BP.) v. CATESBY, Yelv. 100; *sub nom.* ANON., Jenk. 282; *affd.*, on appeal, *sub nom.* PETERBOROUGH (BP.) v. CATESBY (1607), Cro. Jac. 160.

*Annotations:—*Distd. Crooke v. McTavish (1823), 1 Bing. 307; Bruner v. Moore, [1904] 1 Ch. 305. *Mentd.* Cornwallis v. Hood (1665), Cart. 33. *Mentd.* Thorneaton v. Savill (1622), Palm. 306.

**2198. Exclusion of day of vacancy.]—**CORNWALLIS v. HOOD (1665), Cart. 33; 121 E. R. 807.

**2199. Whether notice necessary before time begins to run.—Avoidance by resignation.]—**ANON. (1503), Keil. 49; 72 E. R. 207.

**2200. Avoidance by refusal of bishop to present.—On ground that presentee unlearned.]—**ANON. (1503), Keil. 49; 72 E. R. 207.

**2201. ———.]—**If a benefice be in Wales, & the clerk does not understand Welsh, the bishop may refuse him, but he must give notice

**PART V. SECT. 4, SUB-SECT. 3.—C. (c).**

**2196. When remedy available.]—**If the church were litigious the bishop himself should issue the writ "*jus patronatus*."—MEREDITH v. LIMERICK (BP.) (1862), 14 Ir. Jur. 246.—IR.

of it to the patron.—**ALBANY v. ST. ASAPH (Bp.)** (1588), Cro. Eliz. 119; 1 Leon. 31; 78 E. R. 376.

*Annotations*:—**Consd.** Abergavenny (Marquis) v. Llandaff (Bp.) (1888), 20 Q. B. D. 460. **Refd.** Hele v. Exeter, Bp. (1690), 2 Salk. 539.

**2202.** ————]—**EXETER (Bp.) v. HELE**, No. 2156, *ante*.

**2203.** ———— **On ground that presentee**  
**criminosus.]—EXETER (Bp.) v. HELE**, No. 2156,  
*ante*.

**2204.** ———— **On ground that presentee guilty**  
**of public crime.]—ANON.** (1503), Keil. 50; 72  
E. R. 208.

*Annotation*:—**Mentd.** Lane v. Cotton (1701), 12 Mod. Rep. 472.

**2205.** ———— **Avoidance by cession—Acceptance of**  
**benefice.]—(1)** Before 21 Hen. 8, c. 13, if one who  
had a benefice with cure accepted another with  
cure, the first was void, not by the common law,  
but by the constitution of the Pope, &, therefore,  
no lapse incurred without notice; yet the patron  
might take notice & present, if he would. Since  
21 Hen. 8, c. 13, if the first benefice be of the  
value of £8, the patron at his peril ought to take  
notice of it, & present.

(2) The King may grant a dispensation to hold  
a church in *commendam* without the archbishop,  
for 25 Hen. 8, c. 21, does not restrain his common  
law authority.—**HOLLAND'S CASE** (1597), 4 Co.  
Rep. 75 a; Moore, K. B. 542; Cro. Eliz. 601;  
76 E. R. 1047; *sub nom.* **ARMIGER v. HOLLAND**,  
Cro. Eliz. 542.

*Annotations*:—*As to* (1) **Folld.** Apperley v. Hereford, Bp. (1833), 9 Bing. 681. **Consd.** Alston v. Atlay (1837), 7 Ad. & El. 289. **Refd.** Dodson v. Lynn (1637), Cro. Car. 475; R. v. London, Bp. (1639), W. Jo. 404; Pridgeon's Case (1677), Freem. K. B. 241; Betham v. Gregg (1831), 10 Bing. 352. **Mentd.** Wolferstan v. Lincoln, Bp. (1763), 2 Wils. 174. *Generally*, **Mentd.** Smith's Case (1613), 10 Co. Rep. 135 b; Colt & Glover v. Coventry & Lichfield, Bp. (1616), Hob. 140; R. v. Canterbury, Archbp. (1634), Cro. Car. 354; Swift v. Heirs (1639), March, 31; Yates v. Dryden (1640), Cro. Car. 589; R. v. London, Bp. (1694), Comb. 300.

**2206.** ————]—**R. v. CANTERBURY**  
**(ARCHBP.)**, No. 2421, *post*.

**2207.** ————]—The day of the date of  
the deed of grant in the count coming under a  
*videlicet*, & being never taken notice of again  
in any part of the pleadings, is totally immaterial,  
& so plff. has shown a good title; & the church  
is so void upon institution to the second living,  
that the patron may present immediately there-  
upon if he pleases; but the bishop has no right  
to collate by lapse without giving notice; &  
therefore, we unanimously give judgment for plff.  
(*per* CUR.).—**WOLFERSTAN v. LINCOLN (Bp.)** (1763),  
2 Wils. 174; 95 E. R. 750.

*Annotation*:—**Refd.** Alston v. Atlay (1837), 7 Ad. & El. 289.  
**2208.** ————]—**ALSTON v. ATLAY**, No.  
2059, *ante*.

**2209.** ———— **Avoidance by deprivation.]—If**  
**the incumbent be deprived for not subscribing the**  
**articles, the ordinary must give personal notice**  
**to the patron. A notification publicly read in**  
**the church, & fixed to the doors there, is not**  
**sufficient. In the intimation of such deprivation**  
**he should be called late incumbent, & shown to be**  
**such person as is bound to subscribe within the**  
**statute.]—BACON v. CARLISLE (Bp.)** (1570), 3  
Dyer, 340 a; 73 E. R. 778.

**2210.** ————]—**GREEN'S CASE**, No. 1634,  
*ante*.

### B. To Archbishop.

**2211. When patron may present notwithstanding**  
**lapse.]—BOOTON v. ROCHESTER (Bp.)** (1618), Hut.  
24; 123 E. R. 1074.

— **To bishop.]—See** No. 2195, *ante*.

**2212. Computation of time.]—CATESBY v.**  
**PETERBOROUGH (Bp.) & BAKER**, No. 2107, *ante*.

### C. To Crown.

*See* Part III., Sect. 3, sub-sect. 2, *ante*.

## SECT. 5.—SIMONY.

### SUB-SECT. 1.—IN GENERAL.

**2213. Whether offence at common law.]—OLD-**  
**BURY v. GREGORY, GREGORY v. OLDBURY** (1509),  
Moore, K. B. 564; 72 E. R. 761.

*Annotation*:—**Refd.** Collins v. Blaithern (1767), 2 Wils. 341.

**2214. False declaration of simony—Whether**  
**proceedings maintainable—For perjury Before**  
**defendant found guilty of simony.]—R. v. LEWIS**  
**(1717)**, 1 Stra. 70; 93 E. R. 390.

— **Under Clergy Discipline Act, 1892**  
**(c. 32).]—See** No. 1573, *ante*.

### SUB-SECT. 2.—WHAT AMOUNTS TO SIMONY.

#### A. Agreements as to Next Presentation.

**2215. General rule.]—ANON.** (1627), Godb. 390;  
78 E. R. 230.

**2216. Agreement when benefice vacant—By**  
**stranger.]—STEPHENS v. WALL** (1569), Ben. 102;  
3 Dyer, 282 b; 123 E. R. 135.

*Annotations*:—**Mentd.** Brokesby v. Wickham & Lincoln, Bp. (1588), 1 Leon. 167; Comendams Case, Woodley v. Exeter, Bp. & Manning (1624), Wm. 94; Wolferstan v. Lincoln, Bp. (1763), 2 Wils. 174; Mirehouse v. Rennell (1832), 8 Bing. 490.

**2217.** ————]—**AGARD v. PETERBOROUGH**  
**(Bp.)** (1569), 1 And. 15; 123 E. R. 320.

**2218.** ————]—**ANON.** (1569), Jenk. 236;  
145 E. R. 165.

*Annotations*:—**Mentd.** Wolferstan v. Lincoln, Bp. (1763), 2 Wils. 174; Mirehouse v. Rennell (1832), 8 Bing. 190.

**2219.** ————]—**ANON.** (1572), Ben. 80;  
123 E. R. 205.

**2220.** ———— **Clerk not privy.]—(1)** If a  
stranger contract with a patron for the grant of  
a presentation after the church is void, & present  
a person not privy to the contract, the grant is  
void, as being of a chose in action; but the  
presentee shall not therefore be considered as a  
usurper, but as a *simoniacus promolus*, because  
he is presented in pursuance of a corrupt contract.

(2) The sentence of a spiritual ct. in simony is  
to be taken as true, though in its consequences  
it divests the incumbent of his freehold.—**BAKER**  
**v. ROGERS** (1600), Moore, K. B. 914; Cro. Eliz.  
788; 72 E. R. 993; *sub nom.* **ROGERS v. BAKER**,  
cited in Moore, K. B. at p. 753.

*Annotations*:—*As to* (1) **Consd.** Fox v. Chester, Bp. (1824), 2 B. & C. 635. *As to* (2) **Refd.** St. David's, Bp. v. Lucy (1699), 1 Salk. 131; Martin v. Macknochie (1878), 3 Q. B. D. 730; Lee v. Fluck, [1896] P. 138. *Generally*, **Mentd.** Free v. Burgoyne (1828), 2 Bill. N. S. 65; Whish & Woollett v. Hesse (1831), 3 Hag. Ecc. 659.

**2221.** ————]—(1) If a father, the  
church being void, contract with the grantee of  
the next presentation to permit the grantor to  
present his son, & the son be presented accordingly,

**PART V. SECT. 5, SUB-SECT. 2.—A.**  
**v. Litigation to establish right of**  
**presentation—(Clerk to indemnify**  
**claimant.)—A contract by T., a clerk**

in holy orders, to indemnify W., who  
claimed the right of presentation to  
a living, against the costs of a litigation  
to establish that right, provided that

W., in case of success, should present  
T. to the living, is a corrupt agreement,  
& cannot be enforced.—**LITTLEDALE v.**  
**THOMSON** (1879), 4 L. R. 43.—**IR.**

**Sect. 5.—Simony: Sub-sect. 2, A., B., C., D. & E.]**

he is *simoniacè promotus*, although the son be not privy to the corrupt agreement.

(2) A person presented by simony can never hold the same benefice again.—**BOOTH v. POTTER** (1020), Cro. Jac. 533; 79 E. R. 457.

**2222. Clerk subsequently privy.]—SMITH v. SHERBONE** (1599), Moore, K. B. 910; 72 E. R. 995.

*Annotation:—As to (1) Refd. Barret v. Glubb* (1776), 2 Wm. Bl. 1052.

**2223. Clerk not privy.]—BAKER v. ROGERS**, No. 2220, *ante*.

**2224. ———.]—If a presentation to a benefice with cure be made for money, fee, reward, or other profit, the presentation, admission, & induction, are void, although he who is presented knew nothing of it.—HUTCHINSON'S CASE** (1613), 12 Co. Rep. 101; 77 E. R. 1376.

**2225. ———. Patron not privy.]—(1) A donative is within 31 Eliz., c. 6, against simony although in the King's gift, & he present the incumbent; for simony may be committed without the patron's privy.**

(2) A corrupt contract for procuring a presentation to a benefice, although neither patron nor incumbent be privy to it is simony.—**BAWDEROCK v. MACKALLER** (1633), Cro. Car. 330; 79 E. R. 880.

*Annotation:—Generally, Mentd. Loyd v. Williams* (1771), 3 Wils. 250.

**2226. ———.]—R. v. TRUSSEL** (1667), 1 Sid. 320; 82 E. R. 1137.

**2227. ———.]—R. v. NORWICH (Bp.), HIDE & BOUGHTON** (1692), 3 Lev. 337; 83 E. R. 718.

**Incumbent in extremis.]—See Sub-sect. 2, C., post.**

**Benefice vacant.]—See Nos. 2216–2221, ante.**

**2228. Mortgage.] THEXTON v. BETTS** (1683), Freem. Ch. 87; 22 E. R. 1075.

**B. Agreements to which Patron not Privy.**

**2229. Corrupt agreement—With patron's wife.]—R. v. NORWICH (Bp.), COLE & SAKER**, No. 1913, *ante*.

**2230. ———.]—Simony is worse than felony, it is an enormous offence; if money be paid for to present one to a benefice, although it be not paid to the patron, neither had he any knowledge of it, yet the incumbent for this shall be avoided, & the patron also shall lose his presentment, *pro hac vice* (Coke, C.J.).—**BOYER v. HIGH COMMISSION COURT** (1614), 2 Bulst. 182; 80 E. R. 1052.**

*Annotation:—Refd. Lee v. Flack*, [1896] P. 138.

**2231. ———.]—R. v. CHICHESTER (Bp.)** (1687), 2 Lut. 1090; 125 E. R. 600.

**Both clerk & patron ignorant.]—See Nos. 2225, 2226, ante.**

**C. Agreements when Incumbent in extremis.**

**2232. Grant of next presentation.]—The grant of the next avoidance for money when the parson was sick in his bed ready to die is simony, for the statute is, if the contract be made directly, or indirectly by any way or means (HUTTON, J.).—**SHELDON v. BRET** (1623), Win. 63; 124 E. R. 54.**

*Annotations:—Refd. Barret v. Glubb* (1776), 2 Wm. Bl. 1052; Fox v. Chester, Bp. (1821), 2 B. & C. 635.

**2233. ———. Both parties knowing facts—Clerk not privy.]—The sale of a next presentation, the incumbent being in *extremis*, within the knowledge of both contracting parties, but without the privy or with a view to the nomination of the particular clerk, is not void on the ground of simony.—**FOX v. CHESTER (Bp.)** (1820), 6 Bing. 1;**

3 Bli. N. S. 123; 1 Dow. & Cl. 416; 130 E. R. 1180, H. L.; *revers*. (1824), 2 B. & C. 635.

*Annotations:—Refd. Gully v. Exeter, Bp.* (1828), 2 Moo. & P. 105; Alston v. Atlay (1837), 7 Ad. & El. 289; Walsh v. Lincoln, Bp. (1875), L. R. 10 C. P. 518. **Mentd.** Spiers v. Hunt, [1908] 1 K. B. 720.

**2234. Grant of advowson.—To grantee's knowledge—Clerk not privy.]—On the purchase of an advowson in fee, the incumbent being in *extremis*, but without any privy of the clerk, the next presentation is not void, as being upon a simoniacal contract.—**BARRET v. GLUBB** (1776), 2 Wm. Bl. 1052; Dick. 516; 96 E. R. 619.**

*Annotations:—Consd. Greenwood v. London, Bp.* (1814), 1 Marsh. 292; Fox v. Chester, Bp. (1829), 6 Bing. 1. **Refd.** Fletcher v. Soudes (1826), 3 Bing. 501.

**D. Resignation Bonds.**

Resignation of benefices generally, *see* Sect. 11, sub-sect. 1, B., *post*.

**2235. General rule.]—(1) An archbishop may cite any of his suffragan bishops to appear in any part of his province before either him, or his vicar general, & punish them with deprivation or ecclesiastical censures for any offences contrary to their office as bishops, or for a neglect of any part of their duty as bishops, but not for any thing done by them as visitors.**

(2) Simony, though it relates to a living he holds in *commendam* or forgery is contrary to a man's duty as bishop.

(3) It is the duty of a bishop to tender the oaths upon an ordination.

(4) A contract to resign a benefice is simoniacal.

(5) Selling a curacy, & taking money for admitting persons into orders, is simony.—**ST. DAVID'S (Bp.) v. LUCY** (1699), 12 Mod. Rep. 237; Carth. 481; Holt, K. B. 651; 1 Ld. Raym. 147, 539; 1 Salk. 134; 91 E. R. 126; *sub nom.* **ST. DAVID'S (Bp.) CASE**, 3 Salk. 90; *sub nom.* **CHESTER'S (Bp.) CASE**, 5 Mod. Rep. 433; *sub nom.* **LUCY v. ST. DAVID'S (Bp.)**, Brod. & P. 332.

*Annotations:—As to (1) Consd. Re York (Dean)* (1811), 2 Q. B. 1. **Refd.** McGeath v. Geraghty (1866), 15 W. R. 127; Boyd v. Philippotts (1874), L. R. 4 A. & E. 297; Combe v. De la Here (1881), 6 P. D. 157; Read v. Canterbury, Archbp. (1888), 4 T. L. R. 741; Read v. Lincoln Bp. (1889), 14 P. D. 88; R. v. Tristram, [1902] 1 K. B. 816. **Generally, Mentd.** Mayo & Parson's Case (1720), 1 Stra. 391; Middleton v. Crofts (1736), 2 Atk. 650; R. v. Canterbury, Archbp. (1848), 11 Q. B. 483; Marsden v. Wardle (1851), 2 W. R. 455; Shepherd v. Payne (1863), 9 Jur. N. S. 351; Blanc v. Geraghty (1866), 15 W. R. 133; *Re New Parish of Haigh with Aspull*, [1919] P. 113.

**2236. ———.]—General bond for resignation of a benefice, good.**

My Lord Coke's notion is not law, where he says, that since the bonds are good, there shall be no averment of simony upon it (POWELL, J.).—**ANON.** (1701), 12 Mod. Rep. 501; 88 E. R. 1479.

**2237. ———.]—HILLIARD v. STAPLETON** (1701), 1 Eq. Cas. Abr. 86; 21 E. R. 808.

*Annotations:—N.F. Grey v. Hesketh* (1755), Amb. 268. **Consd.** Fletcher v. Soudes (1826), 3 Bing. 501.

**2238. ———.]—Resignation bonds are allowable.—TURNER v. HAWKINS** (1718), Fortes. Rep. 351; 92 E. R. 886.

**2239. ———.]—Though bonds of resignation are not prohibited by law, yet if they are made use of to extort money from the incumbent, or to turn him out for any thing but ill behaviour, or immorality, equity will grant an injunction against him.—**HAWKINS v. TURNER** (1719), Prec. Ch. 513; 24 E. R. 230.**

**2240. ———.]—PEELE v. CARLISLE (EARL)** (1719), 1 Stra. 227; 93 E. R. 487.

*Annotation:—Folld. Peele v. Capel* (1722), 1 Stra. 534.

**2241. ———.]—GREY v. HESKETH**, No. 2052, *ante*.

**2242. Conditioned to resign on special event—**

**When relative qualified.]**—A bond by an incumbent, conditioned to resign the benefice upon request, when the patron's son shall be of canonical age, is not simony.—*LAWRENCE v. JOHNS* (1611), Cro. Jac. 274; 79 E. R. 235.

*Annotations:*—*Apld.* Babington v. Wood (1630), Cro. Car. 180. *Refd.* Newman v. Newman (1815), 4 M. & S. 66; Fletcher v. Soudes (1826), 3 Bing. 501. *Mentd.* General Estates Co. v. Beaver, [1914] 3 K. B. 918.

**2243.** ———.]—*PEELE v. CAPEL* (1722), 1 Stra. 534; 93 E. R. 683, L. C.

*Annotation:*—*Refd.* Fletcher v. Soudes (1826), 3 Bing. 501.

**2244.** ———.]—*Qu.*: whether a bond of resignation with condition to reside, to resign for the patron's son to be presented, & to keep the premises on the living in repair, be not good in law.—*PARTRIDGE v. WHISTON* (1791), 4 Term Rep. 359; 100 E. R. 1063.

*Annotation:*—*Refd.* Fletcher v. Soudes (1826), 3 Bing. 501.

**2245.** ———.]—A bond, reciting that the patron of a rectory had, by an instrument of the same date, presented an incumbent, & that he had agreed to resign upon request of the patron, or the owners of the advowson for the time being, for the purpose of enabling him or them to present one of the two younger brothers of the patron, when capable of holding:—*Held*: such a bond was simoniacal & void, on the ground that such an agreement was a benefit to the patron, & contrary to 31 Eliz., c. 6, & the common law.—*FLETCHER v. SONDES* (LORD) (1827), 3 Bing. 501; 1 Bli. N. S. 144; 130 E. R. 606, H. L.; *reversg.* S. C. *sub nom.* SONDES (LORD) v. FLETCHER (1822), 5 B. & Ald. 835.

*Annotations:*—*Refd.* Doe v. Fletcher (1825), 2 Man. & Ry. K. B. 206. *Mentd.* Robertson v. Macdougall (1828), 3 C. & P. 259; R. v. O'Brien (1818), 7 State Tr. N. S. 1; Egerton v. Brownlow (1853), 4 H. L. Cas. 1; Walton v. Tucker (1880), 45 J. P. 23; Addis v. Gramophone Co., [1909] A. C. 488.

*Compare* No. 2260, *post*.

**2246.** ———.]—**On non-residence.**—*HILLIARD v. STAPLETON* (1701), 1 Eq. Cas. Abr. 86; 21 E. R. 898.

*Annotations:*—*N.F.* Grey v. Hesketh (1755), Amb. 268. *Consd.* Fletcher v. Soudes (1826), 3 Bing. 501.

**2247.** ———.]—A bond, given by an incumbent to the patron, on presentation, to reside on the living, or to resign if he did not return to it after notice, & also not to commit waste, etc., on the parsonage house, is good. In such a case a licence to the incumbent to absent himself from the living may be revoked.—*BAGSHAW v. BOSSLEY* (1790), 4 Term Rep. 78; 100 E. R. 901.

*Annotation:*—*Dbtd.* Fletcher v. Soudes (1826), 3 Bing. 501.

**2248.** ———.]—**If waste committed.**—*BAGSHAW v. BOSSLEY*, No. 2217, *ante*.

**2249. Conditioned to resign on request.**—*PASCAL v. CLARK* (1617), Noy, 22; 74 E. R. 992.

**2250.** ———.]—A bond given in consideration of being promoted to a benefice, conditioned to resign it on request, is not simony.—*BABINGTON v. WOOD* (1630), Cro. Car. 180; 79 E. R. 757; *sub nom.* BABINGTON v. WOOD *ibid.* 111.

*Annotations:*—*Refd.* Peele v. Carliol (1719), 1 Stra. 227; Fletcher v. Soudes (1827), 1 Bli. N. S. 144.

**2251.** ———.]—*DURSTON v. SANDS* (1686), 2 Cas. in Ch. 186; 2 Rep. Ch. 398; 1 Vern. 111; 22 E. R. 904.

*Annotation:*—*Refd.* Peele v. Carliol (1719), 1 Stra. 227.

**2252.** ———.]—*BABINGTON v. WOOD* (1629), W. Jo. 220; 82 E. R. 117.

*Annotation:*—*Refd.* Goldham v. Edwards (1855), 21 L. J. C. P. 189.

**2253.** ———.]—*STEEPER v. CARVER* (1708), 2 Eq. Cas. Abr. 183; 22 E. R. 157.

**2254.** ———.]—Where a clerk, previous to his being presented to a living, gives his patron a general bond of resignation upon request, such

bond is good; & if unattended with any illegal circumstance, which, if it exists, must be plainly alleged, & fully proved, the ordinary cannot refuse admission to the clerk so presented.—*LONDON (BP.) v. FFFYCHER* (1783), 2 Bro. Parl. Cas. 211; 1 East, 487; Cunningham's Law of Simony p. 52; 1 E. R. 892, H. L.

*Annotations:*—*Consd.* Bagshaw v. Bossley (1790), 4 Term Rep. 78; Leigh v. Lewis (1801), 1 East, 391; Fletcher v. Soudes (1827), 1 Bli. N. S. 144. *Refd.* Partridge v. Whiston (1791), 4 Term Rep. 359; Dashwood v. Peyton (1811), 18 Ves. 27; Newman v. Newman (1815), 4 M. & S. 66; Egerton v. Brownlow (1853), 4 H. L. Cas. 1. *Mentd.* Glyn v. Soares (1835), 1 Y. & C. Ex. 614; Thomas v. Tyler (1838), 3 Y. & C. Ex. 255; Irving v. Thompson (1839), 9 Sim. 17; Kerr v. Rew (1810), 5 My. & Cr. 151; Portugal (Queen) v. Glyn (1840), 7 Cl. & Fin. 466.

**2255. Effect of Clergy Resignation Bonds Act, 1828 (c. 94)—Bond given after presentation.**—*STRICKLAND v. IVENS* (1880), 2 T. L. R. 788.

#### *E. Other Cases.*

**2256. Agreement by clerk to pay Annuity—To late Incumbent's son.**—*BAKER v. MOUNFORD* (1605), Noy, 142; 74 E. R. 1105.

**2257. ———. Money—On being presented to donative.**—A promise to pay a sum of money in consideration that plff. would procure debt, to be presented & instituted to a donative, is void.—*MACKALLER v. TODDERICK* (1633), Cro. Car. 337, 353, 361; 79 E. R. 895, 910, 915.

**2258. ———. On being employed as curate.**—*ST. DAVID'S (BP.) v. LUCY*, No. 2235, *ante*.

**2259. ———. Parsonage let by patron Incumbent—Agreement by incoming incumbent to pay over rent to patron.**—Plff., who was incumbent & patron of a living, put the rectory into repair, & with the sanction of the bishop of the diocese, let it to a tenant for a certain period. Before the termination of the tenancy plff. resigned the living, & presented debt, thereto. The presentation was made upon an understanding & agreement between plff. & debt. that debt. should, in consideration of having received the benefit of such repairs, hand over to plff. any rent which he should receive in respect of the tenancy between the date of the presentation & the termination of the tenancy:—*Held*: it was a simoniacal agreement, & therefore void under 31 Eliz., c. 6. *MOSS v. KILICK* (1881), 50 L. J. Q. B. 300; 11 L. T. 149; 20 W. R. 522.

*Annotation:*—*Mentd.* Calthorpe v. McOscar, [1923] 2 K. B. 573.

**2260. Agreement for simoniacal presentation not acted on.**—*WINCHCOMBE v. WINCHESTER (BP.) & PELLESTON* (1616), Hob. 165; 80 E. R. 313.

*Annotations:*—*Refd.* Doe v. Watson v. Fletcher (1828), 6 L. J. O. S. K. B. 282. *Mentd.* R. v. St. Nicholas, Ipswich (1755), Sess. Cas. K. B. 191; Abbot v. Aday (1837), 7 A. & EL 289.

**2261. ———. In debt for penalties under 31 Eliz., c. 6, for a simoniacal contract to present, the declaration alleged a contract by the clerk to buy the advowson, if he were presented to the living, & a presentation in pursuance of such contract:**

*Held*: proof of presentation was essential to the action, & for that purpose it was not enough to show that debt. prepared a presentation & tendered it to the bishop's secretary, but which never was in fact used or acted upon, the clerk having been afterwards instituted on his own petition as equitable owner of the advowson.—*GREENWOOD v. WOODHAM* (1841), 2 Mood. & R. 303.

*Annotation:*—*Mentd.* Walsh v. Lincoln, Bp. (1875), L. R. 10 C. P. 518.

**2262. Agreement to procure presentation in consideration of marriage.**—A covenant to procure another to be presented, etc., to a benefice upon the next avoidance, in consideration of

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marriage, is simoniacal & void.—**BYRTE v. MANNING** (1635), Cro. Car. 425; 79 E. R. 970.

*Annotation:—Mentd.* Hutchins v. Player (1663), O. Bridg. 272.

**2263. Sale of advowson—Living unlawfully held—By presentee of usurper.]—WALKER v. HAMERSTY, No. 2061, ante.**

**2264. — Agreement for payment by vendor of interest on purchase-money—Until vacancy—Vendor's son incumbent but not privy.]—SWEET v. MEREDITH, No. 2105, ante.**

**2265. Taking money for admitting persons into orders.]—ST. DAVID'S (BP.) v. LUCY, No. 2235, ante.**

**2266. Revocation of presentation by lay patron.]—ROGERS v. HOLLED, No. 2060, ante.**

**2267. Annuity secured to incumbent on resignation—Intention to present another bound by resignation bond.]—A bond given to an incumbent, securing him an annuity of equal value with the profits of the benefice upon his resignation, in order that another person may be presented, who may give a general bond of resignation, so that the patron's son, when of proper age, may be presented, is a bond within 31 Eliz., c. 6, s. 8, & void.—**YOUNG v. JONES** (1782), 3 Doug. K. B. 97; 99 E. R. 558.**

**2268. Agreement to forego small tithes—Inhabitants nominating curate.]—The inhabitants of P. having by endowment & an ancient deed, the right of appointing a curate who was entitled, besides a salary, to the receipt of vicarial tithes, an inclosure Act was passed, reciting that it was matter of doubt whether the curate was entitled to small tithes or to a *modus* in lieu thereof, which question was left unsettled by the Act; the inhabitants four years afterwards presented a curate, with whom they entered into an agreement signed by him & the inhabitants stating his appointment, & that he was entitled to the "payment of £40 annually, payable out of the lands & hereditaments at P. in right of the curacy, together with surplice fees, & all other profits, privileges, & appurtenances to same belonging & of right payable." The inhabitants considering that sum not sufficient, voluntarily agreed to pay a further annual sum of £29, with a proviso that it should not in any respect alter the money payment of £40 wherewith the funds were, & had been immemorably charged in right of the church:—*Held*: this agreement gave a benefit to the inhabitants, who made the presentation, inasmuch as it barred the right of the curate to his tithes, & afforded evidence in future of a *modus*, & was, therefore, simoniacal & void, under 31 Eliz., c. 6, s. 5.—**R. v. OXFORD (BP.)** (1806), 7 East, 600; 3 Smith, K. B. 570; 103 E. R. 233.**

**2269. Bond to procure resignation of presentee—When relative qualified.]—In debt on bond, conditioned for the performance of several things, if one of them be void at the common law, yet the bond may be good for the others. Where it was conditioned to pay money to the obligee upon the conveyance of an estate to the obligor, & to present the obligee's son to the next avoidance of a church, the advowson of which belonged to the estate, if he were then of age to take it, or if not, to procure the person who should be presented to resign, upon notice of the son's being qualified to take it, & to present him:—*Held*: admitting that part of the condition for the presentation of the obligee's son to be simoniacal, the bond was good for the payment of the money.—**NEWMAN v. NEWMAN** (1815), 4 M. & S. 66; 105 E. R. 759.**

*Annotations:—Consd.* Fletcher v. Soudes (1827), 1 Bll. N. S.

144. *Refd.* Mosse v. Killick (1881), 44 L. T. 140. *Mentd.* Short v. Hubbard (1824), 2 Bing. 349; Collins v. Gwynne (1831), 7 Bing. 423; Shackell v. Rowler (1836), 2 Bing. N. C. 631; Howden v. Simpson (1837), 1 Ry. & Can. Cas. 347.

**2270. Exchange of benefices—Bonâ fide agreement for non-payment of dilapidations.]—To a declaration by A., an incoming, against B., an outgoing incumbent, for dilapidations to the rectory house & premises, B. pleaded, that A., being rector of C., & B. incumbent of D., it was agreed between them, with the consent of their respective patrons & diocesans, that they should exchange their respective livings in their then state & condition, " & that pltf. should not call upon deft. to pay for the repairs in the declaration mentioned, or for any or either of them ":—*Held*: (1) the plea did not necessarily disclose a simoniacal contract; (2) a plea, whether coming before the ct. on motion for judgment *non obstante veredicto* or on demurrer, ought to receive a fair & reasonable construction, & if ambiguous, should be construed most strongly against the party pleading.—**GOLDHAM v. EDWARDS** (1856), 18 C. B. 389; 25 L. J. C. P. 223; 20 J. P. 613; 2 Jur. N. S. 493; 4 W. R. 550; 139 E. R. 1420, Ex. Ch.**

*Annotation:—As to* (1) *Consd.* Wright v. Davies (1876), 1 C. P. D. 638.

**2271. — Dilapidations unequal.]—(1) Pltf. incumbent of the rectory of A., & deft., the incumbent of the vicarage of B., with the assent of their respective patrons & diocesans, agreed to exchange their respective benefices, without any payment being made for dilapidations on either side:—*Held*: such an agreement was not necessarily simoniacal before Ecclesiastical Dilapidations Act, 1871 (c. 43), & it was not so contrary to the policy of that Act as to become illegal & void since.**

(2) Pltf. having sued deft. for dilapidations, deft. pleaded the above agreement, pltf. replied, on equitable grounds, that deft. at the time of the agreement represented to pltf. that the repairs of B. would be merely nominal, or only equal to those of A., though he "knew or ought to have known" that the former would be greatly in excess of the latter, & that on the faith that such representation was true pltf. made the agreement. On demurrer:—*Held*: the replication was bad, there being no suggestion of fraud or that deft. knew of the inequality at the time of making the agreement.—**WRIGHT v. DAVIES** (1876), 1 C. P. D. 638; 46 L. J. Q. B. 41; 35 L. T. 188; 40 J. P. 772; 21 W. R. 841, C. A.

*Annotation:—Consd.* *Er* Monk, Wayman v. Monk (1887), 35 Ch. D. 583.

**2272. Purchase of advowson by clerk—For life of another—Subsequent presentation of purchaser on vacancy.]—(1) The purchase of an "estate for life in an advowson" is not the purchase of a "next presentation" or "next avoidance," within the meaning of 13 Anne, c. 11, s. 2, though there be only one avoidance during the lifetime of the *cestui que vie*, the statute applying only to chattel interests. In *quare impedit* the declaration stated that S., being seised for life of an advowson, conveyed it to pltf. by deed for his life, for £3,000; that, during the life of S., the incumbent died, whereby it belonged to pltf. to present a fit clerk, but deft., the bishop, hindered him. Plea, that, the church being so vacant, & pltf. being so seised, pltf. presented himself for admission; that the vacancy caused by the death of the former incumbent was the next & only avoidance of the church which accrued to pltf. after his purchase of the advowson for the term aforesaid; & that such presentation of himself by pltf. was void by**

above sect. :—*Held* : the plea was bad, the purchase of the life estate of S. being a purchase of an "advowson," & not of a "next presentation," & therefore not a simoniacal contract within above Act.

(2) Plea, that, the church being vacant, plff. offered himself to deft. as ordinary for admission, & prayed deft. as such ordinary to admit & institute him thereto, which deft. refused, as he lawfully might, but was ready to admit & institute a fit clerk, other than plff. himself, upon the presentation of plff. :—*Held* : the plea was bad, inasmuch as, by the common law, a clerk who is seised of a freehold estate in an advowson may, upon a vacancy, offer himself to the bishop & pray to be admitted, & the bishop has no absolute discretion to admit or to reject him. (3) *Semble* : the plea should have shown the grounds of the bishop's refusal to present plff.—*WALSH v. LINCOLN* (BP.) (1875), L. R. 10 C. P. 518; 44 L. J. C. P. 244; 32 L. T. 471; 39 J. P. 424; 23 W. R. 829.

*Annotation* :—*Generally*, *Refd.* Lee v. Flack, [1896] P. 138.

#### SUB-SECT. 3.—EFFECT OF SIMONY.

**2273. General rule.**—(1) In a criminal suit instituted against a clerk in holy orders by the secretary to the Bishop of Worcester, it was proved that deft. had been guilty of simony, by reason of his having corruptly & simoniacally obtained presentation & institution to his vicarage, & also of conduct unbecoming a clergyman in unlawfully threatening a certain person to publish a libel upon him with the intent of extorting money. The ct. founding its sentence, in respect of the offence of simony, upon the general ecclesiastical as well as statute law, pronounced that deft. was a disabled person in law to have the vicarage, & that his presentation thereto, & his admission & institution thereupon, were void & frustrate, & of no effect in law, & having regard to all the circumstances of the case, the offence of misconduct as well as that of simony, it further pronounced upon him a sentence of deprivation from the ministry & from the performance of all clerical functions whatsoever in the province of Canterbury, & condemned him in the costs of the suit.

(2) Deft., in a criminal suit, appeared, by his proctor, to the citation & prayed arts. On the admission of the arts., the proctor intimated that he was not in a position to give in either an affirmative or negative issue, & praying justice, submitted himself to the judgment of the ct. The ct. fixed a day for the hearing, & proceeded with the cause as if a negative issue had been pleaded.

(3) In a criminal suit instituted for simony the patron was called as a witness & required to produce the deed of conveyance to him of the advowson of the vicarage in respect of the presentation to which the alleged simony had been committed. It was admitted that the deed was in ct., but the witness declined to produce it on the ground that it was a title deed :—*Held* : the ct., notwithstanding, ordered its production.—*LEE v. MEREST* (1869), 39 L. J. Eccl. 53; 22 L. T. 420; 34 J. P. 422.

**2274. Avoidance of living.**—If the patron for money present to a benefice with cure, every such presentation, & the admission, institution, & induction thereon, are void, although the presentee be not party nor privy to it.—*SIMONY CASE* (1611), 12 Co. Rep. 71; 77 E. R. 1352.

**2275.**—j.—Simony, on the part of a presentee

to a living, being in law a very odious offence, & the consequences of conviction thereof highly penal, the law, even if a simoniacal agreement is established, requires the strictest proof of the presentee's privity thereto before induction, or of his confirmation thereof after; so, in proof that a clerk is *simoniace promotus*, a corrupt agreement must be no less conclusively shown.

In a criminal suit against a clerk for simony, & for being simoniacally promoted :—*Held* : (1) neither his privity to, nor confirmation of, any simoniacal contract was proved; (2) no criminal contract was established, & he would be dismissed from the suit, & the promoters would be condemned in costs.

(3) *Semble* : when a clerk is *simoniace promotus* without his privity or subsequent confirmation, the Ecclesiastical Ct. cannot proceed to a sentence of deprivation in a criminal suit.—*WHISH v. HESSE* (1831), 3 Hag. Eccl. 659.

*Annotations* :—As to (3) *Apld.* Lee v. Beneficed Clerk (1895), 12 T. L. R. 115 (see [1897] A. C. 226). *Generally*, *Mentd.* Sergeant v. Sergeant (1831), 1 Curt. 3; Trevanion v. Trevanion (1837), 1 Curt. 486.

**2276.**—Ejectment against clerk simoniacally presented.]—Where a party was presented to a rectory in consideration of his having given a bond to resign in favour of a particular person, at the request of the patron, & was instituted & inducted, & such bond was held to be void, on the ground that it was simoniacal, & the King then presented A., & he was instituted & inducted :—*Held* : he might maintain ejectment for the rectory against the person who had been simoniacally presented.—*DOB v. WATSON v. FLETCHER* (1828), 8 B. & C. 25; 2 Man. & Ry. K. B. 206; 6 L. J. O. S. K. B. 282; 108 E. R. 952.

**2277. Disability of presentee to hold same benefice.**—*R. v. NORWICH* (BP.), COLE & SAKER, No. 1913, *ante*.

**2278.**—[ ] : *BOOTH v. POTTER*, No. 2221, *ante*.

**2279. Disability of presentee to sue—For tithes.**—The ct. will not prohibit a suit for tithes upon a suggestion of simony.—*RUESBY v. WENTWORTH* (1598), Cro. Eliz. 642; 78 E. R. 881.

*Annotation* :—*Mentd.* Lee v. Beneficed Clerk (1895), 12 T. L. R. 115.

**2280.**—[ ] :—*TOMSON'S CASE* (1627), Litt. 60; 124 E. R. 136.

**2281.**—Lessee of glebe—For use & occupation.]—In an action for use & occupation by an incumbent against a tenant of the glebe lands, who has paid him rent, deft. cannot give evidence of a simoniacal presentation of plff., in order to avoid his title.—*COOKE v. LOXLEY* (1792), 5 Term Rep. 4; 101 E. R. 2.

*Annotations* :—*Apld.* Brooksbey v. Watts (1815), 2 Marsh. 38. *Refd.* Hodson v. Sharpe (1808), 10 East, 350.

**2282.**—[ ] :—For tithe composition—Composition by agreement.]—Where the occupier of land has entered into an agreement for a composition for tithes, he cannot set up as a defence to an action on such agreement, that the incumbent was simoniacally presented.—*BROOKSBY v. WATTS* (1815), 6 Taunt. 333; 2 Marsh. 38; 128 E. R. 1063.

**2283. Simoniacal presentation by trustee—Whether breach of trust.**—It is a universal proposition, & of great moment to the safety & property of mankind, that a trustee ought strictly to pursue the tenor of his trust, without perverting it directly or indirectly to his own personal advantage, & therefore, where an executor intrusted with the disposition of some church preferments, made a presentation to A. under a secret condition for his own benefit, the presentation was set aside, & he was decreed to present a more proper person.



*Sect. 5.—Simony: Sub-sects. 3 & 4, A. & B.*  
*Sect. 6: Sub-sect. 1, A. & B. (a) & (b).]*

—RICHARDSON v. CHAPMAN (1760), 7 Bro. Parl. Cas. 318; 3 E. R. 200.

*Annotations:—*Consd. Pierson v. Garnet (1786), 2 Bro. C. C. 38; Brown v. Higga (1803), 8 Ves. 561.

**2284. Who entitled to present—After presentation by Crown for simony.**—(GREENWOOD v. LONDON (Bp.), No. 2102, *ante*.)

**2285. Whether pardoned—By general pardon.**—PHILLIPS'S CASE (1663), 1 Sid. 170; 82 E. R. 1037.

*Annotation:—*Refd. R. v. Turvill & Lincoln, Bp. (1675), Freeman. K. B. 197.

**2286. Effect of pardon—On avoidance of living.**—

WINCHCOMBE v. WINCHESTER (Bp.) & PULLESTON (1616), Hob. 165; 80 E. R. 313.

*Annotations:—*Mentd. St. Nicholas & St. Peter, Ipswich Parishes (1736), 2 Stra. 1066; Barret v. Gubb (1776), 2 Wm. Bl. 1052; Doe d. Watson v. Fletcher (1828), 6 L. J. Q. B. 282; Alston v. Atlay (1837), 7 Ad. & El. 289.

**2287. ————**—SNOW v. PHILLIPS (1664), 1 Sid. 220; 1 Keb. 780; 82 E. R. 1069.

*Annotations:—*Mentd. Roe v. Gatehouse (1696), 1 Ld. Raym. 145; Hantleside v. Brown (1753), Dick. 237; Powell v. Milburn (1772), 3 Wils. 355.

**2288. ———— On right of patron to present.**—The King presented to a church vacated by simony, & then a general Act of Pardon was passed, containing a restitution of forfeitures, etc.:—*Semble*: the right of the patron to present was not restored by the pardon. — R. v. TURVIL (1675), 1 Freeman. K. B. 197; 2 Mod. Rep. 52; 89 E. R. 140.

Pardons generally, *see* CONSTITUTIONAL LAW, Vol. XI., p. 516 *et seq.*

#### SUB-SECT. 4.—LEGAL PROCEEDINGS IN RESPECT OF SIMONY.

##### A. Jurisdiction.

**2289. Ecclesiastical courts.**—BAKER v. ROGERS, No. 2220, *ante*.

**2290. ————**—DOBIE v. MASTERS, No. 1170, *ante*.

— Under Church Discipline Act, 1840 (c. 60).]

— See No. 1573, *ante*.

— Under Clergy Discipline Act, 1892 (c. 32).]

— See No. 1573, *ante*.

Jurisdiction of ecclesiastical courts generally, *see* Part IV., Sect. 6, *ante*.

##### B. Practice and Procedure.

**2291. Parties—Whether patron must be party.**—In *quare impedit* for simony, the patron need not be joined.—ANON. (1681), Freeman. K. B. 535; 89 E. R. 400.

**2292. ————**—A *quare impedit* by the King against the incumbent, to present by reason of simony in the incumbent, need not make the patron a deft.—R. v. SOWTON (1681), 2 Show. 167; 80 E. R. 866.

**2293. ————**—In a *quare impedit* by the King for simony, the patron need not be made a deft.—R. v. PIOT (1685), 3 Lev. 206; 83 E. R. 652.

**2294. Pleading—Necessity for allegation of presentation.**—R. v. LANDAFF (Bp.), No. 1902, *ante*.

**2295. ———— Amendment.**—(1) The decision of a judge at chambers as to amendments of pleadings within the limits of his discretionary power over such amendments, will not be interfered with by the ct.

(2) In *quare impedit* by the Crown, upon an alleged forfeiture by simony between the patron

in fee, the grantee of the turn & the incumbent, a judge at chambers has authority to allow an amendment, by adding counts varying the terms & the parties to the simoniacal contract.

(3) It is in the discretion of such judge to allow the amendment without making the prosecutor pay the costs previously incurred.—R. v. YORK (ARCHBP.) (1834), 1 Ad. & El. 394; 3 Nev. & M. K. B. 453; 110 E. R. 1257.

**Discovery—Tending to expose party to forfeiture.**—*See* DISCOVERY, Vol. XVIII., p. 166, No. 1198.

**2296. Evidence—Admissibility—Former bill in chancery.**—SNOW v. PHILLIPS (1664), 1 Sid. 220; 1 Keb. 780; 82 E. R. 1069.

*Annotations:—*Refd. Hentleside v. Brown (1753), Dick. 236; Powell v. Milbank (1772), 2 Wm. Bl. 851. Mentd. Roe v. Gatehouse (1696), 1 Ld. Raym. 145.

**2297. ———— Conveyance of advowson.**—LEE v. MEREST, No. 2273, *ante*.

**2298. ———— Sufficiency—Conduct of defendant.**—

—LEE v. MEREST, No. 2273, *ante*.

**2299. Sentence—Deemed true in temporal court.**—

—BAKER v. ROGERS, No. 2220, *ante*.

#### SECT. 6.—MODE OF FILLING BENEFICES.

##### SUB-SECT. 1.—PRESENTATION.

*See, now*, Benefices Act, 1898 (c. 48), (Amendment) Measure, 1923, No. 1.

##### A. In General.

**2300. Definition.**—On the division of an old parish into three new parishes by Act of Parliament, it was provided, "That the right of patronage & presentation to the three churches, should belong to the Dean & Chapter of D. & their successors, for ever, in such manner as the presentation to the rectory of the old parish did belong to them, & not otherwise." One of these new parishes becoming vacant, the Dean & Chapter nominated J. to the cure, but did not present him to the ordinary for institution:—*Held*: (1) this rectory was presentative & not a donative; (2) the word presentation was a known term of the law, & when spoken of a benefice with cure of souls, as in this case, imported the patron's presenting his clerk to the Ordinary, to be admitted & instituted; (3) the subsequent relative words, *viz.* "In such manner as the presentation to the rectory of the old parish did belong to them, & not otherwise," referred only to the right which the Dean & Chapter had of putting in an incumbent, but not the manner in which it was to be done. SHIRT v. CARR (1717), 2 Bro. Parl. Cas. 173; 1 E. R. 868.

**2301. Presentation taken to bishop—Without privity or licence of patron—Validity.**—GRENDIT v. BAKER (1602), Yelv. 7; 80 E. R. 6.

*Annotation:—*Refd. A. G. v. Windsor (Dean & Canons) (1860), 30 L. J. Ch. 529.

**2302. Presentation & nomination in different persons.**—FORD v. HOSKINS (1615), Cro. Jac. 308; Moore, K. B. 812; 1 Roll. Rep. 125, 195; 2 Bulst. 336; 70 E. R. 315.

*Annotations:—*Refd. R. v. Orton Trustees (1849), 14 Q. B. 139. Mentd. Barnardiston v. Soame (1674), 6 State Tr. 1063; Ashby v. White (1703), 2 Ld. Raym. 938.

**2303. ————**—On a commission of charitable uses it was agreed between the lord of the manor of A. & the inhabitants of W. within the manor, that certain copyhold lands should be let for the maintenance of a stipendiary curate of the chapel of W. to be nominated by a majority of the inhabitants & to be allowed by the lord, & by him presented to the Ordinary for a licence to preach;

the usage of nominating, etc., had been pursuant to the agreement; the lord having refused to allow & present the nominee of a majority of the inhabitants, the latter prayed a *mandamus*, which the ct. refused; for their right is either a mere trust, & then their remedy is in equity, or it is a legal right, & then a *quare impedit* will lie. If the right of nomination be in one, & of presentation in another, & either impede the other in his right, a *quare impedit* lies. Where the right of nominating is in A., & of presenting in B., B. is to judge of the qualification of the person nominated, in the same manner as a bishop does; but if the person presenting object to the nominee on the ground of immorality, that must be tried by a jury. — *R. v. STAFFORD (MARQUIS)* (1790), 3 Term Rep. 646; 100 E. R. 782.

*Annotations*.—*Consd.* *R. v. Canterbury, Archbp. & London, Bp.* (1812), 15 East, 117. *Refd.* *R. v. Orton, Trustees* (1819), 14 Q. B. 139; *MacAllister v. Rochester, Bp.* (1880), 5 C. P. D. 194. *Mentd.* *Re Bawby & Workop Turnpike Roads Trustees* (1853), 20 L. T. O. S. 252.

**2304. Irregular presentation.—Presentation before resignation of incumbent accepted.**—If a new presentation of a benefice be made before the bishop has accepted the resignation of the incumbent, the presentation is void. —*FANE'S CASE* (1607), Cro. Jac. 107; 70 E. R. 172.

*Annotation*.—*Refd.* *Hesketh v. Gray* (1755), Say, 185.

**2305. Effect of.—Whether defence in suit for dilapidations.**—*TOMSON'S CASE* (1627), Litt. 60; 121 E. R. 136.

**2306. Evidence of presentation.** Copy of bishop's institution book. A copy of the bishop's institution book is not evidence of a presentation by the patron to a living. —*TILLARD v. SHEBBEARE* (1768), 2 Wils. 366; 95 E. R. 865.

**2307. Bishop's registry of presentations.** Inspection. — *R. v. ELY (Bp.)*, No. 210, *ante*.

#### *B. Who may be Presented.*

##### *(a) In General.*

**2308. Alien.** By the common law an alien was capable of a benefice in England for the church is one throughout the whole world; but at this day that cannot be without the King's licence (*per Cur.*). —*ANON.* (1465), Jenk. 130; 145 E. R. 91.

**2309.** —: If the King present one to a benefice, & afterwards present another, who is admitted, instituted, & inducted, same is a good repeal of the first presentation, & if the King will present a Frenchman, or a Spaniard, they shall not hold the benefice within this realm, for that same is contrary to a special Act of Parliament (*Coke, C.J.*). —*WALLER'S CASE* (1610), Godb. 179; 78 E. R. 109.

**2310.** —: — *COMMENDAM CASE, COLT & GLOVER v. COVENTRY & LICHFIELD (Bp.)* (1617) Hob. 110; Moore, K. B. 898; 80 E. R. 290; *sub nom.* *COLT v. GLOVER*, 1 Roll. Rep. 151; *sub nom.* *COLT'S CASE*, Jenk. 300, Ex. Ch.

*Annotations*.—*Refd.* *Bellamy v. Burrow* (1736), Cas. temp. Talb. 97. *Mentd.* *Manby v. Scott* (1662), O. Bridge. 229; *Edes v. Oxford, Bp.* (1667), Vaugh. 18; *R. v. Worcester, Bp.*, *Jervason & Minkley* (1670), 1 Mod. Rep. 276; *Thomas v. Sorrell* (1673), Freem. K. B. 85; *Hornbee, Williamson, Smith & Stone's Petn.* (1691), Freem. K. B. 331; *Shatter v. Friend* (1691), 1 Show. 172; *Harcourt v. Fox* (1693), 4 Mod. Rep. 167; *R. v. London, Bp. & Lancaster* (1694), Comb. 300; *Owen v. Saunders* (1697), 1 Ld. Raym. 158; *Reynoldson v. Blake* (1697), 1 Ld. Raym. 192; *Cole v. Hawkins* (1717), 1 Stra. 21; *Thornby v. Fleetwood* (1720), 1 Stra. 318; *Wolferstan v. Lincoln, Bp.*, & *Whitehead* (1763), 2 Wils. 174; *Roe d. Berkeley v. York, Archbp.* (1805), 6 East. 86; *Denn d. Nowell v. Roake* (1826), 5 B. & C. 720; *Mirehouse v. Rennell* (1832), 8 Bing. 490; *Osgood v. Nelson* (1869), 10 B. & S. 119; *Rumsey v. Nicholl* (1877), 2 C. P. D. 179; *Roberts v. London Corpn.* (1882), 30 W. R. 637.

**2311. Woman.** — *COMMENDAM CASE, COLT & J.* — VOL. XIX.

*GLOVER v. COVENTRY & LICHFIELD (Bp.)* (1617), Hob. 140; Moore, K. B. 898; 80 E. R. 290; *sub nom.* *COLT v. GLOVER*, 1 Roll. Rep. 151; *sub nom.* *COLT'S CASE*, Jenk. 300, Ex. Ch.

*Annotations*.—*Refd.* *Bellamy v. Burrow* (1736), Cas. temp. Talb. 97. *Mentd.* *Manby v. Scott* (1662), O. Bridge. 229; *Edes v. Oxford, Bp.* (1667), Vaugh. 18; *R. v. Worcester, Bp.*, *Jervason & Minkley* (1670), 1 Mod. Rep. 276; *Thomas v. Sorrell* (1673), Freem. K. B. 85; *Hornbee, Williamson, Smith & Stone's Petn.* (1691), Freem. K. B. 331; *Shatter v. Friend* (1691), 1 Show. 172; *Harcourt v. Fox* (1693), 4 Mod. Rep. 167; *R. v. London, Bp. & Lancaster* (1694), Comb. 300; *Owen v. Saunders* (1697), 1 Ld. Raym. 158; *Reynoldson v. Blake* (1697), 1 Ld. Raym. 192; *Cole v. Hawkins* (1717), 1 Stra. 21; *Thornby v. Fleetwood* (1720), 1 Stra. 318; *Wolferstan v. Lincoln, Bp. & Whitehead* (1763), 2 Wils. 174; *Roe d. Berkeley v. York, Archbp.* (1805), 6 East. 86; *Denn d. Nowell v. Roake* (1826), 5 B. & C. 720; *Mirehouse v. Rennell* (1832), 8 Bing. 490; *Osgood v. Nelson* (1869), 10 B. & S. 119; *Rumsey v. Nicholl* (1877), 2 C. P. D. 179; *Roberts v. London Corpn.* (1882), 30 W. R. 637.

**2312. Nominee of inhabitants.** Necessity for approval of lord of manor. — Under a commission of charitable uses it was agreed, that copyhold lands formerly surrendered for maintenance of a minister in W. chapel should be let, & the rents employed towards maintenance of the minister, to be chosen & appointed by the inhabitants, & presented & allowed by the lord of the manor; who upon complaint might give the minister half a year's warning, & if he had not reformed by that time, might remove him; the information prayed, that the lord might be decreed to allow & approve the candidate who had the majority of votes, which was refused on the ground of misconduct; & the evidence clearly disproving it, a new election was directed; upon which the same candidate being returned, & producing strong affidavits of good conduct for the last six years, the decree, stating the affidavits, declared that, in consequence of them, the relator deserved the approbation of the trustees. — *A-G. v. STAFFORD (MARQUIS)* (1796), 3 Ves. 77; 30 E. R. 903, L. C.

**2313. Nominee of Papist.** A presentation was made by a college on the nomination of a Roman Catholic patron: — *Held*: it was absolutely void under 13 Ann., c. 13. — *BOYER v. NORWICH (Bp.)*, [1892] A. C. 417; 61 L. J. P. C. 46; 67 L. T. 30; 56 J. P. 692; 8 T. L. R. 603, P. C.

**Presentee not of sufficient learning.** — See Nos. 2156, 2185, *ante*, No. 2315, *post*.

**Presentee guilty of unorthodoxy.** — See No. 1117, *ante*, No. 2352, *post*.

**Presentee guilty of misconduct.** — See No. 2351, *post*.

##### *(b) Where Patrons Co-Owners.*

**2314. One co-owner.** — *HOLLYS v. FULHAMME* (1539), 1 And. 1; Benl. 34; 123 E. R. 321; *sub nom.* *FULHAMME'S CASE*, Moore, K. B. 4.

**2315. Trustee.—Whether trustees bound to present nominee of beneficiary's assign.** — *ALBENABLE (EARL) v. ROGERS*, No. 2016, *ante*.

**2316.** —: — (1) *Lord Fairfax*, by a codicil to his will, in the year 1671, gave all his tithes of Bilborough in fee, subject to an estate therein for the life of R., to H. & his heirs & assigns, to the use of a preaching minister there, to be nominated by H. & his heirs. The heir of H. conveyed the tithes with other property to trustees for sale for payment of his debts, & they were accordingly sold & conveyed by these trustees in 1716 to R. & J. & their heirs, on trust as to the tithes to the use of a preaching minister to be nominated by R. & his heirs. J., who was only trustee for R., surviving R., became seized of the legal estate, & his descendants continued so seized in succession until 1820, when his heir-at-law conveyed the tithes upon the original trusts

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to T., the heir of R. T. had in 1721 nominated B. the preaching minister of Bilborough. In a suit by T. & B. for an account of tithes in Bilborough:—*Held*: this was a valid nomination of B.

(2) It appeared from the evidence, that the tithes of Bilborough had been appropriated to an alien priory, dissolved by 27 Hen. 8, c. 28; that Henry 8th afterwards demised them for 21 years by the description of *omnes decimas garbarum et fœni*; that Edward 6th, by letters patent, granted them to H. & W. & their heirs, by the description of *omnes illas decimas garbarum, granorum, bladorum, fœni, lunae et agnellorum ac alias decimas nostras quascunque*, etc., & that the title to them under that grant was vested in T. & his nominee. There was no mention of rectory or advowson in the grant. There was no trace of any endowment for a vicar or curate at any time in Bilborough:—*Held*: the grant included the rectory & comprised all tithes of every description arising in Bilborough, & the decree ordering an account of them to T. & B. was affirmed.—*HODGKINS-WORTH v. FAIRFAX* (1834), 3 Cl. & Fin. 115; 8 Bl. N. S. 882; 6 E. R. 1381, H. L.

Of class.—*See* No. 1980, *ante*.

**2317. — Whether duty to present one of favoured class—Construction of trust deed.**—The presentation to certain livings was given by an Act of Parliament vested in the Corp. of Shrewsbury, for whom a body of trustees was afterwards substituted, with a direction that they should nominate a fit & proper person duly qualified according to law, with a proviso that "*cæteris paribus*" preference should be given to a favoured class:—*Held*: (1) the *cætera* were the qualifications mentioned before, & not the whole of the qualifications of a clergyman; (2) the words "fit & proper person duly qualified" etc., were not thus rendered surplusage; (3) every person whom a bishop would be bound to accept if presented to him by a patron, would not necessarily be fit & proper within the meaning of the statute.

(1) At a meeting of the trustees to elect a clergyman for presentation to the living, there were several candidates, A. & others being of the favoured class, & C. not being so. A. was proposed, but a majority voted against him. C. was then proposed, & obtained a majority of votes, & he was declared duly elected. Upon the election of C. being set aside, on account of his not being of the favoured class:—*Held*: the trustees must proceed to a new election. A.'s merits not having been considered with reference to those of the other candidates, excepting C.—*A.-G. v. POWIS (EARL)* (1853), Kay, 180; 2 Eq. Rep. 506; 21 L. J. Ch. 218; 2 W. R. 140; 69 E. R. 79.

**2318. — Trustee presenting himself—Restrained by injunction.**—*POTTER v. CHAPMAN*, No. 73, *ante*.

**2319. — Trust to present from class—Whether refusal of whole class "failure" of trust.**—An advowson was conveyed in strict settlement with a declaration of trust that only the Fellows of a certain college should be presented to the benefice. On "failure" of the donees of the power of appointment to make such presentation the advowson was to be for the benefit of the Master & Senior Fellows of the college for ever. Plt. who was a donee of the power, offered the benefice, which was vacant at the time, to each of the Fellows, but they all refused it, & he appointed himself:—*Held*: there had been no "failure" within the meaning of the settlement, & there-

fore, the advowson was still vested in pltf., subject to a trust on future occasions to appoint a Fellow in accordance with the deed.—*HOPPER v. ST. JOHN'S COLLEGE, CAMBRIDGE* (1914), 31 T. L. R. 139.

### C. Mode of Presentation.

#### (a) In General.

**2320. By Crown—Whether by parol.**—(1) The King may present by parol, for nothing is granted or given by the presentation, for it is but a commendation or declaration of the King's will (COKE, C.J.).

(2) If a man presents *ad rectoriam*, it is as good as if he had presented *ad ecclesiam* (COKE, C.J.).—*R. v. —* (1611), Cro. Jac. 247; 79 E. R. 212.

*Annotation*:—As to (1) *Refd.* *Owen v. Saunders* (1697), 1 Ld. Raym. 168.

**2321. —**—(1) A common person by his letter or his word may make a presentation to a benefice to the bishop; the King may present by word if the ordinary be present; for a presentment is but a commandment; if the King under any seal present, it is good. It is best to plead the King presented generally, & not to plead it by letters patent, for it is the worst way (*per CUR.*).

(2) A presentment under the Great Seal to a church, parcel of the Duchy of Lancaster, is good, & needed not to be under the Duchy Seal (*per CUR.*).—*R. v. EMERSON* (1612), 1 Brownl. 162; 123 E. R. 720.

**2322. — Presentation under seal—What seal required.**—*R. v. EMERSON*, No. 2321, *ante*.

**2323. —**—*R. v. LINCOLN (BP.) & KING* (1613), Moore, K. B. 871; 72 E. R. 906. *Annotation*:—*Refd.* *Askill v. Clarke* (1697), 2 Lut. 1233.

**2324. —**—*STEPHENS v. POTTER*, No. 83, *ante*.

**2325. — Effect of no institution nor induction.**—*HARRIS v. WILLIS* (1665), 1 Sid. 239; 82 E. R. 1081.

**2326. By subject—"Ad rectoriam."**—*R. v. —*, No. 2320, *ante*.

**2327. — Whether by parol—Or by letter.**—*R. v. EMERSON*, No. 2321, *ante*.

**2328. —**—*GORE-BOOTH v. MANCHESTER (BP.)*, No. 1147, *ante*.

**2329. —**—*A.-G. v. BRERETON*, No. 1880, *ante*.

— **Co-owners.**—*See* Sub-sect. 1, C. (b), *post*.

#### (b) Where Patrons Co-Owners or Corporation.

##### i. In General.

**2330. Co-owners—Whether all must join.**—*HOLLYS v. FULIAMBE* (1539), Benl. 31; 1 And. 1; 73 E. R. 955; *sub nom.* *FULIAMBE'S CASE*, Moore, K. B. 4.

**2331. —**—Where there are several *cæteris que trust* of presentation, & they do not all agree, there can be no nomination. So in the case of joint tenants before severance, they must all agree, or no act can be done. Where there are parceners in an advowson, who cannot agree in one person, the ct. will direct them to draw lots who shall have the first presentation.—*SEYMOUR v. BENNET* (1742), 2 Atk. 482; 26 E. R. 601.

*Annotation*:—*Fold.* *Johnstone v. Baber* (1856), 6 De G. M. & G. 439.

*See, also*, No. 1957, *ante*.

— **Trustees.**—*See* Sub-sect. 1, C. (b) ii., *post*.

**2332. Corporation—Presentation by deed under seal—Variance in name immaterial.**—Edward III. granted licence to R. to found a collegiate hall of scholars, etc., *sub nomine Aulae Scholar' Reginae*

*de Oxon,' quae per unum praepositum de dictis scholaribus gubernabitur, & to give & assign a certain house, etc., praefatis praepositis et scholaribus aulae illius for their habitation for ever.* James I. had exemplified under the great seal the said charter in the records of the Chancery; & the clause *sub nomine* was *Aula Reginae de Oxonia*. R., who founded the college, in his charter of foundation, ordered that it should for ever be called *Aula Reginae*; & in several parts of his charter, *scholares* were called *socii*. The provost & scholars of the hall, by deed under their common seal & *per nomina* H., *praepositi Collegii in universitate Oxoniae, et sociorum, et scholarium ejusdem collegii*, presented A. to a church, who was admitted, instituted, & inducted, & who afterwards, being provost of the said hall or college, demised the said rectory for years; afterwards the provost of the hall or college aforesaid, & the scholars of the same, *per nomina* "praepositi, sociorum, et scholarium, Aulae vel Collegii Reginae in universitate Oxoniae," patrons of the said church, by their deed sealed with their common seal, confirmed the said demise; & the ordinary likewise confirmed it in the lifetime of A.: *Held*: the true name of the corp. was "*Praepositus et Scholares Aulae Reginae de Oxon.*" & the presentation & confirmation were good.—*AYRAY'S CASE* (1611), 11 Co. Rep. 18 b; 77 E. R. 1168.

*Annotations*:—*Mentd.* Gyner v. Kemsley (1677), Freem. K. B. 293; Ipswich Corp. v. Johnson (1732), 2 Burn. K. B. 120; A.-G. v. Rye Corp. (1817), 7 Taunt. 516; *Re Meredith's Trust* (1864), 10 L. T. 565.

**2333.** ——— **Mandamus to principal to affix seal.**—*A mandamus* lies to the provost of a college to compel him to affix the college seal to a presentation by the college.—*R. v. BLAND* (1740), 7 Mod. Rep. 355; 87 E. R. 1287.

*Annotations*:—*Refd.* *R. v. Cambridge* (Vice-Chancellor) (1765), 3 Burr. 1617; *R. v. Kendall* (1841), 1 Q. B. 366; *R. v. Orton, Trustees* (1851), 14 Q. B. 139.

## ii. Where Patrons Trustees.

**2334. What notice of meeting required.**—(1) Presentation to a living. Twenty-five trustees were to meet, & to present & elect a clergyman; one dies; the rest are equally divided, half being in favour of A. the rest voting for B. Upon the death of the supporters of the latter, the friends of A. meet & sign a presentation for him. This is void at law, & cannot be supported in equity.

(2) There should have been a distinct notice for the meeting of all.

(3) A direction that the trustees should meet for such purpose "within four months" from the death of an incumbent, does not prevent their meeting after that time.

(4) Trustees cannot make proxies to vote in such a personal trust as the above; though if a choice were regularly made at a proper meeting, they might for the mere purpose of signing the presentation.—*A.-G. v. SCOTT* (1750), 1 Ves. Sen. 413; 27 E. R. 1113; *sub nom.* *WILSON v. DENNISON*, Amb. 82.

*Annotations*:—*Generally, Mentd.* *A.-G. v. Vivian* (1826), 1 Russ. 226; *Lang v. Purves* (1862), 15 Moo. P. C. C. 359; *Re St. Stephen's, Coleman Street, Re St. Mary the Virgin, Aldermanbury* (1888), 38 Ch. D. 492; *Re Church Patronage Trust, Laurie v. A.-G.*, [1904] 2 Ch. 613.

**2335. Number of trustees acting.**—*A.-G. v. SCOTT*, No. 2334, *ante*.

**2336.** ———.—Where by neglect the number of trustees in a trust to present to a living was not filled up at the time of an avoidance:—*Held*: (1) the ct. would not by injunction prevent the effect of a presentation under the legal title of the heir of the surviving trustee, without a special ground; (2) the ct. would take care as to the

future, that the trust should be properly filled up.—*A.-G. v. LITCHFIELD* (BP.) (1801), 5 Ves. 825; 31 E. R. 878.

*Annotation*:—*Generally, Mentd.* *Re Church Patronage Trust, Laurie v. A.-G.*, [1904] 1 Ch. 41.

**2337.** ——— **Whether terms of trust deed complied with.**—By deed, the advowson of the vicarage of C. was vested in eight trustees, upon trust, from time to time as a vacancy should occur, that they or the major part of them & the survivors of them & their succeeding trustees, & the survivors of them or the major part of them for the time being, within the space of four calendar months next after such vacancy, should publish notice in the parish church upon two several Sundays immediately after divine service, of a certain time for the meeting of the parishioners within such four calendar months for electing a vicar; & the same parties were within six calendar months to present him when elected to the ordinary to be instituted & inducted. By the same indenture it was declared that when any of the trustees or the successors should be dead, the survivors should, as they in their discretion should think fit, before their number should be reduced to five, or within three months next after it should be reduced to four, appoint new trustees, so that the number of nine might be completed. In 1810, the number of the trustees was reduced to four, but no new appointment took place until Nov. 1822, when there were only two trustees surviving, who conveyed the advowson to themselves & seven new trustees. In May, 1838, the number of the trustees being reduced to six & appointment of new trustees was made, & the number restored to nine. In Sept. 1840, the late vicar died, & on Jan. 10 & 17, 1841, notice signed by five of the trustees was published of a meeting of the parishioners to elect a vicar. The name of N., one of the trustees who signed the notice, was subsequently erased. On Jan. 21 & 22 the election took place in the presence of the five trustees who had signed the notice. The deed of May, 1838, was not executed by P., one of the continuing trustees, until Jan. 22, 1841. At the time of the election two of the trustees were abroad, & one was dead. After the election, four of the trustees who were present signed at the foot of the poll-book a declaration, that A. was duly elected; but B., one of the trustees, refused to sign such declaration. Within six months from the election five of the trustees, one of whom had not been present at the election, presented A. to the ordinary: *Held*: (1) the appointment of 1822 was under the circumstances valid; (2) the election of A. was good; (3) the presentation of him signed by the five trustees was sufficient.

(4) Although trustees are not appointed in the manner directed by the trust deed, yet if there be no fraud or concealment in the appointment, & all parties interested acquiesce in & allow it to remain for many years unquestioned, the ct. will not interfere to remove them.—*A.-G. v. CUMING* (1843), 2 Y. & C. Ch. Cas. 139; 7 Jur. 187; 63 E. R. 61.

*Annotations*:—*Generally, Mentd.* *Turner v. Collins* (1871), 25 L. T. 261.

**2338.** ———.—By a deed of feoffment, made in 1591, a chapel with hereditaments appurtenant thereto, was vested in feoffees upon trust as to the income for the minister of the chapel, with a proviso that so often as all the feoffees save four should be dead, the four survivors should, within two months, convey to fresh feoffees. In 1866, there being only three surviving trustees, a document purporting to be the nomination of a

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*(b) ii., D. & E.; sub-sect. 2, A.]*

minister by all the three, was executed by two of them only, the third trustee being, from age & infirmity, incapable of attending to business. A suit was instituted to set aside the appointment, & an *interim* order obtained. Before the hearing of the cause, the third trustee died, & the two survivors executed a second nomination of the same minister:—*Held*: (1) in the absence of any special provisions in the deed as to the mode of appointing the minister, no objection could be taken on the ground of the number of trustees having been reduced below four; (2) this being in the nature of a public trust, an appointment by the majority was valid; (3) the incapacity of the third trustee rendered any consultation with him unnecessary; (4) the second nomination by the two survivors, after the death of the third, was a *bona fide* attempt to cure the technical defect, if any, of the first appointment, & was not affected by the pendency of the suit.—*A.-G. v. LAWSON* (1866), 36 L. J. Ch. 130; 15 W. R. 100.

**2339. Whether proxies allowable.**—*A.-G. v. SCOTT*, No. 2334, *ante*.

**2340.** —.—*Qu.* whether trustees of an advowson can vote by proxy.—*WILSON v. KIRSHAW* (1750), 7 Bro. Parl. Cas. 296; 3 E. R. 192.

**2341. Void presentation Candidate unqualified** —**Whether qualified candidate entitled or new election necessary.**—*A.-G. v. POWIS (EARL)*, No. 2317, *ante*.

**When trustees incorporated.**—*See CORPORATIONS*, Vol. XIII., pp. 288, 314, Nos. 192, 819.

#### *D. Grounds for Refusing Presentee.*

**2342. General rule.**—(1) In *quare impedit* by one claiming for life under a will, a presentment by the devisee for life himself is sufficient, & a presentment need not be alleged in the deviser.

(2) *Schismaticus inveteratus* is too general to be alleged as the cause of the refusal of a clerk.

(3) *So non est idoneus* generally, or *criminosus* generally is not sufficient.

(4) The cause of refusal ought to be alleged in particular, that the party may answer it.

(5) All such causes as are sufficient to deprive an incumbent, are sufficient to refuse a presentee.—*SPECOT'S CASE* (1590), 5 Co. Rep. 57 a; Jenk. 258; Gouldsb. 35, 52; 3 Leon. 108; 77 E. R. 141; *sub nom.* *SPECOT v. EXETER* (BP.), 1 And. 189.

*Innotations*:—As to (2) *Dbid.* *Exeter*, Bp. v. Hele (1693), Show. Parl. Cas. 88. *Consd.* R. v. Canterbury, Archbp. & London, Bp. (1812), 15 East, 117. *Refd.* Heath v. Burder (1860), 2 L. T. 670; Marshall v. Exeter, Bp. (1860), 7 C. B. N. S. 653. As to (4) *Refd.* Heath v. Burder (1860), 2 L. T. 670. As to (5) *Consd.* Heywood v. Manchester, Bp. (1884), 12 Q. B. D. 404. *Refd.* Gorham v. Exeter, Bp. (1849), 2 Rob. Eccl. 1. *Generally, Mentd.* *Bredman's Case* (1606), 6 Co. Rep. 56 b; Creswick v. Bookaby (1612), 2 Bulst. 47; Deekrow v. Jenkins (1630), Cro. Car. 178; Ayet v. Oats (1648), Sty. 125; Phillips v. Bury (1691), Comb. 265; Gerrard v. Gerrard (1695), 1 Salk. 54; Auchterarder v. Kinnoull (1839), 4 State Tr. N. S. 1.

**2343. Presentee frequenter of taverns.**—That the presentee is a haunter of taverns & unlawful games, which are *mala prohibita* only, is no cause for the bishop to refuse to admit him.—*BELL v. NORWICH* (BP.) (1565), 3 Dyer, 251 b; 73 E. R. 564.

*Innotations*:—*Consd.* Heywood v. Manchester, Bp. (1884), 12 Q. B. D. 404. *Refd.* *Specot's Case* (1590), 5 Co. Rep. 57 a. *Mentd.* *Case of Monopolies* (1602), 11 Co. Rep. 84 b.

**2344. Insufficiency of learning—Ignorance of Welsh—Benefice in Welsh diocese.**—*ALBANY v. ST. ASAPH* (BP.), No. 2201, *ante*.

**2345.** —.—*Though situate in Eng-*

*land.*—By *Pluralities Act*, 1838 (c. 106), s. 104, within certain dioceses "it shall & may be lawful for the bishop, if he shall think fit, to refuse institution or licence to any spiritual person who, after due examination & inquiry, shall be found unable to preach, administer the sacraments, perform other pastoral duties, & converse in the Welsh language."

The patron of a benefice in one of such dioceses presented a clergyman who could not speak Welsh. The bishop thereupon commissioned certain persons to hold an inquiry as to whether the parish required a pastor who should know Welsh. The persons so commissioned held the inquiry & reported to the bishop, but refused to permit the patron or the clergyman to be present or to be represented or produce evidence at the inquiry. The bishop, on receiving the report, refused to admit or institute the clergyman. In an action by the patron against the bishop in respect of such refusal:—*Held*: (1) "due examination & inquiry" meant examination & inquiry as to the clergyman's knowledge of the Welsh language, not as to the requirements of the parish; (2) the statute gave an absolute discretion to the bishop as to the mode of ascertaining the requirements of the parish; (3) he was not bound to hold a formal inquiry of a judicial character for that purpose, & therefore, the refusal to hear the patron or the clergyman did not invalidate the inquiry which was held, & the bishop was justified in refusing to admit or institute the clergyman.—*ABERGAVENNY (MARQUIS) v. LLANDAFF (BP.)* (1888), 20 Q. B. D. 460; 57 L. J. Q. B. 233; 58 L. T. 812; 36 W. R. 859; 4 T. L. R. 341.

**2346.** —.—**Necessity for statement of particulars of deficiency.**—*EXETER (BP.) v. HELE*, No. 2156, *ante*.

**2347.** —.—*Willis v. Oxford* (BP.), No. 2185, *ante*.

—.—*See, also*, No. 2357, *post*.

**2348. Presentation obtained by misconduct.**—Denurrer allowed to a bill to have a presentation to a living upon the next avoidance delivered up, charging deft. with gross misconduct in obtaining it, & in other respects, while a private tutor in the family.—*M'NAMARA v. —* (1801), 5 Ves. 821; 31 E. R. 878.

**2349. Presentee already beneficed—Joint value exceeding £1,000.**—*STORIE v. WINCHESTER* (BP.), No. 2158, *ante*.

**2350. Failure to produce testimonial—From former bishop.**—*EXETER (BP.) v. MARSHALL*, No. 41, *ante*.

**2351. Drunkenness.**—M., a clerk, being refused institution into a vicarage by the bishop on the ground of drunkenness, it was proved that in 1873 two instances of drunkenness occurred. No proof of subsequent amendment was given, & the testimonials were contradicted by the instances of drunkenness:—*Held*: the discretion of the bishop in the matter was sound, & could not be disturbed.—*MARRINER v. BATH & WELLS* (BP.) (1878), 42 J. P. 436, P. C.

*Annotation*:—*Mentd.* *Gordon v. Hayward* (1905), 21 T. L. R. 298.

**2352. Presentee guilty of ritualistic offences.**—A bishop refused to institute a clerk in holy orders to a benefice on the grounds that he had, whilst acting as curate to a former holder of the benefice, habitually committed offences against ecclesiastical law & failed to observe the Book of Common Prayer, by wearing unlawful vestments & doing unlawful acts in respect of matters of ritual when officiating in the communion service, & that he declined to undertake not to repeat the offences

2378. When restrained. Pendente lite--Suit to impeach conveyance of advowson.---(On the principle of protecting property pending litigation, the ct. will, in a suit to impeach a conveyance of an advowson, restrain the institution of a clerk, even as against a deft. claiming to be a purchaser for valuable consideration without notice under it. -- GREENSLADE v. DARE (1853), 17 Beav. 502; 51 E. R. 1120; subsequent proceedings (1855), 20 Beav. 284.

*Sect. 6.—Mode of filling benefices: Sub-sect. 2, B. & C.; sub-sects. 3 & 4. Sect. 7: Sub-sect. 1.]*

*B. By Collation.*

**2379. Effect—On right of patron to present.]—**GREEN'S CASE, No. 1634, *ante*.

**2380. — After inhibition by archbishop.]—**(1) In a licence to a parson with cure of souls to accept of another benefice "*modo sit infra*" ten miles of the former, the words "*modo sit infra*" shall not be taken as a condition so as to make the first benefice void on the taking of the second. (2) *Qu.*: if a collating by a bishop during the archbishop's visitation, & after his inhibition, be good.—DODSON v. LYNN (1637), Cro. Car. 475; 79 E. R. 1011; *sub nom.* DODSON v. GLYN, W. Jo. 394.

*C. By Licence.*

**2381. Effect—Invalidity of letters of orders—Known to party falsely pretending to be in holy orders.]—**R. v. ELLIS, No. 1800, *ante*.

**SUB-SECT. 3. INDUCTION.**

**2382. By whom performed—Clerk not resident within archdeaconry—General mandate to clergy within archdeaconry.]—**If an archdeacon make a general mandat for the induction of a parson, viz., *univers. personis vicariis clericis & literatis infra archidiaconat. meum ubicunque constitut.*, & if a minister or a preacher who is not resident within that archdeaconry, makes the induction, yet it is good (*per CUR.*).—DEAN'S CASE (1609), Noy, 134; 74 E. R. 1007.

*Annotation:—*Reid. Woolley v. Robinson (1678), Freem. K. B. 463.

**2383. Mandate—Accession of new bishop before execution of mandate—Whether mandate revoked.]—**(1) Induction by virtue of a mandate, granted by the guardian of the spiritualities, & executed after the consecration of a new bishop, is not void.

(2) Formalities of induction are not examinable in the Temporal Cts.—WOOLLEY v. ROBINSON (1678), Freem. K. B. 457, 463; 80 E. R. 341, 346; *sub nom.* ROBINSON v. WOOLLY, 3 Keb. 821; T. Jo. 78; 2 Lev. 190; 1 Vent. 319, Ex. Ch. *Annotation:—*Generally, *Mentd.* Phillips v. Bury (1694), Skin. 447.

**2384. Effect.]—**An annuity granted by a prebendary after admission & institution, & before induction is not good to charge the prebend.

The grant was not good to bind the successor, because it was made before induction, at which time it was not a good grant, for the successor shall not be bound but in respect that the grant was good to charge the prebend, & the prebendary could not charge it before he was inducted, because the induction makes him to have the actual possession of the prebend, & to have the freehold in deed of the possessions thereof, for before induction he has not the freehold either in deed or in law. But the collation & induction makes him, as well as it makes a parson or vicar, to have the cure of souls, & it enables them to administer the sacraments to the parishioners, & to perform all divine service. So that he is a prebendary or parson to such purpose, but yet a prebendary cannot lawfully have seisin of the house, glebe, or tithes, in our law before his installation, nor the parson before his induction, & the installation is to be done to the prebendary by the dean & chapter, & the induction to the parson or vicar by the archdeacon (*per CUR.*).

Whereby it appears, that without induction, which is a corporal possession, he who is admitted & instituted is not parson; so that from hence it is to be observed, that no possession can be had before induction, & without possession confirmation is worth nothing (*per CUR.*).—HARE v. BICKLEY (1577), 2 Plowd. 526; 75 E. R. 778.

*Annotations:—*Reid. Rawlinson v. Green (1617), Poph. 127; Robinson v. Woolly (1677), 3 Keb. 821.

**2385. —.]—**The first clerk being inducted could not be removed by law, for the presentation is under the Great Seal & by the King in law being in his name, & there is no difference in the form when it is for the King or for the Chancellor, saving that for the most part the one is *mandates* & the other is *rogantes* (*per CUR.*).—LORD CHANCELLOR'S CASE (1611), Hob. 214; 80 E. R. 360.

**2386. —.]—**HUTCHINS v. CLOVER, No. 2372, *ante*.

**2387. —.]—**BROWN v. SPENCE (1603), 1 Lev. 101; 1 Keb. 590; 1 Sid. 163; 83 E. R. 318.

*Annotation:—*Mentd. Franco v. Alvares (1746), 3 Atk. 342.

**2388. — Incumbent presented under mistake.]—**PERNE v. OLDFIELD (1680), 2 Cas. in Ch. 19, 31; 22 E. R. 826, 832.

**2389. — On grant of advowson after institution to second living.]—**LINCOLN (BP.) v. WOLFERTAN, No. 2058, *ante*.

**2390. — On right to maintain trespass—In respect of glebe—Before actual possession taken.]—**

(1) By his induction the parson is put in possession of a part for the whole, & may maintain an action for a trespass on the glebe land, although he has not taken actual possession of it.

(2) A parson who resigns his living is not entitled to emblements.—BULWER v. BULWER (1819), 2 B. & Ald. 470; 100 E. R. 437.

*Annotation:—*As to (2) *Reid.* Davis v. Eyton (1830), 7 Bing. 154.

**— On right to sue for tithes.]—**See No. 3396, *post*.

**2391. —.]—**BLISS v. WOODS, No. 456, *ante*.

*—.]—*See, also, No. 3396, *post*.

**2392. Proof—Necessity for.]—**WOODCOCK v. SMITH, No. 2375, *ante*.

**2393. —.]—**PITKERN v. ELLIS, No. 2376, *ante*.

**2394. — Sufficiency of—Possession for several years.]—**(1) Fifteen years' possession of a benefice is *prima facie* evidence of a regular induction & of reading the Thirty-Nine Articles.

(2) Payment of tithes by deft., a parishioner, is *prima facie* evidence against him of the rector's title.—CHAPMAN v. BEARD (1797), 3 Anst. 942; 145 E. R. 1088.

**2395. Obstruction—Remedies against—Writ de vi laica removenda—Injunction.]—**BOULT v. BLUNT (1560), Cary, 51; 21 E. R. 27.

**2396. —.]—**The issuing of the writ *de vi laica removenda* from the common law side of the Ct. of Ch. in England has fallen into desuetude, as the same relief can be given by injunction in a case of obstruction to the induction of a party to a benefice, to restrain all interference therewith.—*Ex p.* JENKINS (1808), 1 L. R. 2 P. C. 258; 5 Moo. P. C. C. N. S. 351; 38 L. J. P. C. 6; 19 L. T. 583; 17 W. R. 502; 16 E. R. 547. P. C.

**SUB-SECT. 4.—READING OF AND ASSENT TO THIRTY-NINE ARTICLES.**

**2397. At what place—Entry into church unlawfully obstructed—Porch.]—**Reading the Articles in the porch of a chapel of ease is well enough, where he is kept out of the church & chapel,—



**BROWN v. SPENCE** (1603), 1 Lev. 101; 1 Keb. 590; 1 Sid. 163; 83 E. R. 318.

*Annotation*:—**Mentd.** Franco v. Alvares (1746), 3 Atk. 342.

**2398. Sufficiency—Must be done sincerely.**—The assent to the Thirty-Nine Articles must be unfeigned.—**SMITH v. CLARKE** (1591), Cro. Eliz. 252; 78 E. R. 507.

**2399. Proof—Necessity for.**—**WOODCOCK v. SMITH**, No. 2375, *ante*.

**2400. — When presumed.**—**MONKE v. BUTLER** (1614), 1 Roll. Rep. 83; 81 E. R. 344.

*Annotations*:—**Folld.** Powell v. Milbank (1772), 2 Wm. Bl. 851. **Refd.** Williams v. East India Co. (1802), 3 East, 192; R. v. Hawkins (1808), 10 East, 211; Pearce v. Whale (1826), 7 Dow. & Ry. K. B. 512; Heysham v. Forster (1829), 5 Man. & Ry. K. B. 277.

**2401. — Incumbent recently appointed.**—

**PITKERN v. ELLIS**, No. 2376, *ante*.

**2402. —**—**POWELL v. MILBANK**, No. 1808, *ante*.

**2403. — Possession for several years.**—**CHAPMAN v. BEARD**, No. 2391, *ante*.

**2404. Effect of failure to read Articles—Avoidance of benefice.**—If an incumbent neglect to read the Thirty-Nine Articles within two months after his induction, pursuant to 13 Eliz., c. 12, the benefice becomes thereby void, without sentence of deprivation.—**GREEN'S CASE**, No. 1634, *ante*.

**2406. — Necessity for notice to patron.**—(1) Upon acceptance of a second benefice with cure, the patron of the first benefice may present to it, be the value what it may.

(2) But lapse shall not incur against him without notice, unless the first benefice be of the value of £8.

(3) Acceptance of a second benefice is void *ab initio* by not subscribing, & such acceptance, therefore, will not vacate the first.

(4) Loss of the second benefice by not reading the Articles does not restore the incumbent to the first which he had forfeited.—**SHUTE v. HIGDON** (1672), Freem. K. B. 25, 51; Vaugh. 129; 89 E. R. 22, 40.

*Annotation*:—**As to** (1) **Refd.** Wolferstan v. Lincoln, Bp. (1763), 2 Wils. 171.

**2407. — Second benefice—Whether incumbent restored to first benefice.** **SHUTE v. HIGDON**, No. 2406, *ante*.

## SECT. 7.—PLURALITIES.

### SUB-SECT. 1.—HOLDING OF TWO BENEFICES TOGETHER.

**2402. What amounts to—Admission & Institution to benefice—No induction.**—**AGAR v. PETERBOROUGH & DENN** (Bp.) (1553), Moore, K. B. 12; 72 E. R. 406.

Induction generally, *see* Sect. 6, sub-sect. 3, *ante*.

**2409. — Benefice held in mediety—One clerk holding both.**—If two parsons of one church have each an entire cure, & one is presented to both cures, it is a plurality.—**ANON.** (1594), Cro. Eliz. 351; 78 E. R. 599.

**2410. — Clerk rector of united benefice.**—A clergyman, who had for many years down to shortly before his death been rector of K., by his will bequeathed £1,000 “as an augmentation fund” for that benefice “upon condition that the benefice or rectory never be held in plurality by any neighbouring clergyman.” Stops towards the union

of the rectory of K. with a neighbouring rectory & vicarage were commenced by the bishop of the diocese in the year preceding testator's death & subsequently, in the year of his decease, the rectory of M. with the vicarage of S. & the rectory of K. were united into one benefice for ecclesiastical purposes, the deft. incumbent of M.-cum-S. being presented to the rectory of K.:—**Held**: testator having used “plurality” which was a technical expression involving the holding of a benefice by some clergyman who at the same time holds one or more other benefices, the rector of the one united parish or benefice was not holding in plurality, & the event contemplated by the condition of defeasance had not arisen.—**Re MACNAMARA, HEWITT v. JEANS** (1911), 104 L. T. 771; 55 Sol. Jo. 409.

**2411. When permissible—Yearly value not exceeding specified amount—Computation of value.**—The clause in 21 Hen. 8, c. 13, s. 9, “of the yearly value of £8,” means the real value, & not the rate in the King's books.—**BOND v. THURKET** (1601), Cro. Eliz. 853; 78 E. R. 1079; *sub nom.* **BENE v. THURKET**, Noy, 38.

*See, note*, Pluralities Amendment Act, 1885 (c. 51), s. 14.

**By licence or dispensation.**—*See* No. 2205, *ante*, Nos. 2413 2417, *post*.

**2412. Dispensation from Who may grant—Crown.**—**HOLLAND'S CASE**, No. 2205, *ante*.

**2413. — At what time dispensation may be granted—Whether after induction to second living.**—

(1) If a parson having a benefice with cure of the value of £8, etc. accepts another benefice with cure, & is instituted, the first benefice is void by the institution, but the patron, although he may take notice if he will, is not bound so to do till after induction; after induction he must take notice at his peril.

(2) A dispensation after institution, but before induction, is too late.

(3) If a parson is presented, admitted, & instituted to a benefice with cure above the value of £8, & afterwards & before induction to the first, he accepts another benefice with cure & is inducted, the first is void.—**DIBBY'S CASE** (1599), 4 Co. Rep. 78 b; Jenk. 273; 70 E. R. 1054; *sub nom.* **ROBINS v. GERARD & PRINCE**, Moore, K. B. 434; *sub nom.* **ROBINS v. PRINCE**, Gouldsb. 162.

*Annotations*:—**As to** (1) **Consd.** Alston v. Atlay (1837), 7 Ad. & El. 289. **Refd.** R. v. Canterbury, Archbp. (1633), Cro. Cir. 351; R. v. London, Bp. & Baldecock (1638), W. Jo. 404; Wolferstan v. Lincoln, Bp. & Whitehead (1763), 2 Wils. 171. **As to** (2) **Refd.** Colt & Glover v. Coventry & Lichfield, Bp. (1616), Hob. 140. **As to** (3) **Refd.** Betham v. Gregg (1834), 10 Bing. 352. *Generally*, **Mentd.** Pybus v. Mitford (1671), 3 Keb. 338; Walcot v. Botfield (1851), 2 Eq. Rep. 758.

**2414. —**—**R. v. LONDON** (Bp.) & **BALDECOCK** (1638), W. Jo. 404; 82 E. R. 211.

*Annotations*:—**Consd.** Alston v. Atlay (1837), 7 Ad. & El. 289. **Mentd.** Thompson v. Leach (1697), 1 Ld. Raym. 313.

**2415. — Construction of dispensation—“Modo sit infra.”**—**DODSON v. LYNN**, No. 2380, *ante*.

**2416. — Whether distance material factor.**—On a dispensation to hold two livings, the distance, by the temporal law, is immaterial.—**R. v. LITCHFIELD** (Bp.) (1775), 2 Wm. Bl. 968; 96 E. R. 571.

**2417. — Effect.**—**PINSON'S CASE** (1628), Het. 125; 124 E. R. 395.

*Annotation*:—**Refd.** Alston v. Atlay (1837), 7 L. J. Ex. 392.

**2418. Effect—Avoidance of first benefice.**—Where a parson, having one benefice of £8 yearly

## PART V. SECT. 7, SUB-SECT. 1.

**1. What amounts to—Vicar-choral.**—A vicar-choral, by accepting a

benefice with cure of souls, does not thereby hold benefices in plurality; & such office of vicar-choral is not

thereby vacated.—**SHAW v. WOODS** (1855), 5 L. C. L. R. 156; 7 Ir. Jur. 365.—**IR.**



2435. — What amounts to.] — DANIEL v. MORTON, No. 2434, *ante*.

*Semble* : Title Act, 1832 (c. 100), limiting the time for recovery of tithes, would not have operated to bar the claim.- *A.-G. v. DURHAM (EARL)* (1882), 46 L. T. 16.

2437. --- - - - -.] Applt. was the owner of the tithe rentcharge in two civil parishes by virtue of his being the incumbent of a church in each parish. He claimed that he was the incumbent of two separate benefices, so that, if that was the case, he was entitled to exemption from the poor rate on the tithe rentcharge, inasmuch as his total income from each parish was below the limit fixed by Ecclesiastical Tithe Rentcharge Rates Act, 1920 (c. 22), s. 1. On complaints for the rates the evidence showed that from very early times the two livings had never been separately occupied. The justices held that the two civil parishes were part of one benefice, & they ordered distress warrants to be issued: *Held*: there was evidence on which the justices could find that applt. was the occupant of one benefice & not two benefices, & their decision must be affirmed. *CARPENTER v. LAINDON OVERSEERS* (1922), 127 L. T. 555; 86 J. P. 161; 20 L. G. R. 511, D. C.

2438. Effect - Whether union of parishes.] At common law there might be a union, but that was only of churches, & but as an appropriation of one rectory to another, but still the parishes were distinct (HOLT, C.J.). *HARMAN v. DENNE* (1695), 1 Salk. 165; 3 Salk. 89; 91 E. R. 153, 710; *sub nom. HERMAN v. DENNE*, Holt, K. B. 522; 12 Mod. Rep. 82; *sub nom. ST. SWITHUN'S PARISH CASE*, Holt, K. B. 139; Skin. 588, 616.

*Annotations:* **Reid**, *Hartley v. Cook* (1833), 9 Blng. 728;  
*Robinson v. Bristol* (1851), 19 L. T. O. S. 230.

**2439. --- Constitutes one benefice.** -Where three parish churches have been united by 22 Car. 2, c. 11, the benefice may be described in pleading as one rectory. - *WILSON v. VAN MILDERT* (1801), 2 Bos. & P. 391 : 126 E. R. 1346.

2440. -- **Whether union of districts for rating.** -- The incumbent of two benefices which had been united "for ecclesiastical purposes only" by order in council under Pluralities Act, 1838 (c. 106), s. 16, claimed relief in respect of rates under

*See, now, Union of Benefices Measure, 1923, No. 3.*

**2433. At common law—Who may unite—Bishop**  
**—With assent of patrons.]—**Two churches whose  
revenues are not sufficient to maintain their  
respective charges may be united & consolidated  
by the ordinary, with the assent of the patrons,  
if it be afterwards confirmed by the King, though  
their value be above £8 per annum.—**AUSTYN v.**  
**TWYNE** (1596). Cro. Eliz. 500 ; 78 E. R. 750.

*Annotation* :—**Reid**. Reynoldson v. Blake (1697), 1 Ld. Raym. 192.

2434. ]—The Bishop of N., within which diocese were the perpetual curacy of W. & the rectory of C., addressed an instrument to D., the perpetual curate of W., under the episcopal seal, setting forth that he, the bishop, did, by these presents, “unite, annex & incorporate the aforesaid rectory of C., with all its rights, members & appurtenances, to & with the aforesaid perpetual curacy of W., during your incumbency of same, & so long as you shall be perpetual curate there, & no longer, by our ordinary authority, & as much as in us lies, & the laws & statutes of this realm do permit, & not otherwise; so that you the aforesaid rectory of C. with the aforesaid perpetual curacy of W. may, as one benefice, so long as you are perpetual curate of the said perpetual curacy of W., retain, & the fruits,” etc., “of both the said benefices, the burdens & charges due on same being by you sustained, receive, convert & apply to your own use, freely & lawfully, any ecclesiastical ordinance to the contrary notwithstanding. Provided, nevertheless, that you have & keep a sufficient curate, licensed & approved by our ordinary authority, to instruct & teach the people of the parish in which you shall not reside; & provided also that, if you shall at any time hereafter be collated or instituted to any other benefice whatsoever, that then our union shall be null & void to all intents & purposes in the law, as if same had never been granted”: *Held*: (1) assuming that the bishop had power to unite the two benefices into one without the assent of the Crown, chapter or patron, the instrument, on the whole, did not show an intention to effect such a union, & therefore, W. & C. being fifty miles from each other, D., while resident at C., was non-resident at W., within Pluralities Act, 1838 (c. 106), & the bishop might, under sect. 83, while D. was receiving the profits of both livings, appoint a stipend to the curate of W., & enforce the payment by monition & sequestration of W.; (2) the fact of non-payment of the salary must, after the summons & sequestration, be assumed to have been duly proved before the bishop, & it could not be objected that D. had not due notice of all the facts; (3) in an action for money had & received, brought by D. against the sequestrator for the purpose of impeaching the sequestration, D. could not insist that he had vacated the benefice of W. by adopting that of C., inasmuch as his right of action depended upon his being incumbent of W.—*DANIEL v. MORTON* (1850), 10 Q. B. 198; 20 L. J. Q. B. 98; 16 L. T. O. S. 322; 15 J. P. 40; 15 Jur. 699; 117 E. R. 851.

*Annotations*:—As to (1) **Reid**, *Robinson v. Bristol* (1852), 22 L. J. C. P. 21; *Ac. G. v. Durham* (1852), 46 L. T. 16.

*Sect. 7.—Pluralities: Sub-sect. 2. Sect. 8: Sub-sects. 1, 2 & 3, A. & B. (a) & (b).]*

**Ecclesiastical Tithe Rentcharge Rates Act, 1920 (c. 22), s. 1 (2).** The income of each benefice separately was under £300; the combined income was between £300 & £500. The justices were of opinion that the combined income must be treated as one for the purpose of rating, & made an order for payment of one-half the amount of the rates which would, but for the Act, have been payable by the incumbent:—*Held*: (1) the benefices having been united "for ecclesiastical purposes only" under Pluralities Act, 1838 (c. 106), s. 16, the proviso to that sect. applied; (2) such united benefices were not a "district formed for ecclesiastical purposes by virtue of statutory authority" within Tithe Rentcharge Rates Act, 1899 (c. 17), s. 2 (1), & therefore, the incomes of the two benefices were separately ratable, & the incumbent was entitled to total relief from rates in respect thereof.—*KEANE v. ASHBOCKING OVERSEERS*, [1922] 1 K. B. 143; 91 L. J. K. B. 129; 126 L. T. 252; 85 J. P. 270; 38 T. L. R. 40; 66 Sol. Jo. 92; 19 L. G. R. 759, D. C.

*Annotation:—As to (2) Distd. Carpenter v. Laindon Overseers (1922), 127 L. T. 555.*

*See, further, RATES & RATING.*

**2441. — Whether holding in plurality.]—***Re MACNAMARA, HEWITT v. JEANS*, No. 2110, *ante*.

**— On patronage.]—***See Sect. 4, sub-sect. 1, D., ante.*

**2442. — On Crown—Union of benefices by statute—Crown not named.]—**An Act of Parliament for the consolidation of endowed rectories & vicarages binds the Crown though not named.—*R. v. ARMAGH (ARCHBP.)* (1722), 1 Stra. 516; 8 Mod. Rep. 5; 93 E. R. 671; *on appeal, sub nom. ARMAGH (ARCHBP.) & WHALEY v. R.* (1724), Fortes. Rep. 213, H. L.

**2443. — Payment of annuities to retiring incumbent—Whether annuities benefice with cure & inalienable.]—**In pursuance of an order in council under the Union of Benefices Act, 1800 (c. 124), uniting two City benefices, certain annuities were granted to the retiring incumbent & his assigns out of the annual income of the united benefice, & made a first charge thereon during the joint lives of himself & the incumbent of the united benefice, so long as he should perform in person, or by substitute to be approved of by the bishop, the duties of curate of the united benefice under the style of vicar in charge, with a provision for the retiring incumbent after the death of the incumbent of the united benefice:—*Held*: such annuities were not a benefice with cure within 13 Eliz., c. 20, & accordingly, could be validly mortgaged by the retired incumbent.—*McBEAN v. DRANE* (1885), 30 Ch. D. 520; 55 L. J. Ch. 10; 53 L. T. 701; 33 W. R. 924; 1 T. L. R. 624.

## SECT. 8.—RIGHTS AND DUTIES OF BENEFICED CLERGY.

### SUB-SECT. 1.—IN GENERAL.

**Preaching—Necessity for licence of bishop.]—***See Sect. 2, sub-sect. 4, A., ante.*

*—See, also, No. 394, ante.*

**— Control of ministrations in parish.]—***See Part III., Sect. 7, sub-sect. 2, C., ante.*

**— Intended sermon on subject-matter of**

**pending action restrained.]—***See CONTEMPT OF COURT, Vol. XVI., p. 23, No. 183.*

### SUB-SECT. 2.—CURE OF SOULS.

**2444. General rule.]—***CLERKE d. PRIN v. HEATH*, No. 1795, *ante*.

**2445. —.]—***BLISS v. WOODS*, No. 456, *ante*.

**2446. Evidence of.]—***CLERKE d. PRIN v. HEATH*, No. 1795, *ante*.

**Lay rector has no cure of souls.]—***See No. 1361, ante.*

### SUB-SECT. 3.—RESIDENCE.

#### A. In General.

**2447. Duty to reside on benefice—In parsonage.]**

*—BUTLER & GOODALE'S CASE*, No. 2460, *post*.

**2448. —.]—**An incumbent must reside in the parsonage house, where there is one, & not in another house though within the same parish.—*LAW v. IBBETSON* (1771), 5 Burr. 2722; 98 E. R. 428.

*Annotations:—Expld. Wilkinson v. Allott* (1776), 2 Cowp. 429. It is said, that in *Law v. Ibbotson*, I did say, "that if there was no parsonage house, the parson might reside where he pleased"; but it is clear that must mean somewhere in the parish; any other construction would be a shameful evasion of the statute (*LORD MANSFIELD, C.J.*). *Consd. Wynn v. Smithies* (1815), 5 Taunt. 198.

**2449. — Incumbent holding two benefices—Residence in benefice not having parsonage.]**—The incumbent of two livings, one of which has a house of residence upon it, & the other not, may reside in that in which there is no parsonage house, without a licence from the bishop, & such residence will excuse him from residing in the other living.—*WYNN v. SMITHIES* (1815), 6 Taunt. 198; 1 Marsh. 547; 128 E. R. 1010.

**2450. Period of absence—Need not be continuous.]—***QUILTER v. MUSSENDINE* (1720), Gilb. Ch. 228; 25 E. R. 158.

*Annotation:—Mentd. Rickard v. Graham*, [1910] 1 Ch. 722.

**2451. — "In any one year"—Year from time when action brought for penalty.]—***CATHCART v. HARDY*, No. 2470, *post*.

#### B. Dispensation from.

##### (a) Licence of Bishop or Archbishop.

**2452. Necessity for—Private Act annexing benefice to deanery.]—**A private Act annexed the rectory of H. to the deanery of Windsor, & recited that the necessary residence on the deanery, & the dean's attendance on her Majesty, as registrar of the order of the garter, would oblige him to be often absent from H., & the Act compelled him to appoint a stipendiary curate constantly resident at H.:—*Semble*: this, without more, conferred an excuse for non-residence at H., although in the subsequent Act, 43 Geo. 3, c. 84, imposing residence on all benefices not therein excepted, this is not enumerated, as a ground of exemption or of licence.

Where a private Act "united" & "annexed" a rectory in the diocese of O. to a deanery in the diocese of S. & dispensed with any presentation to the dean, but left institution & induction still necessary:—*Held*: a licence from the bishop of O. for non-residence on the rectory was necessary, as well as a licence for non-residence on the deanery from the bishop of S.

### PART V. SECT. 8, SUB-SECT. 2.

**t. Vicar-choral.]—**The office of vicar-choral is not attended with a cure of souls.—*SHAW v. WOODS* (1855), 5 L. C. L. R. 156; 7 Ir. Jur. 365.—*IR.*

Where deft. had first ruled pltt. to discontinue an action for non-residence on a notification of exemption, which pltt. had agreed to admit, & traverse the title:—*Held*: deft. might afterwards have another rule to discontinue as to the same benefice, if he could show a sufficient ground.—*WRIGHT v. LEGGE* (1815), 6 Taunt. 48; 128 E. R. 950.

**2453. Grounds for granting—Incumbent holding benefices in different dioceses—Licence in respect of one benefice.**—It is no ground within 43 Geo. 3, c. 84, s. 19, for a licence of non-residence upon a benefice in one diocese, that a bishop of another diocese has licensed the incumbent's non-residence on a benefice within that diocese, because he had no house on that benefice, & lived within two miles thereof, & did the duty & a licence granted on that ground, would not be valid without the allowance of the Archbishop, under sect. 20.

(2) The non-residence on one benefice under a licence from the diocesan thereof, is not equivalent to actual residence thereon, so as to excuse the incumbent's non-residence on another benefice.

(3) Therefore, a bishop's retrospective certificate that he would have granted a licence of non-residence because the incumbent was performing the duties of another benefice within two miles of which he lived by licence from another diocesan, not being allowed by the archbishop, is void, but is good with the archbishop's certificate, though the latter be granted after July 1, 1814.—*WRIGHT v. FLAMANK* (1815), 6 Taunt. 52; 1 Marsh. 308; 128 E. R. 952.

**2454. Registration—Benefice in archbishop's peculiar—Situate in another diocese—Place of registration.**—A licence of non-residence on a benefice within an archbishop's peculiar, locally situate in another diocese, needs not to be registered in the registry of the diocese, but ought to be registered in the registry of the archbishop.—*WYNNE v. MOORE* (1814), 5 Taunt. 757; 128 E. R. 889.

**2455. Effect—Non-residence under licence not equivalent to actual residence.**—*WRIGHT v. FLAMANK*, No. 2453, *ante*.

**2456. Retrospective licence—Effect.**—(1) Under 54 Geo. 3, c. 51, the retrospective certificate of a bishop to excuse a non-residence incurred before the passing of that Act, need not be obtained before July 1, 1814.

(2) A bishop's certificate that he would have granted a licence, cannot be pleaded in bar, or used as a defence upon the trial, of an action for non-residence.

(3) If the certificate covers so much of the time of the non-residence, that not enough non-residence to constitute an offence remains uncovered, the ct. will discontinue the action.—*WYNNE v. KAY* (1814), 5 Taunt. 843; 1 Marsh. 387; 128 E. R. 924.

*Annotation*:—As to (1) *Reid*. *Wright v. Flamank* (1815), 6 Taunt. 52.

**2457. ———.**—*WRIGHT v. FLAMANK*, No. 2453, *ante*.

#### (b) Other Excuses for Non-Residence.

**2458. Obedience to inhibition.**—*ROBINS v. GERARD & PRINCE* (1599), as reported in Moore, K. B. 434; 72 E. R. 678; *sub nom.* *ROBINS v. PRINCE*, Gouldsb. 162.

*Annotations*:—*Mentd.* Colt & Glover v. Coventry & Lichfield, Bp. (1616), Hob. 140; R. v. Canterbury, Archbp. (1633), Cro. Car. 354; R. v. London, Bp. & Baldock (1638), W. Jo. 404; Rybus v. Mitford (1674), 3 Keb. 338; Lincoln, Bp. v. Wolferstan (1764), 1 Wm. Bl. 490; Betham v. Gregg (1834), 10 Bing. 352; Alston v. Atlay (1837), 7 Ad. & El. 289; Walcot v. Botfield (1854), 2 Eq. Rep. 758.

**2459. Sickness without fraud.**—*ROBINS v. GERARD & PRINCE* (1599), as reported in Moore, K. B. 434; 72 E. R. 678; *sub nom.* *ROBINS v. PRINCE*, Gouldsb. 162.

*Annotations*:—*Reid*. Walcot v. Botfield (1854), 2 Eq. Rep. 758. *Mentd.* Colt & Glover v. Coventry & Lichfield, Bp. (1616), Hob. 140; R. v. Canterbury, Archbp. (1633), Cro. Car. 354; R. v. London, Bp. & Baldock (1638), W. Jo. 404; Rybus v. Mitford (1674), 3 Keb. 338; Lincoln, Bp. v. Wolferstan (1764), 1 Wm. Bl. 490; Betham v. Gregg (1834), 10 Bing. 352; Alston v. Atlay (1837), 7 Ad. & El. 289.

**2460. ———.**—(1) By 21 Hen. 8, c. 13, it was resolved that the parson ought to reside in the parsonage-house & not in another house, although within the same parish.

(2) Lawful imprisonment without covin, or the non-existence of a parsonage-house in the parish, or sickness without fraud, are good excuses for non-residence.—*BUTLER & GOODALE'S CASE* (1598), 6 Co. Rep. 21 b; 77 E. R. 285; *sub nom.* *GOODALE v. BUTLER*, Cro. Eliz. 590; Moore, K. B. 540; Gouldsb. 109.

*Annotations*:—As to (1) *Reid*. — v. Head (1728), 2 Lee, 566; Walcot v. Botfield (1854), Kay, 534. As to (2) *Reid*. Mun v. Baylies (1671), Freem. K. B. 340; Walcot v. Botfield (1854), Kay, 534.

**2461. Non-existence of parsonage.**—*BUTLER & GOODALE'S CASE*, No. 2460, *ante*.

**2462. ———.**—The want of a parsonage-house is no excuse for the incumbent's residing out of the parish.—*WILKINSON v. AILLOT* (1776), 2 Cowp. 429; 5 Burr. 2725, n.; 98 E. R. 1160.

*Annotation*:—*Reid*. Wynn v. Smithies (1815), 6 Taunt. 198.

**2463. ———.**—*WYNN v. SMITHIES*, No. 2449, *ante*.

**2464. Lawful Imprisonment.**—*BUTLER & GOODALE'S CASE*, No. 2460, *ante*.

**2465. ———.**—It is no ground for issuing a writ of prohibition to prevent a bishop from declaring a living void under Pluralities Act, 1838 (c. 100), s. 58, which has been under sequestration for a year, in consequence of the non-residence of the incumbent, that the non-residence is occasioned by his imprisonment, under a sentence pronounced by this ct. upon a criminal information for libel.

We certainly did not contemplate this consequence of our judgment; but though this gentleman is rendered physically unable to obey the order requiring him to reside in his living, as his inability results from his own extreme misconduct, he cannot avail himself of it as any excuse for non-compliance with that order. If any superior authority should think proper to release him from that imprisonment in order that he may return to his congregation, that is for them, & not for us (*LORD DENMAN, C.J.*).—*Ex p. BARTLETT* (1818), 12 Q. B. 488; 11 L. T. O. S. 239; 12 Jur. 726; 12 J. P. Jo. 389; 116 E. R. 950; *sub nom.* *Re BARTLETT*, Cripps' Church Cas. 131; 18 L. J. Q. B. 11; *subsequent proceedings*, *sub nom.* *Re BARTLETT*, 3 Exch. 28.

*Annotation*:—*Reid*. Bonaker v. Evans (1850), 16 Q. B. 162.

**2466. Resignation.**—*RUDGE v. THOMAS* (1617), 3 Bulst. 202; 1 Roll. Rep. 403; 81 E. R. 170.

*Annotations*:—*Reid*. Price v. Williams (1836), 1 M. & W. 6. *Mentd.* Barker v. Braham & Norwood (1773), 2 Wm. Bl. 566.

**2467. Death.**—(1) Death is not such a non-residence as will avoid a lease by a parson.

(2) A reservation of rent in a parson's lease, payable on the quarter-days, or within twenty days after, is good, & binds the successor, & the tenant shall not have twenty days after the last quarter-day of the term.

(3) A concurrent lease by a parson to commence at a future day, is a lease in reversion, & void against the successor.—*MUN v. BAYLIES* (1671), Freem. K. B. 340; 89 E. R. 253; *sub nom.*

**Sect. 8.—Rights and duties of beneficed clergy: Sub-sect. 3, B. (b) & C. (a) & (b) i. & ii.; sub-sect. 4. Sect. 9: Sub-sects. 1 & 2.]**

**BAYLY v. MURIN**, 1 Vent. 244; 2 Lev. 61; sub nom. **BAILY v. MUNNE**, 3 Keb. 46, 107, 193.

*Annotations*.—**Generally**, **Mentd.** Winter v. Loveden (1897), 1 Ld. Raym. 287; Wallis v. Hodson (1740), Barn. Ch. 272; Lane v. Bennett (1836), 1 M. & W. 70; Vivian v. Blomberg (1836), 3 Bing. N. C. 311.

**2468. Defendant being chaplain retained.**—**ANON.** (1733), 2 Barn. K. B. 316; 94 E. R. 524.

**2469. Sequestration.**—A sequestration upon a *fi. fa.* of a benefice with cure, is no excuse for the non-residence of the incumbent: & a lease thereof made by him, is, on account of such absence, void by 13 Eliz., c. 20, s. 1.—**DOE d. ROGERS v. MEARS** (1774), 1 Cowp. 129; 10ff, 602; 98 E. R. 1004.

**2470. Licence by patron—Bound to resign on failure to reside on benefice—Revocability of licence.**—**BAGSHAW v. BOSSLEY**, No. 2247, *ante*.

**2471. Living unhealthy.**—To debt against the incumbent of a parish for non-residence, it is a good defence that, from the unhealthfulness of the living, he cannot reside there, but at the risk of life.—**SCAMMELL v. WILLETT** (1799), 3 Esp. 29, N. P.

**2472. Private Act annexing benefice to deanery.**—**WRIGHT v. LEAGE**, No. 2452, *ante*.

**Sufficiency of excuse—To prevent avoidance of lease by incumbent.**—*See* Nos. 2466, 2467, 2469, *ante*.

#### C. Enforcement of.

##### (a) In General.

**2473. Monition.**—**DAVIES v. POPE** (1797), Return of Appeals before the High Court of Delegates, p. 92, No. 182 (Parliamentary Papers, 199, April 3, 1808).

—*See, generally*, Part IV., Sect. 10, sub-sect. 2, *ante*.

**2474. Suspension.**—**MUGG v. LEY** (1709), Return of Appeals before the High Court of Delegates, No. 124 (Parliamentary Papers, 199, April 3, 1808).

**2475.**—An incumbent suspended, *ab officio et beneficio*, for immoral practices.—**PAWLET v. HEAD** (1728), 2 Lec. 565.

—*See, generally*, Part IV., Sect. 10, sub-sect. 4, *ante*.

**Monition & sequestration by bishops.**—*See* Sect. 10, sub-sect. 4, *post*.

##### (b) Proceedings for Penalties.

##### i. In General.

**2476. Nature of proceedings—Civil not criminal.**—**RACKHAM v. BLUCK**, No. 1478, *ante*.

##### ii. Practice and Procedure.

**2477. Venue.**—(1) In debt under 43 Geo. 3, c. 84, s. 12, for wilfully absents himself from his benefice, the venue must be laid in the county where the offence is committed.

(2) 31 Eliz., c. 5, extends as well to offences of omission as of commission.—**WHITEHEAD v. WYNN** (1810), 5 M. & S. 427; 105 E. R. 1107.

*Annotation*.—**Generally**, **Mentd.** Spencer v. Swannell (1839), 3 M. & W. 154.

**2478. Pleading—Contents—Allegation that defendant instituted & inducted.**—An information for non-residence need not allege that deft. was instituted & inducted. Objection that deft. was described "parson or vicar" was overruled.—**GARLAND v. BURTON** (1738), Andr. 291; 2 Stra. 1103; 95 E. R. 403.

*Compare* No. 2480, *post*.

#### PART V. SECT. 8. SUB-SECT. 3.—C. (b) ii.

**a. Proof of exemption.**—Action for penalties, under 5 Geo. IV, c. 91,

against a clergyman, for non-residence on his benefice. It is no ground of nonsuit that plff., in his declaration, negatives certain grounds of exemption,

but does not prove the negative, the onus of proof resting on deft.—**ARLTHNOT v. LESLIE** (1833), 1 Ir. L. Rec. N. S. 83.—**IR.**

**2479.** — **Whether allegation of length of absence sufficiently certain.**—(1) 43 Geo. 3, c. 84, which prohibits under a penalty a spiritual person from absents himself from his benefice for more than a certain time in any one year, means year from the time when the action is brought for the penalty.

(2) In such action it is not necessary to allege in the declaration that the benefice has the cure of souls; & its being alleged that he absented himself for a period exceeding eight months together, on Oct. 10, 1810, for the space of nine months, then next following is sufficiently certain of the time of absence, for it shall be intended to be for more than eight months immediately consecutive to Oct. 10, the jury having found a verdict for a penalty corresponding with that period of absence.

(3) The annual value means average annual value.

(4) A prebend is a benefice within the above statute.—**CATHCART v. HARDY** (1814), 2 M. & S. 534; 105 E. R. 480.

**2480. Evidence—Necessity for proof of institution & induction.**—**BEVAN v. WILLIAMS** (1770), 3 Term Rep. 635, n.; 100 E. R. 775.

*Annotations*.—**Mentd.** Radford v. McIntosh (1790), 3 Term Rep. 632; Smith v. Taylor (1805), 1 Bos. & P. N. R. 196; Pearce v. Whale (1826), 5 B. & C. 38.

*Compare* No. 2478, *ante*.

**2481.** — **Sufficiency—Name of parish.**—In a *qui tam* action for non-residence, where the declaration states deft. to be vicar of A. & he gives evidence that the parish is called B., the entry of deft.'s institution in the bishop's book by the name of A. is not conclusive evidence against him though it is evidence of the parish being called by both names.—**STILL v. COLERIDGE** (1801), For. 117; 145 E. R. 1131.

**2482.** — **Non-residence.**—**RACKHAM v. BLUCK**, No. 1478, *ante*.

**2483. Penalty—Mode of assessment—One-third part of "annual value" of benefice—Average annual value.**—**CATHCART v. HARDY**, No. 2479, *ante*.

**2484.** — **By registrar.**—**RACKHAM v. BLUCK**, No. 1478, *ante*.

#### SUB-SECT. 4.—ECCLESIASTICAL DUTIES.

**2485. Conduct of—Whether matter of public interest—Management of charity in parish.**—The conduct & management, by the clergyman of a parish, of a charitable society in the parish, from the benefits of which dissenters are by his sanction excluded, is not the lawful subject of public comment, so as to excuse, under the plea of not guilty, the publication of untrue & injurious matter respecting the clergyman in relation to the charity.

*Qu.*: whether sermons preached in a church, but not published, are the lawful subject of such public comment.—**GATHERCOLE v. MIAL** (1846), 15 M. & W. 319; 15 L. J. Ex. 179; 7 L. T. O. S. 89; 10 J. P. 582; 10 Jur. 337.

**2486.** — **Dispute between incumbent & churchwarden—As to use of church & vestry.**—A churchwarden having written to plff. the incumbent, accusing him of having desecrated the church, by allowing books to be sold in it during service & by turning the vestry into a cooking apartment.

the correspondence was published without pltf.'s permission in the deft.'s newspaper, with comments on pltf.'s conduct:—*Held*: (1) this was a matter of public interest which might be made the subject of public discussion; (2) the publication was, therefore, not libellous, unless the language used was stronger than, in the opinion of the jury, the occasion justified.—*KELLY v. TINLING* (1865), L. R. 1 Q. B. 699; 35 L. J. Q. B. 231; 13 L. T. 255; 30 J. P. 791; 12 Jur. N. S. 940; 14 W. R. 51.

*Annotations*:—*Generally*, *Mentd.* *Kelly v. Sherlock* (1866), L. R. 1 Q. B. 686; *Davis v. Duncan* (1874), L. R. 9 C. P. 396; *Purcell v. Sowler* (1876), 1 C. P. D. 781.

**Neglect or refusal to perform.**—*See* Sect. 13, sub-sect. 3, A., *post*.

## SECT. 9.—CHARGES ON BENEFICES.

### SUB-SECT. 1.—IN GENERAL.

**2487. Whether claimable by prescription—Charge by way of annuity.**—An annuity lies by prescription against the parson of a church; & it is no plea to say that the church is destroyed; for it is due in respect of the profits which arise from the tithe & glebe.

The church is the cure of souls & the right of tithes. If the material fabric of the parish church be down, another may be built, & ought to be (*per* CUR.).—*ANON.* (1675), 1 Mod. Rep. 200; 80 E. R. 827.

**Charges authorised for purpose of improving property of benefice.**—*See* Part VII., Sect. 7, sub-sect. 3, *post*.

### SUB-SECT. 2.—MADE WHILE CHARGES

#### AUTHORISED BY STATUTE.

*NOTE.*—*Charges on benefices were made unlawful by 13 Eliz., c. 20. This Act was repealed by 43 Geo. 3, c. 84, s. 10, but, so far as it related to charges, was revived by 57 Geo. 3, c. 99, & in considering the cases in this sub-section regard must be had to these Acts.*

**2488. Validity—Demise of benefice to secure annuity.**—(1) A rector in Dec. 1810, granted, bargained, sold, & demised the rectory & all the glebe lands, tithes, etc. to a trustee for securing an annuity for a term of years, if he the rector should so long live. This conveyance having been made after the passing of 43 Geo. 3, c. 84, & before the passing of 57 Geo. 3, c. 99:—*Held*: a valid conveyance passing the legal estate to the trustee.

(2) The rector succeeded to the rectory, upon the death of the former incumbent, in Apr. 1816. A. & B. were then in possession of the glebe lands, having been tenants of the former incumbent, & they continued in possession until Dec. 1816, when the rector conveyed them to the trustee for securing the annuity:—*Held*: the latter could not maintain an ejectment against A. & B. without giving them a notice to quit.—*DOE d. CATES v. SOMERVILLE* (1826), 6 B. & C. 126; 9 Dow. & Ry. K. B. 100; 5 L. J. O. S. K. B. 28; 108 E. R. 399.

*Annotation*:—*As to* (2) *Reid*. R. v. Halifax (1855), 4 E. & B. 647.

**2489. ——— Assignment of term when charges prohibited by statute.**—A rector, in 1811, & after 13 Eliz. c. 20, had been repealed, in consideration of £600 granted, bargained, & sold the

rectory & glebe lands, & all tithes, etc., for a hundred years, to the grantee of an annuity for securing the same. After the passing of 57 Geo. 3, c. 99, by deed, reciting the grant of the annuity, & that B. had agreed to lend the rector £600 to enable him to redeem the annuity, the grantee of the same, in consideration of £600, by direction of the rector, assigned to B. the £600 by him paid for the purchase of the annuity, & the term, & the rector confirmed to B. the rectory for that term, for the purpose of securing the repayment of the sum advanced by him to redeem the annuity, as well as other sums:—*Held*: inasmuch as the term was created after the passing of the 43 Geo. 3, c. 84, which repealed 13 Eliz. c. 20, against charging benefices, the assignment of it for the purpose of securing the money paid as the consideration for the annuity, was valid, & vested the legal estate in B., although made after 57 Geo. 3, c. 99, which, perhaps, revived 13 Eliz. c. 20, so far as related to charges upon benefices.—*DOE d. BROUGHTON v. GULLY* (1829), 9 B. & C. 341; 4 Man. & Ry. K. B. 249; 7 L. J. O. S. K. B. 201; 100 E. R. 128.

*Annotations*:—*Folld.* *Doe d. Wilks v. Ramsden* (1833), 4 B. & Ad. 608. *Reid.* *Bunter v. Cresswell* (1850), 19 L. J. Q. B. 357.

**2490. ———**—A rector, after 13 Eliz. c. 20, had been repealed, & before its revival by 57 Geo. 3, c. 99, demised his rectory to a trustee for 99 years, to secure an annuity. After the passing of 57 Geo. 3, c. 99, by deed reciting the grant of the former annuity, & that A. had agreed to purchase of the grantor an annuity of £574 a year for £4,400, & out of that sum to pay off the former annuity, & that that annuity & the term created to secure the same, should be assigned to a trustee for A.'s benefit, the rector granted the said annuity of £574, chargeable on his rectory; & the trustee of the term created to secure the annuity of 1813, assigned it to a trustee for the benefit of A.:—*Held*: inasmuch as the term was created after the passing of 43 Geo. 3, c. 84, which repealed 13 Eliz. c. 20, the assignment of it, though for the purpose of securing the payment of an annuity charged on the benefice after the passing of 57 Geo. 3, c. 99, was valid.—*DOE d. WILKS v. RAMSDEN* (1833), 4 B. & Ad. 608; 1 Nev. & M. K. B. 489; 110 E. R. 585.

*Annotation*:—*Reid.* *Bunter v. Cresswell* (1850), 16 L. T. O. S. 41.

*Compare* No. 2511, *post*.

**2491. ——— Covenant to charge benefice to which grantor might be presented subsequently—No charge executed until after passing of Act prohibiting charges.**—43 Geo. 3, c. 84, repealed 13 Eliz. c. 20, which prohibited the charging of benefices. 43 Geo. 3, c. 84, was repealed in 1817, & the effect of such repeal was to revive 13 Eliz. c. 20. In 1811 an incumbent duly charged his then present benefice with an annuity, & covenanted that, if he should afterwards be preferred to any other benefice, he would fully charge the same with the annuity; & that in the meantime the same should be charged & chargeable with the annuity. In 1814 the incumbent was preferred to another benefice but no legal charge upon it was executed until 1818:—*Held*: the deed of 1811 constituted a good equitable charge, which attached upon the new benefice as soon as it was acquired.—*METCALFE v. YORK (ARCHB.)* (1830), 1 My. & Cr. 547; 6 L. J. Ch. 65; 40 E. R. 485.

*Annotations*:—*Apld.* *Re Mirams*, [1891] 1 Q. B. 594. *Reid.*

13 L. Eq. R. 272. *IR.*

*e. ——— Judgment.* A judgment is, under Debtors (Ireland) Act, 1810

### PART V. SECT. 9, SUB-SECT. 2.

**b. Validity—Monies expended on buildings.**—Monies expended under the statutes for buildings & other

improvements on glebe lands, duly certified by the bishop, constitute a good legal charge on a moiety of the benefice.—*BROOKE v. HORNER* (1819),



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Long v. Storie (1849), 3 De G. & Sm. 308; Montagu v. Sandwich (1886), 32 Ch. D. 525. *Mentd.* Wellesley v. Wellesley (1839), 4 My. & Cr. 561; Ludgate v. Channell (1861), 16 L. T. O. S. 357; Mornington v. Keane (1858), 2 De G. & J. 292; Tuckley v. Thompson (1860), 1 John. & H. 126; Holroyd v. Marshall (1862), 10 H. L. Cas. 191; Talby v. Official Receiver (1888), 13 App. Cas. 523; Western Wagon & Property Co. v. West, [1892] 1 Ch. 271; *Re* Lind, Industrials Finance Syndicate v. Lind, [1916] 2 Ch. 345.

SUB-SECT. 3.—MADE WHEN CHARGES FOR-  
HIDDEN BY STATUTE.

## A. Warrants of Attorney.

**2492. When valid—Whether warrant of attorney charging benefice—Or merely collateral security.]**

(1) A grant of a rentcharge by a rector or vicar out of his benefices is void by 13 Eliz. c. 20.

(2) If in such a deed of grant, he also covenant personally to pay the rentcharge or annuity, & give a warrant of attorney to confess judgment as a collateral security for payment of the annuity, the ct. will not order the deeds to be delivered up to be cancelled.—*MOUYS v. LEAKE* (1799), 8 Term Rep. 411; 101 E. R. 1461.

*Annotations:—As to (1) Consd.* Gibbons v. Hooper (1831), 2 B. & Ad. 734. *Foll.* Sloane v. Packman (1843), 1 Dow. & L. 332. *Refd.* Colebrook v. Layton (1833), 4 B. & Ad. 578; Hawkins v. Gathercole (1854), 3 Eg. Rep. 348. *As to (2) Refd.* Faircloth v. Gurney (1833), 9 Bing. 622. *Generally, Mentd.* Kerrison v. Cole (1807), 8 East, 231; Horwood v. Underhill (1808), 10 East, 123; Morgan v. Horseman (1810), 3 Taunt. 241; Davis v. Marlborough (1819), 2 Swan. 108; Aston v. Gwinnell (1829), 3 Y. & J. 136; McCormack v. Melton (1834), 1 Ad. & El. 331; Ferguson v. Norman (1838), 5 Bing. N. C. 76; Howden v. Simpson (1839), 10 Ad. & El. 793; Phillips v. Phillips (1850), 10 C. B. 85; Young v. Clare Hall (1851), 21 L. J. Q. B. 12; James v. Rice (1854), Kay, 231; Payne v. Brecon Corp'n. (1858), 3 H. & N. 572; Howkins v. Bennet (1861), 30 L. J. C. P. 193.

**2493. ————]**—A warrant of attorney was given to confess judgment at the suit of A. It recited a grant of an annuity to A., & that the same was secured by the demise of a rectory, glebe lands, tithes, etc. by the grantor, to B. It then declared that the warrant of attorney was executed for the purpose of securing the annuity, & to the end & intent that a sequestration might be obtained by A. & continued during the continuance of the annuity, for the better securing the same:—*Held:* the warrant of attorney was a fraud on 13 Eliz. c. 20, as creating a charge on an ecclesiastical benefice.—*FLIGHT v. SALTER* (1831), 1 B. & Ad. 673; 9 L. J. O. S. K. B. 67; 109 E. R. 937.

*Annotations:—Distd.* Gibbons v. Hooper (1831), 9 L. J. O. S. K. B. 69; Britten v. Wait (1832), 3 B. & Ad. 915; Moore v. Ramsden (1832), 1 L. J. K. B. 134. *Foll.* Newland v. Watkin (1832), 2 Moo. & S. 174; Faircloth v. Gurney (1833), 9 Bing. 622. *Distd.* Colebrook v. Layton (1833), 4 B. & Ad. 578. *Appl.* Saltmarsh v. Hewett (1834), 1 Ad. & El. 812. *Apprvd.* Jeffries v. Alexander (1860), 8 H. L. Cas. 595.

**2494. ————]**—A beneficed clergyman granted annuities by three several deeds, & by the same deeds, made them chargeable on his living, which he thereby conveyed in trust for the grantee, for the more effectually raising & enforcing payment of the annuities out of the living; & he also gave a security for payment of the annuities, three warrants of attorney, with defeasances in the common form, to confess judgment at the suit of the grantee. On motion to set aside the warrants of attorney, as being a charge upon the living in evasion of 13 Eliz. c. 20:—*Held:* this did not appear; the covenants in the annuity deed for payment of the annuity might

be good, though the rest was void, & payment of the arrears, under these covenants, might well be enforced by the warrants of attorney.—*GIBBONS v. HOOPER* (1831), 2 B. & Ad. 734; 9 L. J. O. S. K. B. 69; 109 E. R. 1317.

*Annotations:—Distd.* Newland v. Watkin (1832), 2 Moo. & S. 174. *Foll.* Britten v. Wait (1832), 3 B. & Ad. 915; Colebrook v. Layton (1833), 4 B. & Ad. 578. *Refd.* Saltmarsh v. Hewett (1834), 1 Ad. & El. 812.

**2495. ————]**—A clergyman granted an annuity, & secured it by a conveyance of his benefice & by a warrant of attorney:—*Held:* the conveyance was void, but the warrant of attorney good.—*ABERDEEN v. NEWLAND* (1831), 4 Sim. 281; 58 E. R. 106.

*Annotation:—Refd.* Saltmarsh v. Hewett, Skrine v. Same (1834), 3 L. J. K. B. 188.

**2496. ————]**—*KIRLEW v. BUTTS* (1831), 2 B. & Ad. 736, n.; 109 E. R. 1318.

*Annotations:—Foll.* Britten v. Wait (1832), 3 B. & Ad. 915. *Consd.* Newland v. Watkin (1832), 2 Moo. & S. 174. *Refd.* Colebrook v. Layton (1833), 1 Nev. & M. K. B. 374.

**2497. ————]**—A beneficed clergyman granted an annuity by deed & made it chargeable on his living & gave a warrant of attorney in the common form, to confess judgment at the suit of the grantee for £3,200. By the annuity deed it was agreed that the judgment to be entered up on the warrant of attorney was to be a further security for the annuity & that no execution or sequestration should be issued thereon other than such sequestration as was therein mentioned, until the annuity should be in arrear; & the grantor then covenanted that if the grantee should at any time deem it expedient to sequester the living it should be lawful for him to issue a sequestration by virtue of the judgment for the £3,200, or any part thereof. Judgment having been entered up on the warrant of attorney & the annuity being in arrear the grantee issued a sequestration for £3,200, which sum greatly exceeded the arrears due, & entered into possession of the living. The ct. refused to set aside the annuity deed, warrant of attorney, & judgment, but directed that the writ of sequestration should continue in force only for the arrears that had become due on the annuity.—*BRITTEN v. WAIT* (1832), 3 B. & Ad. 915; 1 L. J. K. B. 267; 110 E. R. 336.

**2498. ————]**—*Deft.*, a beneficed clergyman, gave to *pltf.* a warrant of attorney to secure a previously contracted debt authorising *pltf.* to enter up judgment thereon, & immediately thereupon to sue out one or more writ or writs of *fieri* or *levari facias de bonis ecclesiasticis*, or *sequestrari facias*, & to procure one or more sequestrations thereon "against *deft.*'s livings. *Pltf.* having accordingly entered up judgment & sequestered the livings, the ct., at the instance of an annuity creditor, having a subsequent judgment, & without the concurrence of *deft.*, granted a rule to restrain *pltf.* from further enforcing his writ of sequestration on the ground that the warrant of attorney, being a "charging of a benefice with a pension or profit," was void by 13 Eliz. c. 20.—*NEWLAND v. WATKIN* (1832), 9 Bing. 113; 2 Moo. & S. 174; 131 E. R. 557; *sub nom. Ex p. MORRIS*, *NEWLAND v. WATKIN*, 1 L. J. C. P. 177.

*Annotations:—Foll.* Faircloth v. Gurney (1833), 9 Bing. 622. *Consd.* Saltmarsh v. Hewett (1834), 1 Ad. & El. 812. *Appl.* Long v. Storie (1849), 13 L. T. O. S. 530. *Refd.* Moore v. Ramsden (1832), 7 Ad. & El. 898. *Mentd.* Semple v. Nicholson (1859), 4 H. & N. 298.

**2499. ————]**—A clergyman granting an annuity, agreed that it should be charged on his

(c. 105), ss. 19, 21, 22, a valid charge upon an ecclesiastical benefice, without

issuing a sequestration; & the ct. will in a plenary suit grant a receiver over

the benefice.—*HALE v. CARPENDALE* (1853), 5 Ir. Jur. 121.—*IR.*

benefice, & the payment secured by a bond & warrant of attorney with a judgment to be entered up thereon, for the purpose of charging the benefice. By the deed of grant the annuity was made payable on certain days & chargeable on the benefice, with a power of distress, etc.; it also contained a demise of the benefice to a trustee, with a power in default of payment, to receive the tithes, rents & profits, etc. It was thereby also declared, that the bond & warrant of attorney, referred to in the deed as having been already prepared, & meant to bear even date with & to be executed & given at the same time as the deed, & the judgment to be entered up thereon, should be further securities for the annuity; & that immediately after such judgment the creditors might sue out execution & do such other acts as might be necessary for obtaining a sequestration: & that as often as the annuity should be in arrear, they might put in force such writ of sequestration. The condition of the bond, after reciting the agreement for purchase of the annuity & for securing the same by such bond warrant of attorney, & judgment reciting also the deed of grant, was declared to be for the due payment of the annuity on certain days. The warrant of attorney gave authority to receive a declaration at the suit of plffs., in an action of debt on a bond describing it as a bond of even date with the warrant of attorney, executed by the grantor of the annuity & given to the grantees, & to suffer judgment. The defeasance recited, that it was given to secure the payment of an annuity of the amount mentioned in the bond payable on the same days as in the condition of the bond was expressed. On a motion to set aside the judgment on this warrant of attorney on the ground that it was a charge on the benefice:—*Held*: this did not sufficiently appear, the reference in the warrant of attorney to the bond amounting to no more than a description of the bond, its date, the parties to it, & the time at which the annuity was to be paid & not incorporating the terms of the deed of grant, recited in the bond, with the warrant of attorney, as to make the latter operate as charge of the benefice.—*COLEBROOK v. LAYTON* (1833), 4 B. & Ad. 578; 1 Nev. & M. K. B. 374; 2 L. J. K. B. 95; 110 E. R. 573.

*Annotations*:—*Distd.* Saltmarsh v. Hewett (1834), 1 Ad. & El. 812. *Refd.* Hawkins v. Gathercole (1855), 3 Eq. Rep. 348. *Mentd.* Lane v. Horlock (1846), 16 L. J. Q. B. 87.

**2500.** ————]—The deed by which an annuity was granted contained a charge on a rectory, but a warrant of attorney which accompanied the deed, though it recited the deed, gave no authority to sequester the rectory: *Held*: the deed was only void *pro tanto* & the warrant of attorney was unimpeachable.—*FAIRCLOTH v. GURNEY* (1833), 9 Bing. 622; 2 Moo. & S. 822; 2 L. J. C. P. 61; 131 E. R. 747.

*Annotations*:—*Refd.* Lewis v. Hooper (1834), 4 Nev. & M. K. B. 318; Snow v. Booth (1855), 2 Jur. N. S. 37.

**2501.** ————]—A warrant of attorney which appears upon the face of it to be to secure the payment of an annuity charged upon an ecclesiastical benefice, is void, under 13 Eliz. c. 20.

The ct. will set aside a warrant of attorney, judgment & execution, where the defeasance of the warrant of attorney recites the grant of an annuity by A. to B., rector of R., *cum cura animarum*, intended to be secured by an indenture, "whereby A. had charged the annuity upon the rectory of R.;" & that it had been agreed that such annuity should also be secured by that warrant of attorney; & that no execution should issue until 21 days' default in payment of the

annuity, in which case B. might, *toties quoties*, sue out such execution as he should think fit, & also sequester the rectory, to the intent that B. might recover the arrears.—*SALTMARSH v. HEWETT* (1834), 1 Ad. & El. 812; 110 E. R. 1417; *sub nom.* *SALTMARSH v. HEWETT, SKIRNE v. SAME*, 3 Nev. & M. K. B. 656; 3 L. J. K. B. 188.

*Annotations*:—*Refd.* Moore v. Ramsden (1838), 7 Ad. & El. 898; Hawkins v. Gathercole (1855), 3 Eq. Rep. 348. *Mentd.* Lane v. Horlock (1846), 16 L. J. Q. B. 87; Croft v. Lumley (1855), 5 E. & B. 648.

**2502.** ————]—On a proceeding at the instance of a sequestrator to settle the rights of several sequestration creditors of a beneficed clergyman a creditor claimed under a warrant of attorney which appeared by memorandum indorsed, to be given by the clergyman for the purpose of securing an annuity granted by deed:—*Held*: the creditor need not show the deed, in order to prove that it was free from objection under 13 Eliz. c. 20, the warrant of attorney being on the face of it, regular.—*JOHNSON v. BRAZIER* (1834), 1 Ad. & El. 624; 110 E. R. 1345.

**2503.** ————]—R. granted an annuity, charging it, by deed, on two ecclesiastical benefices held by him, which he thereby demised on trusts to secure the annuity. He at the same time executed a warrant of attorney to the grantee, reciting the annuity deed, & stating that, for further securing the regular payment of the said annuity, he thereby desired & authorised certain attorneys, etc., the rest of the instrument being in the common form of a warrant of attorney to suffer judgment in an action of debt. The amount for which judgment was to be entered was twice the purchase-money of the annuity. There was no defeasance:—*Held*: the warrant of attorney was not void as charging the benefices contrary to 13 Eliz. c. 20.—*MOORE v. RAMSDEN* (1838), 7 Ad. & El. 898; 3 Nev. & P. K. B. 180; 7 L. J. Q. B. 54; 112 E. R. 708; *previous proceedings* (1832), 1 L. J. K. B. 134.

*Annotations*:—*Refd.* Pack v. Tarpley (1839), 9 Ad. & El. 168.

**2504.** ————]—Deft., a beneficed clergyman, demised two livings to plff. for a term of 99 years upon trust to pay £3,700 previously borrowed by deft. of plff., the indenture not in any way referring to a warrant of attorney. On the same day deft. executed a warrant of attorney to plff., in the defeasance of which it was stated to be given as a collateral security for £3,700 & interest "further secured by a grant & demise bearing even date herewith of the vicarages" in question. The money in question not being paid, plff. signed judgment, & issued a sequestration. On application to set aside the warrant & subsequent proceedings:—*Held*: it was not void as a charging of a benefice within 13 Eliz. c. 20, s. 1, but it was an independent security for a loan.—*BENDRY v. PRICE* (1839), 7 Dowl. 753; 3 Jur. 1150.

*Annotations*:—*Foll.* Bishop v. Hatch (1839), 7 Dowl. 763. *Refd.* Hawkins v. Gathercole (1855), 3 Eq. Rep. 348.

**2505.** ————]—The owner of an advowson mortgaged it, & also mortgaged the equity of redemption, & then sold the advowson, subject to the mtges., & took from the purchaser a mtge. of the advowson for securing the purchase-money. The purchaser, to induce the first mtgee. to allow his money to remain on the security, gave him a warrant of attorney, & a similar security to the second mtgee., & also another to the vendor for the amount of the purchase-money: & it was arranged that the first mtgee.'s judgment should have priority. The living was subsequently sequestered, & a bill was filed by the first mtgee. for sale & foreclosure, & he moved for a receiver &

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for an injunction to restrain defts., the other incumbancers, from compelling payment from the sequestrator of the money in his hands:—*Held*: the transaction pointed so particularly to making the judgments & sequestration a charge on the living, as to come within the prohibition of 13 Eliz. c. 20.—*LONG v. STORIE* (1849), 3 De G. & Sm. 308; 12 L. T. O. S. 530; 13 Jur. 227; 64 E. R. 492.

*Annotation*:—*Consd.* *Bates v. Brothers* (1854), 2 Sm. & G. 509.

**2506. How validity ascertained—Admissibility of evidence—To explain intention of parties.]**—

On an application to set aside a warrant of attorney, pursuant to 13 Eliz. c. 20, s. 1, on the ground of its amounting to a charging of a benefice, the ct. will not look beyond the warrant to ascertain the intention of the parties & will not read affidavits for that purpose.—*BISHOP v. HATCH* (1839), 7 Dowl. 763; 4 Jur. 318.

*Annotation*:—*Refd.* *Hawkins v. Gathercole* (1855), 6 De G. M. & G. 1.

### B. Judgments.

**2507. Whether charge on living.]**—Glebe land is bound by the delivery of writ of *fiat facias de bonis ecclesiasticis* to the bishop, but is not affected by the judgment. Therefore a judgment confessed by an incumbent in the North Riding of Yorkshire, is not an incumbrance upon the living, so as to require registration, under 8 Geo. 2, c. 6.—*COTTE v. WARRINGTON* (1833), 5 B. & Ad. 117; 2 Nev. & M. K. B. 227; 110 E. R. 855.

*Annotation*:—*Refd.* *Hawkins v. Gathercole* (1855), 6 De G. M. & G. 1.

**2508. Judgment registered.]**—A judgment is not by Judgments Act, 1838 (c. 110), made a charge on an ecclesiastical benefice held by debtor.—*BATES v. BROTHERS* (1851), 2 Sm. & G. 509; 2 Eq. Rep. 803; 23 L. J. Ch. 782; 23 L. T. O. S. 305; 18 J. P. 661; 18 Jur. 715; 2 W. R. 636; 65 E. R. 503.

**2509. ]**—A judgment entered up against a beneficed clergyman does not create a charge under Judgments Act, 1838 (c. 110), s. 13, upon his living.

A receiver was appointed by the ct. in a suit by a judgment creditor of a beneficed clergyman to enforce his judgment as a charge upon the living, the Vice Chancellor who appointed the receiver considering that the judgment was a charge. Another judgment creditor then issued a sequestration against the same living, & a motion being made in the cause for his committal for contempt, another Vice Chancellor refused to make any order, but directed him to pay the costs, & he undertook to deal with the sequestration as the ct. should direct. At the hearing, the same Vice Chancellor felt bound by the opinion expressed on the occasion of the appointment of the receiver, & decided accordingly. On appeal:—*Held*: (1) the first judgment was not a charge on the benefice, & a receiver ought not to have been appointed; (2) sequestration was the only proper mode of enforcing a judgment against the profits of a benefice; (3) the judgment creditor who had issued a sequestration had a priority of charge, notwithstanding any contempt he might have committed by interfering when a receiver was appointed.—*HAWKINS v. GATHERCOLE* (1855), 6 De G. M. & G. 1; 3 Eq. Rep. 348; 24 L. J. Ch.

332; 24 L. T. O. S. 281; 19 J. P. 115; 1 Jur. N. S. 481; 3 W. R. 194; 43 E. R. 1129, L. JJ.

*Annotations*:—*As to* (1) *Refd.* *Arnold v. Gravesend Corp.*, *Pallister v. Same* (1856), 25 L. J. Ch. 776; *McBean v. Deane* (1885), 30 Ch. D. 520. *As to* (2) *Refd.* *Parry v. Jones* (1856), 1 C. B. N. S. 339. *Generally, Mentd.* *Cope v. Doherty* (1858), 2 De G. & J. 614; *Burder v. O'Neill* (1863), 2 New Rep. 551; *Re Poland* (1866), 35 L. J. Bcy. 19; *Cambrian Rys. Scheme* (1868), 3 Ch. App. 278, n.; *Norwich, Bp. v. Pearce* (1868), L. R. 2 A. & E. 281; *Beloeley v. Carter* (1869), 4 Ch. App. 230; *Garnett v. Bradley* (1873), 3 App. Cas. 944; *Re Meredith, Ex p. Chick* (1879), 11 Ch. D. 731; *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354; *Seward v. Vera Cruz* (1884), 10 App. Cas. 59; *Re Leavesley*, [1891] 2 Ch. 1; *Baird v. Tunbridge Wells Corp.*, [1894] 2 Q. B. 867; *Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs & Trademarks*, [1898] A. C. 571; *Birmingham Corp. v. Birmingham Canal Navigations* (1905), 3 L. G. R. 1287; *R. v. West Riding of Yorkshire County Council*, [1906] 2 K. B. 676; *Portcawl U. C. v. Brogden*, [1917] 1 Ch. 534; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Re Plymouth Corp. & Walter*, [1918] 2 Ch. 354; *A.-G. v. Brown*, [1920] 1 K. B. 773; *Nicolle v. Volsin* (1922), 91 L. J. P. C. 129; *Rhonda's Claim*, [1922] 2 A. C. 339; *Woodfield v. Bond*, [1922] 2 Ch. 40.

**2510. Right of judgment creditor to receiver.]**—*HAWKINS v. GATHERCOLE*, No. 2509, *ante*.

### C. Other Transactions.

**2511. Validity—Demise of benefice—To secure annuity.]**—A demise by a parson of his benefice, made subsequent to 57 Geo. 3, c. 99, for securing an annuity, is void, it being in substance a charging of the benefice within 13 Eliz. c. 20, which, as far as relates to chargings of benefices, is now in force, having been revived by 57 Geo. 3, c. 99.—*SHAW v. PRITCHARD* (1829), 10 B. & C. 211; 5 Man. & Ry. K. B. 180; 8 L. J. O. S. K. B. 133; 109 E. R. 410.

*Annotations*:—*Refd.* *Newland v. Watkin* (1832), 2 Moo. & S. 171; *Saltmarsh v. Hewitt* (1834), 1 Ad. & EL. 812.

—*See, also*, Nos. 2488–2490, *ante*.

**2512. To trustee for payment of incumbent's creditors.]**—To an action by a sequestrator of the living of S. upon a covenant to pay the yearly rent of £980, contained in a lease of the rectory & tithes, with certain exceptions, of the living of S. granted by the rector of S. to deft. before the sequestration, deft. pleaded that the rector being indebted to V. & M. in large sums of money, & requiring time to pay the debts, V. & M. at the request of the rector consented to give time, & V. consented to advance him a further sum upon condition of the lease being granted to deft., & of another deed being executed by which the rector appointed deft. receiver of all the tithes, etc. demised by the lease, & authorising him, after deduction of a percentage, to pay therefrom the debts of V. & M. to keep up certain policies of insurance for the benefit of V. & M. & also certain other policies, & to carry out other purposes connected with the arrangement. The plea alleged that the lease was executed as part of the same transaction, & that the rector knew at the time of the deeds being executed that deft. was attorney & agent for V., & that the second deed was made to enable him to apply the rent reserved by the first deed in the manner above mentioned; that there was due from the rector to V. & M. more than was claimed in the action, & that he, deft., had applied the tithes, etc., received by him, as directed by the second deed. Deft. pleaded, further, that before the execution of the lease the rector of S. was indebted to V. & M. & others, & that in consideration thereof & of a further advance by V., the rector agreed to charge the

### PART V. SECT. 9, SUB-SECT. 3.—B.

**2507. Whether charge on living.]**—*Under Debtors (Ireland)*, 1840 (c. 105),

s. 22, a judgment is a good charge upon an ecclesiastical benefice in Ireland, 13 Eliz. c. 20, not extending

to Ireland, where there is no corresponding enactment.—*WINTER v. ROMAN* (1856), 8 Ir. Jur. 399.—*IR.*

living of S. by executing the lease declared on, & by appointing deft. agent & receiver by the deed set out in the first plea; & that the lease was part of the same transaction to charge the living:—*Held*: the first plea did not show any defeasance of the covenant to pay the rent contained in the lease: but there was an equitable assignment of the rent so far as necessary to pay V. & M., & the lease was void as being part of a transaction by which the living was charged, contrary to 13 Eliz. c. 20.—*WALTHAM v. CRAFTS* (1851), 6 Exch. 1; 20 L. J. Ex. 257; 16 L. T. O. S. 401; 155 E. R. 428.

**2513. — Composition—Trustee to apply future income in payment of incumbent's debts.**—A composition with a clergyman, in consideration that his future income may be received by a trustee, & applied in liquidation of his debts, after providing for a curate, is void under 13 Eliz. c. 20.—*ALCHIN v. HOPKINS* (1831), 1 Bing. N. C. 99; 4 Moo. & S. 615; 3 L. J. C. P. 272; 131 E. R. 1055.

*Annotations*:—*Apld.* Long v. Storie (1849), 13 Jur. 227. *Refd.* Hawkins v. Gathercole (1855), 6 De G. M. & G. 1. *Mentd.* McManus v. Cooke (1887), 35 Ch. D. 681.

**2514. — Mortgage of income of canonry — No cure of souls.**—*GREENFELL v. WINDSOR* (DEAN & CANONS), No. 342, *ante*.

**2515. — Personal covenant to pay—Contained in void charge.**—A declaration in covenant stated that deft. had granted an annuity to plff., & for the better securing the annuity demised a rectory & prebendal stall to certain trustees, & covenanted for payment of the annuity: & alleged as a breach the non-payment thereof. To this declaration deft., being under terms of pleading issuably, pleaded that the indenture was made with the view of charging, & was a charge upon, the rectory, the same being a benefice with a cure of souls, contrary to 13 Eliz. c. 20, & that the indenture & security were made to evade the statute:—*Held*: the statute avoided the charge upon the benefice only, but not the covenant in the deed containing it.—*SLOANE v. PACKMAN* (1843), 11 M. & W. 770; 1 Dow. & L. 332; 12 L. J. Ex. 423; 1 L. T. O. S. 316; 152 E. R. 1015.

*Annotation*:—*Refd.* Phillpotts v. Phillpotts (1850), 10 C. B. 85.

*Compare* Sub-sect. 3, A., *ante*.

**2516. — Mortgage of pew rents — Of consolidated chapel.**—The pew rents of a consolidated chapel, paid to the churchwardens on trust to pay the expenses of the chapel & hand over the surplus to the vicar, come under the words "livings appointed for ecclesiastical ministers" in 13 Eliz. c. 20; & a mtge. of such pew rents is a charging of a benefice with a "profit out of the same to be yielded" under the Act, & is void.—*Re LEVESON, Ex p. ARROWSMITH* (1878), 8 Ch. D. 96; 47 L. J. Bcy. 46; 38 L. T. 547; 26 W. R. 600, C. A.

*Annotations*:—*Mentd.* Magdalen Hospital v. Knotts (1878), 8 Ch. D. 799; *Vickers v. Selwyn* (1903), 89 L. T. 747; *Wolfe v. Surrey County Council Clerk, Reeve v. Same*, [1905] 1 K. B. 439.

**2517. — Assignment of annuity—To retiring incumbent on union of benefices.**—*MCBEAN v. DEANE*, No. 2443, *ante*.

## SECT. 10.—SEQUESTRATION OF BENEFICES.

### SUB-SECT. 1.—NATURE AND OCCASIONS OF PROCESS.

**2518. When remedy available—Lunacy of incumbent.**—*LONDON (BP.) & BEACMONT v. NICHOLLS* (1723), Bunb. 141; 145 E. R. 625. *Annotation*:—*Refd.* Harding v. Hall (1842), 11 L. J. Ex. 354. **J.—VOL. XIX.**

— **When sequestration granted.**—*See* Sub-sects. 2, A., 3, 4, & 5, *post*.

**2519. — Curacy.**—*PROUT v. CRESWELL*, No. 776, *ante*.

**2520. Is charge on benefice—Within 18 Geo. 2, c. 20.**—Where the qualification of a justice of the peace is an ecclesiastical benefice, a sequestration, issued at the suit of a creditor, under which possession has been duly taken, & the profits received, is an "incumbrance affecting the estate" within 18 Geo. 2, c. 20, s. 1. In a penal action against the incumbent for acting as a justice without being qualified, the writ of *sequestrari facias* is admissible in evidence against him, although the judgment roll contains no entry of an award of the writ.—*PACK v. TARDLEY* (1839), 9 Ad. & El. 408; 1 Per. & Dav. 478; 2 Will. Woll. & H. 88; 8 L. J. M. C. 93; 112 E. R. 1280.

*Annotations*:—*Refd.* Bunter v. Creswell (1850), 19 L. J. Q. B. 357; *Powell v. Hildbert* (1850), 15 Q. B. 120.

**2521. Is only proper method of enforcing judgment—Against profits of benefice.**—*HAWKINS v. GATHERCOLE*, No. 2509, *ante*.

**2522. Is continuing execution.**—Deft. was rector of the parish of A. in the archdeaconry of D., which was formerly in the diocese of B., but was dissevered from that diocese under Ecclesiastical Commissioners Act, 1836 (c. 77), & permanently annexed to & included in the diocese of S. The registrar of such portion of the diocese of B. as lay within the archdeaconry had an office at C., at which, after the annexation, he continued to transact the business of sequestrations as he had done before. A writ of *sequestrari facias* was issued by plff., directed to the Bishop of S., & delivered to the registrar & accepted by him, & sequestrators were appointed under the seal of the Bishop of S., & the writ remained in the registrar's hands at his office at C.:—*Held*: (1) the writ of sequestration is a continuing execution & continues in force until the debt & costs are realised, without reference to the time at which the writ is nominally returned, or until the bishop is ruled to return it, which has the effect of putting an end to the writ; (2) a bishop is a corporation sole, & on the death of a bishop there is no need of a fresh writ of sequestration, but the succeeding bishop may be called upon to make a return of that which has been levied since he came into office & to return the writ; (3) under the circumstances above stated this writ was rightly directed to the Bishop of S., & the present bishop must make a return to it.—*PHILIPS v. ST. JOHN* (1855), 10 Exch. 895; 3 C. L. R. 478; 24 L. J. Ex. 171; 24 L. T. O. S. 311; 156 E. R. 704.

**2523. What property subject to sequestration—Only that held as corporation sole.**—*MOSELY v. WARBURTON*, No. 1856, *ante*.

**2524. Legal presumption of validity.**—In an action for money had & received by deft., as sequestrator, to the use of plff., as incumbent, plff. is not entitled, upon proof of the receipt of the money by deft., to call upon him to prove the validity of the sequestration, but is bound to prove on his own part that the sequestration is invalid.

The law will infer a valid sequestration until something is shown to the contrary (*LORD CAMPBELL, C.J.*).—*BARTLETT v. EVANS* (1851), 18 L. T. O. S. 71.

### SUB-SECT. 2.—FOR DEBT OR ON BANKRUPTCY.

#### A. Issue of Writ.

**2525. Who may apply for—Provisional assignee of insolvent incumbent.**—A provisional assignee, in

*Sect. 10.—Sequestration of benefices: Sub-sect. 2, A., B. & C. (a), (b) & (c).]*

whom a prisoner's estate & effects are vested by an order of the Insolvent Debtors Ct., under Judgments Act, 1838 (c. 110), s. 37, has power where such prisoner is a beneficed clergyman, to apply for a sequestration under sect. 55.—*SMITH v. WETHERELL* (1847), 5 Dow. & L. 278; 17 L. J. Q. B. 57; 10 L. T. O. S. 229.

**2526.** — Not subsequent incumbrancer—After appointment of receiver obtained by prior incumbrancer.]—*HAWKINS v. GATHERCOLE*, No. 2509, ante.

**2527.** To whom writ issued—Transfer of benefice to another diocese.]—*PHELPS v. ST. JOHN*, No. 2522, ante.

**2528.** When granted.]—*R. v. SWINNEY* (1776), 1 Cr. & J. 390, n.; 148 E. R. 1474.

*Annotation* :—*Folld. R. v. Armstrong* (1835), 2 Cr. M. & R. 205.

**2529.** — Defendant possessed of benefice—No lay fee.]—Where to a special *capias ullagatum* the sheriff returns an inquisition finding that deft. has benefice but no lay fee, this ct. will award a writ of sequestration upon reading the transcript of the outlawry & inquisition.—*R. v. HIND* (1831), 1 Cr. & J. 389; 1 Dowl. 286; 148 E. R. 1473; *sub nom. Re HINDE, DIXON & DALTON v. HINDE*, 1 Tyr. 347; 9 L. J. O. S. 107.

*Annotation* :—*Folld. R. v. Armstrong* (1835), 2 Cr. M. & R. 205.

**2530.** — — — — —.]—Where a sheriff returned to a writ of *capias ullagatum* that deft. had no goods, nor any lay fee in his bailiwick, but that he was possessed of a rectory, the ct. ordered the writ of sequestration, although the sheriff did not return that he had seized the rectory into his hands.—*R. v. ARMSTRONG* (1835), 2 Cr. M. & R. 205; 4 L. J. Ex. 167; 150 E. R. 88; *sub nom. R. v. ARMSTRONG, SWANN v. ARMSTRONG*, 3 Dowl. 760; 5 Tyr. 752.

**2531.** — — — — — Name & situation of benefice not stated in sheriff's return.]—To a writ of *capias ullagatum*, the sheriff returned that deft. had no goods, nor any lay fee within his bailiwick, but that he was a beneficed clergyman; not stating the name or situation of the benefice. The ct. refused a writ of sequestration, but suggested a motion for a rule calling upon the sheriff to amend his return.—*R. v. POWELL, ION v. POWELL* (1836), 1 M. & W. 321; 5 L. J. Ex. 170; 150 E. R. 456.

**2532.** — — — — —.]—Deft., a beneficed clerk, having failed to pay to pltf. his debt as ordered by the ct. an attachment was issued against him, to which *non est inventus* was returned. The ordinary writ of sequestration was then issued, to which it was returned that deft. had no lay property; & the ct., on motion, ordered a writ of *sequestrari facias de bonis ecclesiasticis* to issue, directed to the bishop of the diocese.—*ALLEN v. WILLIAMS* (1851), 2 Sm. & G. 455; 3 Eq. Rep. 67; 24 L. J. Ch. 160; 24 L. T. O. S. 122; 3 W. R. 85; 65 E. R. 478.

**2533.** — No writ of execution issued.]—Judgment having been signed against deft., a beneficed clergyman in the county of Brecon, a writ of sequestration was issued & put in force in Aug., but at that time no writ of *fi. fa.* whatever had been issued.

In Oct. a writ of *fi. fa.* was issued against deft., to which the sheriff of Bristol made a return of *nulla bona* only, & not that deft. was *clericus beneficiatus*. On Nov. 22, a rule *nisi* was obtained to set aside the writ of sequestration:—*Held*: the writ of sequestration was irregular.—*BROMAGE v. VAUGHAN* (1852), 7 Exch. 223; 21 L. J. Ex. 111; 18 L. T. O. S. 260; 16 J. P. 394; 155 E. R. 926.

**2534.** — No return of *nulla bona* to writ of execution.]—*RABBITS v. WOODWARD* (1869), 20 L. T. 778.

**2535.** Issue of second writ—No return to first writ.]—*YARROTH v. SEYS* (1720), Bunb. 62; 145 E. R. 595.

#### *B. Position, Powers and Duties of Bishop.*

**2536.** Position—In situation of sheriff.]—Where a bishop grants sequestration against the effects of a clergyman, within his diocese, he stands in the same situation as sheriff, & the ct. has the same power over him as over that officer. Therefore, where four writs of sequestration had issued against the effects of a clergyman, at the same time by the same attorney, at the suit of different persons, & they had been placed so as to defeat the execution of pltf., who was entitled to priority, the ct., ordered the bishop to return what he had levied, & give precedence to the writ issued at the suit of pltf.—*R. v. LONDON (Bp.)* (1822), 1 Dow. & Ry. K. B. 486.

**2537.** — — — — —.]—When the profits of benefice, which had been sequestrated at the instance of the provisional assignee, & not paid into ct., upon the ground that a judgment creditor, since the insolvent's discharge, was taking steps to set it aside, no notice having been given to the provisional assignee that it was intended to dispute his title, the Insolvent Ct. granted a rule upon the bishop to show cause why he should not make a return of the proceeds of the sequestration. The bishop having made a return:—*Held*: the bishop, whose office in this matter was analogous to that of sheriff was accountable to the ct.

The bishop is the officer of this ct.; he sequesters the profits of a benefice in pursuance of an order made by the Insolvent Ct., which order Judgments Act, 1838 (c. 110), emphatically pronounces to be his sufficient warrant. There appears no reason that the fruits of his levy should travel to the hands of the provisional assignee through the Ct. of Q. B.; & the natural construction of the statute is that it is the business of this ct. to enforce the rights of the creditors in such a matter. The bishop has made his return of £713 13s. 7½d. levied under the provisional assignee's sequestration; & has given us the dates of seven subsequent sequestrations issued on judgments of particular creditors. The order now made is, that he shall pay the money into ct. (*per CUR.*).—*Re WETHERELL* (1848), 11 L. T. O. S. 249, 373.

**2538.** — — — — —.]—A return having been made by a bishop to a writ of *fi. fa. de bonis ecclesiasticis*, annexing accounts of moneys levied under that & a prior writ issued by another sequestator, the ct. referred the account to the master to examine the deduction made from the sum levied, & say whether they were proper to be allowed, notwithstanding the same accounts had been filed in the Ecclesiastical Ct.—*MORRIS v. PHELPS* (1850), 4

#### **PART V. SECT. 10, SUB-SECT. 2.—A.**

*d. When granted—Return of nulla bona to writ of another creditor.]—The ct. granted a writ of sequestration to the bishop, without a writ of *fi. fa.* having been first issued by pltf., & a return thereto obtained, when it*

*appeared by the records of the ct. that the sheriff to whom such writ, if issued, must have gone, had recently returned nulla bona to a *fi. fa.* sued out of the ct., by another creditor, against deft.—SMITH v. ARMSTRONG (1847), 10 L. R. 447.—IR.*

#### **PART V. SECT. 10, SUB-SECT. 2.—B.**

*e. Liability for default of sequestator.]—A suit is sustainable for an account, on foot of a sequestration over a benefice in the diocese, against the personal representatives of two successive bishops & the present bishop,*

Exch. 895; 19 L. J. Ex. 165; 14 L. T. O. S. 422; 14 J. P. 560; 154 E. R. 1480.

*Annotations*.—*Consd.* Hawkins v. Gathercole (1855), 6 De G. M. & G. 1. *Refd.* Billing v. St. Aubyn, Townes v. Same, Ramsay v. Same (1861), 4 L. T. 404.

**2539. — Money paid under mistake of fact by sequestrator—Property applied by bishop in sequestration—Personal liability of bishop.**—Where tithe rentcharge was paid by plffs. under a mistake of fact to the sequestrator of a benefice appointed by an order made by the bishop under Bkpcy. Act, 1883 (c. 52), s. 52, & was received & applied by the bishop, who had no notice of the mistake, first in providing for the spiritual needs of the benefice, & then in payment of the balance to the trustee in bkpcy. of the incumbent:—*Held*: the bishop, as between himself & plffs., was in the position of a principal, & as such was liable to repay the amount so received & applied by him.—*BAYLIS v. LONDON (Bp.)*, [1913] 1 Ch. 127; 82 L. J. Ch. 61; 107 L. T. 730; 29 T. L. R. 50; 57 Sol. Jo. 96, C. A.

*Annotations*.—*Refd.* Sinclair v. Brougham, [1914] A. C. 398. *Mentd.* Chillingworth v. Esche (1923), 129 L. T. 808; Holt v. Markham, [1923] 1 K. B. 504.

**2540. Duties.—To account—To whom accountable—Not creditor.**—A creditor of an insolvent clergyman cannot have a rule calling on a bishop to render an account of moneys received under a sequestration obtained under the Insolvent Act.—*Ex p. MOFFATT & DEWE (1837)*, Will. Woll. & Dav. 358; *sub nom. Re DEWEIT, Ex p. MOFFATT*, 1 Jur. 453.

—**To make return to writ.**—*See* Sub-sect. 2, D., *post*.

#### C. Sequestrators.

##### (a) In General.

**2541. Appointment—Whether bishop bound to appoint cheapest sequestrator.**—(1) A sequestrator has no right to charge the estate with the expense of audit dinners if the incumbent expressly forbids it; but by lying by & not objecting at the time, the incumbent cannot afterwards object to such charge if it is the practice to give such dinners to the payers of tithe.

(2) The bishop is not bound to appoint the person who will act as sequestrator on the cheapest terms.—*Re SANDERS v. PENLEASE (1850)*, 1 L. T. 51; 23 J. P. 774.

**2542. Position—Mere bailiff or agent of bishop.**—On the general principle, I am inclined to hold, that the sequestrator will be liable for dilapidations. The King's writ issues to the bishop to levy a sum for the discharge of the debt. This writ has been truly described as mandatory to the bishop, who is, in a general sense, only ministerial. The sequestrator is a kind of bailiff to the bishop. There is no mention of any purpose, but the payment of the particular debt; it is, however, a thing incident to, & inseparable from, the subject-matter itself, that there are certain duties & expenses for which the sequestrator is bound to provide. The instrument issued under the authority of the bishop, & contains a clause of allowance for all necessary charges; & I do not know on what principle it can be maintained, that the repairs of the chancel, & of the parsonage, are

not necessary charges. The clergyman is, by law, equally required to provide such repairs, as well as the performance of Divine Service, & he cannot exonerate himself from one of those duties, more than from the other (*SIR W. SCOTT*).—*HUBBARD v. BECKFORD (1798)*, 1 Hag. Con. 307; 2 Phillim. 5, n.

*Annotation*.—*Refd.* Harding v. Hall (1842), 10 M. & W. 42.

**2543. —**—*J*—The sequestrator of a benefice, appointed by the bishop under a writ of *sequestrari facias*, is the mere bailiff or agent of the bishop, & has no such interest in the profits as will enable him to maintain an action at law against a party who wrongfully receives them.—*HARDING v. HALL (1842)*, 10 M. & W. 42; 11 L. J. Ex. 354; 6 J. P. 633; 6 Jur. 649.

*Annotations*.—*Refd.* Baylis v. London, Bp., [1912] 2 Ch. 318; *Hewson v. Shelley*, [1914] 2 Ch. 13. *Mentd.* Bunter v. Crosswell (1850), 14 Q. B. 825; Powell v. Hibbert (1850), 15 L. T. O. S. 158.

**2544. — On bankruptcy.**—Where a sequestrator has become bkpt., the ct. will restrain him from exercising his power, & permit the assignee to use his name, until a new sequestrator has been appointed.—*Re IVESON, Ex p. HALL (1835)*, 1 Deac. 87; 2 Mont. & A. 392; 4 L. J. Bcy. 83, Ct. of It.

**2545. Remuneration.**—A sequestrator is not entitled to a stated fee of 6s. 8d. a day for his fee.

I do not remember that 6s. 8d. is an absolute stated fee, to all sequestrators, whether the effects seized under the sequestration are large or small; & as the sequestrator, in this case, has not got in £40 in almost two years, I think the gross sum the master has allowed him, is sufficient for his trouble.—*WOOD v. FREEMAN (1743)*, 2 Atk. 542; 20 E. R. 725.

**2546. — What expenses allowed—Expenses of audit dinners.**—*Re SANDERS v. PENLEASE*, No. 2541, *ante*.

##### (b) Powers and Duties of Sequestrator.

**2547. Repairs—Only to repair as necessity arises—Right to retain money to meet future repairs.**—A sequestrator's duty is to do repairs as they become requisite out of the moneys coming to his hands, & not to retain money to meet the probable expenses of future repairs.—*DEAN v. LEMPHRIERE (1857)*, 29 L. T. O. S. 125; 5 W. R. 500.

—**Liability for dilapidations.**—*See* Part VII., Sect. 9, sub-sect. 1, B., *post*.

**Accounts What charges allowed.**—*See* No. 2541, *ante*.

##### (c) Accounts.

**What charges & expenses allowed.**—*See* No. 2541, *ante*.

**2548. Place of custody—Bishop's registry.**—The bishop's registry is the proper place of custody for the sequestrator's receipts, accounts, etc., with reference to their admissibility as legal evidence in questions of disputed right to tithes.—*PULLEY v. HILTON (1823)*, 12 Price, 625; 147 E. R. 829.

**2549. Reopening accounts—Reference to master—To examine deductions.**—*DAWSON v. SYMONDS*, No. 2557, *post*.

on the allegation of loss to the creditor by the default of the sequestrator, during their respective bishoprics.—*HOGG v. GARRETT (1849)*, 12 I. Eq. R. 559.—*IR*.

#### PART V. SECT. 10, SUB-SECT. 2.—C. (a).

**1. Where parties to bill by annuitant—Annuit charged on benefice.**—Sequestrators in possession of a

benefice, & who have been appointed merely for the purpose of paying curates, etc., are not necessary parties to a bill by an annuitant whose annuity is charged upon the benefice.—*STANNUS v. ROBINSON (1837)*, 2 Jo. Ex. Ir. 498.—*IR*.

#### PART V. SECT. 10, SUB-SECT. 2.—C. (b).

**g. Accounts—Unauthorised payment**

of money to bishop.]—When a sequestrator has been ordered to account in the Ct. of Exchequer for sums which he has received, he ought not, pending the confirmation of the master's report, to pay over to the bishop the money in his hands; & if he do so, the ct. will, notwithstanding such payment, compel him to bring in the amount.—*GALBRAITH v. PILKINGTON (1847)*, 10 I. L. R. 473.—*IR*.

*Sect. 10.—Sequestration of benefices: Sub-sect. 2, C. (c), D. & E.]*

**2550.** ———. ———.]—*MORRIS v. PHELPS*, No. 2538, ante.

**2551.** ———. **Whether action of account maintainable—By incumbent against sequestrator & creditor.**—The vicar of a parish suffered judgment to be entered up against him in the Ct. of Exch. for a debt in virtue of which the tithes, rents & profits of the vicarage were sequestered: after the sequestration had continued for some time, the vicar filed his bill against the judgment creditor, the sequestrator & the bishop, praying that an account might be taken of the tithes, rents & profits received by the sequestrator, & the payments thereof to the judgment creditors; & that upon payment by pltf. of what should be found due to the creditor, he might be ordered to enter up satisfaction on the judgment, & that the writ of sequestration might be discharged:—*Held*: the bill must be dismissed with costs against the bishop & the sequestrator on the ground of want of privity, & against the judgment creditor on the ground that the matter was one entirely for the ct. of common law in which the judgment was entered up, & the Ct. of Ch. had no jurisdiction to decree on account to be taken in such a case.—*WILLIAMS v. IVIMEY* (1870), 23 L. T. 100.

*Annotation:—**Reid*. *Baylis v. London Bp.*, [1913] 1 Ch. 127.  
**2552.** ———. **Jurisdiction of county court to hear action involving reopening of accounts.**—*BURROW v. TILSON* (1898), 14 T. L. R. 214, C. A.

#### *D. Return to W. A.*

**2553. Who may apply for—Not incumbent.**—A deft. has no right to have a writ of *levari facias de bonis ecclesiasticis* returned, but may have a return of the amount of profits received by the sequestrator.—*HART v. VOLLANS* (1832), 1 Dowl. 434.

**2554. By whom made—General rule.**—Attachment may issue against a peer, but for not returning a *fi. fa. de bonis ecclesiasticis*, it is proper to move against the chancellor, commissary, or official.—*R. v. St. Asaph (Bp.)* (1752), 1 Wils. 332; 95 E. R. 610.

*Annotations:—**Mentd.* *Miller v. Knox* (1838), 4 Blng. N. C. 574; *Roberts v. Gower* (1846), 8 L. T. O. S. 125.

**2555.** ———. **Death of bishop.**—Rule on bishop's exor. to return *fi. fa. de bonis ecclesiasticis*.—*LANQUIT v. JONES* (1718), 1 Stra. 87; 93 E. R. 401.

**2556.** ———. ———.]—*PHELPS v. ST. JOHN*, No. 2522, ante.

**2557.** ———. **Translation of bishop.**—(1) Upon the translation of a bishop to another diocese pending a sequestration issued by him, the return to the writ of *fi. fa. de bonis ecclesiasticis* is properly made by his successor.

(2) Where deductions were made from the sum levied under the sequestration in respect of certain legal charges, including the curate's stipend, the ct. referred it to the master to say whether the deductions were proper.—*DAWSON v. SYMONDS* (1848), 12 Q. B. 830; 18 L. J. Q. B. 34; 12 Jur. 1072; 116 E. R. 1082.

*Annotations:—**As to (2)* *Folld.* *Morris v. Phelps* (1850), 4 Exch. 895. *Generally, Mentd.* *Powell v. Hibberd* (1850), 19 L. J. Q. B. 347.

**2558.** ———. **Transfer of benefice to another diocese.**—*O'KINES v. ONSLOW* (1856), 27 L. T. O. S. 185.

**2559. Time for—Not before execution satisfied.]**

—A writ of *levari facias* having been returned by the bishop & filed, before the execution was satisfied; the ct. granted a rule absolute in the first instance, that the writ should be taken off the file, & sent back to the bishop, & that he should certify to the ct. what he had done under it.—*ALDERTON v. ST. AUBYN* (1840), 8 Dowl. 223; 6 M. & W. 150; 9 L. J. Ex. 60; 4 J. P. 61; 4 Jur. 53, Ex. Ch.

**2560.** ———. **Delay in appointment of sequestrator.**—A writ of *levari facias* was lodged at the office of the bishop of the diocese in 1852. At that time several other writs were there, & no sequestrator was appointed to collect pltf.'s demand until Aug. 1858, when pltf.'s nominee was appointed. The first amount of rentcharge would be due in the next month of Oct. & collected during the following Nov.:—*Held*: an application in Michaelmas Term, 1858, requiring the bishop to make a return to pltf.'s writ, was not premature.—*BROMAGE v. VAUGHAN* (1858), 32 L. T. O. S. 134.

**2561. Sufficiency of—Not amount levied before bishop appointed.**—A bishop cannot be required to make a return of what has been levied under a *levari facias*, previous to his coming into office.—*PHILLIPS v. BERKELEY* (1836), 5 Dowl. 279; Will. Woll. & Dav. 50.

*Annotations:—**Apprvd.* *Phelps v. St. John* (1855), 10 Exch. 895. *Mentd.* *Doc d. Bloomer v. Bransom* (1838), 1 Will. Woll. & H. 193.

**2562.** ———. **Statement of receipts & expenditure—No statement that no other sums received.]**

A return to a writ of *levari facias de bonis ecclesiasticis*, stating the receipts & expenditure of the sequestrator, but not stating that no other sum had been received, is not sufficient.—*ELCHIN v. HOPKINS* (1838), 7 Dowl. 146; 3 Jur. 11.

**2563. Effect of—Termination of bishop's authority.**—Though a *levari facias de bonis ecclesiasticis* is a continuing execution, & a levy may be made under it from time to time after it is returnable till the sum indorsed be satisfied, yet if it be actually returned, the authority of the bishop is at an end. Therefore where such a writ remained in the hands of the bishop long after it was returnable, who sequestered the profits of a vicarage accruing as well before the return day as after, & being ruled to return the writ, returned only the amount of the sum levied up to the return day, the ct. would not order the writ & return to be taken off the file, but would only permit the return to be amended by inserting the sum levied, up to the time when the writ was actually returned.—*MARSH v. FAWCETT* (1795), 2 Hy. Bl. 582; 126 E. R. 716.

*Annotation:—**Mentd.* *Billing v. St. Aubyn*, *Townes v. Same*, *Ramsay v. Same* (1861), 7 Jur. N. S. 775.

**2564. False return—Remedy of creditors.]**—*PICKARD v. PAITON* (1666), 1 Sid. 276; 82 E. R. 1103.

**2565. Certificate by bishop—When ordered—After writ satisfied—No wrongful act.]**—Where no wrongful act is shown, it is too late three years after satisfaction of the writ of *sequestrari facias*, to call upon the bishop to certify to the ct. what has been done under the writ.—*BILLING v. ST. AUBYN*, *TOWNES v. ST. AUBYN*, *RAMSAY v. ST. AUBYN* (1861), 4 L. T. 404; 7 Jur. N. S. 775.

#### *E. Priorities.*

**2566. As between several sequestrations—According to date of publication.]**—*LEGASSICKE v.*

#### **PART V. SECT. 10, SUB-SECT. 2.—E.**

*h. As between sequestration creditor & other creditors.]*—A party claiming

under an annuity, charged on a rectory & vicarage by the incumbent, is entitled to priority

creditor of the incumbent, although prior in point of time, who did not obtain a sequestration until after the



**EXETER (Br.) (1782), 1 Crompton's Practice, 351.**

**2567. Position—In situation of sheriff.]—R. v. LONDON (Br.), No. 2536, *ante*.**

**2568. —According to order in which writs of *levari facias* delivered to bishop's officer.]—When several writs of *levari facias* are delivered to the bishop's officer, he is bound to issue the writs of sequestration thereon in the order of time in which the writs of *levari facias* were delivered to him to be executed, & not according to the date of their teste.**

Where, therefore, writs of *levari facias* issued against W. were delivered to the deputy registrar of the bishop in 1847, with directions to suspend the execution of them until further instructions & with a request that notice should be given of any subsequent writ being lodged & sequestration applied for; & on Mar. 30, 1853, W. having become insolvent, the petition of the provisional assignee was lodged with the deputy registrar to be executed, & with directions that sequestration thereon should be immediately issued, in pursuance of Judgments Act, 1838 (c. 110), & notice thereof having been given by the deputy registrar, directions were given on Mar. 31 to issue sequestration upon the writs of *levari facias*:—*Held*: the petition of the provisional assignee was entitled to priority over the writs of *levari facias*.—*STURGIS v. LONDON (Br.) (1857), 7 E. & B. 542; 26 L. J. Q. B. 209; 20 L. T. O. S. 88; 3 Jur. N. S. 861; 5 W. R. 409; 119 E. R. 1347.*

**2569. —Liability of first sequestrator to account to second creditor.]—A sequestrator being in possession of a rectory, under a sequestration issued by a creditor of the rector, a second creditor having obtained a subsequent sequestration is entitled to an account in equity against the first sequestrator, & payment of the surplus after satisfaction of the first creditor; nor are prior incumbrancers who have not obtained sequestration necessary parties to the suit.—*CUDDINGTON v. WITHEY (1818), 2 Swan. 171; 30 E. R. 581.***

*Annotation*:—*Consd. Harding v. Hall (1842), 10 M. & W. 42.*

**2570. —First writ superseded for irregularity.]**

—*CAMPBELL v. WHITEHEAD (1820), 1 Hag. Con. 311, n.; 161 E. R. 563.*

**2571. —Creditor's sequestration followed by sequestration by bishop—On suspension.]—BUNTER v. CRESSWELL, No. 1628, *ante*.**

**2572. —Interest—First writ sued out before Judgments Act, 1838 (c. 110)—Other writs sued out after Judgments Act, 1838 (c. 110).]**—A sequestration having issued against the living of a clergyman before the passing of the above Act, which by sect. 17 gives a judgment creditor a right to interest on his judgment debt, even though the judgment was obtained before the passing of the Act, & a subsequent sequestration having issued, the ct., on the application of the first sequestrators, refused to permit them to indorse the amount of interest claimed by them on their judgment since the passing of the above Act, as by so doing the subsequent sequestrators would be prejudiced.—*WATKINS v. TARPLEY (1847), 2*

*Saund. & C. 158; 17 L. J. Q. B. 47; 10 L. T. O. S. 191; 11 Jur. 1017.*

**2573. —Right to sequestration disputed—Appointment of receiver.]—SILVER v. NORWICH (Br.) (1816), 3 Swan. 112, n.; 30 E. R. 794.**

*Annotations*:—*Held. White v. Peterborough, Br. (1818), 3 Swan. 109. Mentd. Rhodes v. Mostyn (1853), 1 Eq. Rep. 212.*

**2574. ———.]—A third incumbrancer on a rectory having obtained a sequestration, a receiver was appointed at the instance of the second incumbrancer.—WHITE v. PETERBOROUGH (Br.) (1818), 3 Swan. 109; 30 E. R. 793; subsequent proceedings (1821), Jac. 402.**

*Annotations*:—*Mentd. Tipping v. Power (1842), 1 Harc. 405; Armstrong v. Storer (1851), 14 Beav. 535; Rhodes v. Mostyn (1853), 17 Jur. 1007; Ford v. Chesterfield (1856), 21 Beav. 426.*

**2575. As between sequestration creditor & other creditors.]—A rector entitled to an annual stipend in lieu of tithes, assigned it by way of mtgce. Afterwards a creditor of the rector obtained judgment, & in the regular course, sequestration of the stipend:—*Held*: the mtgce. should be preferred.—*BRINGTON v. HOWARD (1757), Amb. 485; 27 E. R. 317.***

**2576. ———.]—An occupier of lands took a lease of the tithes, due from himself to a rector, at a rent reserved. The rent was afterwards assigned by the rector to another person who claimed to be paid the arrears. The lessee having also received notice of a further claim from grantees of annuities, previously charged on the tithes by the rector, who had, as such grantees, subsequently to the title of the rector's assignee, sued out a *fi. fa. de bonis ecclesiasticis*, against the rector, on a judgment obtained by them on their securities, filed a bill of interpleader against all the parties, & obtained injunctions on paying the rent due from him into ct. On the answers of defts. coming in, the priority of the several titles of claimants being thereby clearly set out, & the rector disclaiming, the ct. dissolved the injunctions, holding, that in such a case they could not restrain the party who was shown to have a preferable title, from proceeding to enforce it; or to decree that the parties should interplead in a case where the priority of right was so distinctly set forth by the answers. If the case be not such as will support a bill of interpleader, defts. should demur. Such a lease & assignment of part of the rector's ecclesiastical property were held to be good, & not to be affected by an execution sued out against the rector, after the rent had been assigned.—*BOWYER v. PUTCHARD, ETC. (1822), 11 Price, 103; 117 E. R. 415.***

**2577. ——— Agreement by judgment creditor to take mortgage as security for judgment debt—Sequestration obtained by subsequent judgment creditor.]—In Jan. 1851, A. obtained & registered a judgment against B., a beneficed clergyman. By a deed, dated in Nov. 1851, after reciting that A. had agreed to allow B. to receive the rent-charge in lieu of tithes of the benefice, for his own use, B. assigned to A. certain property, by way of**

date of the charge.—*WISK v. BERKEFORD (1833), 5 L. Eq. R. 407; 3 Dr. & War. 278; 2 Con. & Law. 282.—IR.*

**k. ———.]—A judgment creditor, who had obtained the sequestration of a benefice, is entitled to be paid the fruits of his execution in priority to the claim of the debtor's successor in the benefice, for the value of dilapidations found under a commission of dilapidation.—*CASEY v. HORNER (1846), 10 L. L. R. 221.—IR.***

**l. ———.]—The Bishop could re-**

quire a moiety of the income received by the sequestrator to be deducted for the dilapidations.—*BROOK v. HORNER (1847), 11 L. Eq. R. 211.—IR.*

**m. ———.]—A sequestration by the bishop, under 14 & 15 Vict. c. 73, s. 29, to enforce the due application by the incumbent of money recovered from his predecessor for dilapidations of the glebe, takes priority of judgments against, or charges created by the incumbent.—*CRAMPTON v. MARSHALL (1868), 1 R. 2 Eq. 316.—IR.***

**n. ——— Repairs prior to sequestration.]—The keeping of a glebehouse in repair, is a charge on the moiety of the sum levied under a sequestration, at the suit of a creditor, prior to the demand of that creditor.—*LATIMER v. FITZGERALD (1856), 8 Ir. Jur. 469; 9 Ir. Jur. 28.—IR.***

**o. As between judgment creditor & annuitant.]—The sequestration will not by relation give to the judgment creditor priority over an annuitant who**

**Sect. 10.—Sequestration of benefices: Sub-sect. 2, F., F. & G.; sub-sects. 3 & 4.]**

mtge., as a security for the judgment debt. In Dec. 1851, C. obtained & registered a judgment against B., & obtained a writ of sequestration:—*Held*: C. had priority over A.—**BATES v. BROTHERS** (1853), 2 Eq. Rep. 321; 23 L. J. Ch. 150; 22 L. T. O. S. 196; 17 Jur. 1174; 2 W. R. 110; *affd. on appeal* (1854), 2 Sm. & G. 509.

*See, also*, BANKRUPTCY, Vol. V., p. 927, Nos. 7588, 7589.

#### F. Effect of Sequestration.

**2578. General rule.]—LAWRENCE v. EDWARDS**, No. 930, *ante*.

**2579. Does not excuse incumbent's non-residence.]—DOE d. ROGERS v. MEANS**, No. 2469, *ante*.

**2580. Right to recover glebe land—Notice to quit given before sequestration read in church.]—**Where a notice to quit, given by a rector to the tenant of his glebe land, expired on Dec. 25 & on Jan. 17 following a sequestration was read in the church, & the rector afterwards, by order of the sequestrator, received from the tenant, who held over, a weekly allowance, which he described in a receipt as issuing out of the tithe and glebe:—*Held*: the rector might still maintain an ejectment, laying the demise on Jan. 1 as between Dec. 25 & Jan. 17 the tenant was a trespasser.—**DOE d. MORGAN v. BLUCK** (1813), 3 Camp. 447.

*Annotations*:—*Reid*, Bennett v. Appley (1827), 6 B. & C. 630; Harding v. Hall (1842), 10 M. & W. 42; Bunter v. Cresswell (1850), 14 Q. B. 825; Powell v. Hibbert (1850), 15 Q. B. 129; Knight v. Clarke (1885), 15 Q. B. D. 294. *Mentd.* Doe d. Gardner v. Kennard (1848), 12 Jur. 821.

**2581. Is defence to action of incumbent—For use & occupation of glebe.]—POWELL v. HIBBERT**, No. 2580, *post*.

**2582. On charitable legacy augmenting living.]—**Testatrix, in 1703, bequeathed her residue in trust for the vicar of N. for the time being, for ever, he annually preaching a sermon, the same to be paid "in augmentation" of the vicarage. The income had not been paid from 1811 to 1863, & in 1847 a sequestration had issued against the vicar, & he had become insolvent in 1852, but no sequestration had issued upon it. The ct. assumed the assent of the Ordinary:—*Held*: the gift constituted an augmentation to the living, & not a mere legacy to the vicar for the time being, & the arrears down to 1847 belonged to the vicar, & the subsequent income to the sequestrator.—*Re* PARKER'S CHARITY (1863), 32 Beav. 651; 2 New Rep. 434; 55 E. R. 257; *sub nom.* *Re* PARKER'S TRUSTS, 9 L. T. 72; 27 J. P. 644; 9 Jur. N. S. 884; 11 W. R. 937.

**Bankruptcy of incumbent—Effect of.]—See** BANKRUPTCY, Vol. V., p. 927, Nos. 7584–7593.

#### G. Other Cases.

**2583. Publication of writ—Time for.]—**It is not necessary that a writ of sequestration should be published before the return day of the *levari facias*, upon which it is founded.—**BENNETT v. APPERLEY** (1827), 6 B. & C. 630; 9 Dow. & Ry. K. B. 673; 5 L. J. O. S. K. B. 274; 108 E. R. 583.

*Annotation*:—*Mentd.* Powell v. Hibbert (1850), 15 L. T. O. S. 158.

became such after the entry of the judgment but before the sequestration issued.—*Wise v. BRESFORD* (1843), 5 L. J. Q. B. 407; 2 Con. & Law. 283; 3 Dr. & War. 276.—*IR.*

**2584. — Effect of.]—**A sequestration obtained by the assignees of an insolvent incumbent operates only from the time of publication, & does not entitle the assignees to the arrears of composition for tithes due before publication.—**WAITE v. BISHOP** (1834), 1 Cr. M. & R. 507; 3 Dowl. 234; 5 Tyr. 90; 4 L. J. Ex. 50; 149 E. R. 1181.

*Annotations*:—*Reid*, Bunter v. Cresswell (1850), 16 L. T. O. S. 41. *Mentd.* Parry v. Jones (1856), 1 C. B. N. S. 339.

**2585. Evidence of sequestration—Judgment roll —Writs of execution.]—PACK v. TARPLEY**, No. 2520, *ante*.

**2586. Transfer of benefice to another diocese—Sequestration by bishop of diocese from which benefice transferred—Validity.]—**Before Ecclesiastical Commissioners Act, 1836 (c. 77), the parish of H. was in the archdeaconry of C. in the diocese of L. In 1836 an Order of Council issued, transferring all that archdeaconry to the diocese of W., in compliance with the recommendation of the comrs. under the above statute. J. became Bishop of L.; &, afterwards, under Judgments Act, 1838 (c. 110), s. 55, a writ in the nature of a *levari facias* issued, directed to J., reciting that the incumbent of H. had petitioned the Insolvent Debtors' Ct., & commanding J. to sequester the vicarage of H. for the debts of the incumbent, which J. accordingly did, appointing a sequestrator:—*Held*: (1) the incumbent could not sue a tenant for use & occupation of the glebe, had during the period of the sequestration, & this defence arose on *munquam indebitatus*; (2) under Ecclesiastical Jurisdiction Act, 1847 (c. 98), s. 8, which passed after the sequestration was published, the sequestration, being an act done under the authority of J., the bishop of the diocese from which H. had been transferred, was made good, & it continued in force till the debt was levied, though after Nov. 1, 1847, & though sect. 8 is confined to acts done before. (3) *Seem*: the sequestration was also made good by Ecclesiastical Commissioners Act, 1836 (c. 77), s. 20, which, continued to a time later than the date of the sequestration, directs that no change of boundary etc. under that Act shall affect the jurisdiction of any of the ecclesiastical cts.—**POWELL v. HIBBERT** (1850), 15 Q. B. 129; 19 L. J. Q. B. 347; 15 L. T. O. S. 158; 14 J. P. 622; 14 Jur. 800; 117 E. R. 407.

*Annotation*:—*As to* (2) & (3) *Consd.* Phelps v. St. John (1855), 10 Exch. 895.

**By whom return made.]—See** No. 2558, *ante*.

**2587. Setting aside writ—Time for application.]—BROMAGE v. VAUGHAN**, No. 2533, *ante*.

**2588. — When granted—Not after income received by bishop.]—**A clergyman being insolvent, his "living" was sequestered, & the bishop received the income, setting apart a certain sum for maintenance, the service of the church & the necessities of the benefice, & holding the surplus. The assignees of the insolvent's estate having applied for a rule to set aside the writ of *sequestrari facias*, & claiming the whole amount levied under it, the ct. discharged the rule with costs.—**MARSH v. JONES** (1851), 16 L. T. O. S. 342.

**2589. — Sequestration granted to levy amount of mortgage debt—Property foreclosed & sold for less than amount of debt.]—**S. mortgaged the advowson of the vicarage of G. to pltf., as a security for the repayment of two sums of £7,500

**PART V. SECT. 10, SUB-SECT. 2.—G.**  
*p. Appointment of receiver—Before sequestration issued.]—*A receiver will not be appointed over an eccle-

astical benefice with cure of souls in a case where no sequestration had issued, and the Bishop was not a party to the suit.—*McCRORY v. CHICHESTER* (1837), 2 Jo. Ex. Ir. 358.—*IR.*

& £5,000, advanced by pltf. to him, & afterwards conveyed the advowson, subject to the payment of the two several sums to deft., who, as a security for the payment of the same, executed a warrant of attorney, whereby he confessed judgment at the suit of pltf. for the sum of £25,000. The vicarage having become vacant, deft. was presented thereto, & default having been made in payment of the interest on the several sums, pltf. caused a writ of sequestration to issue against the vicarage. Pltf. subsequently died, & his representatives afterwards obtained a decree of foreclosure of the equity of redemption & sold the advowson for £11,000. On a motion for a rule to set aside the writ of sequestration:—*Held*: the sale was not a satisfaction of the judgment, & the sequestration remained in full force & unaffected.—*LONG v. WILLIAMS* (1872), 20 L. T. 878.

### SUB-SECT. 3.—IN PROCEEDINGS IN ECCLESIASTICAL COURTS.

**2590. When granted—Incumbent charged with neglect of ministerial duties.**—*PULLEN v. CLEWER* (1684), 1 Hag. Ecc. App. B. 2; 162 E. R. 700; *sub nom.* *CLEWER v. PULLEN*, Return of Appeals before the High Court of Delegates, No. 70 (Parliamentary Papers, 199, April 3, 1868).

*Annotations*.—*Consd.* *Martin v. Mackonochie* (1879), 4 Q. B. D. 697; *Combe v. De La Bore* (1881), 6 P. D. 157. *Refd.* *Combe v. Edwards* (1878), 3 P. D. 103; *Martin v. Mackonochie* (1882), 7 P. D. 94.

**2591. — After monition to show cause.**—Sequestration of a living decreed at the instance of creditors of the incumbent, who did not appear to a monition to show cause.—*ARBITT v. GURNEY* (1843), 2 Notes of Cases, 75; 7 J. P. 402.

**2592. — Party declared contumacious.**—Sequestration against a party declared contumacious by the ecclesiastical ct.—*COOPER v. DODD* (1850), 15 Jur. 69, L. C.

**2593. Sequestrator hindered by incumbent — Power of court to commit for contempt—No return by bishop.**—In a cause of office, the ct. suspended the party proceeded against, a clergyman, *ab officio de beneficio*, & directed notice of the sentence to be sent to the Bishop of Winchester, from whom the case came by letters of request. The bishop appointed a sequestrator, who, in consequence of the opposition of deft., was not able to collect & receive the greater part of the profits of the benefice. No return was made by the bishop, but the facts were stated in affidavit by the sequestrator, on which motion was made for a monition against deft. to show cause why he should not be pronounced in contempt:—*Held*: in the absence of any return from the bishop, the monition could not issue.—*TROWER v. HURST* (1817), 1 Rob. Eccl. 597; 5 Notes of Cases, 160, 382; 11 Jur. 210; 163 E. R. 1148.

*Annotation*.—*Mentd.* *Re Thakeham Sequestration Money* (1871), L. R. 12 Eq. 494.

### SUB-SECT. 4.—ON DEFAULT BY INCUMBENT.

**2594. When granted—Neglect to perform duties.**—*HANCOCK v. BOMER* (1692), Return of Appeals before the High Court of Delegates, No. 99 (Parliamentary Papers, 199, April 3, 1868), cited in 3 P. D. at p. 111.

*Annotations*.—*Consd.* *Combe v. Edwards* (1878), 3 P. D. 103. *Mentd.* *Mackonochie v. Penzance* (1881), 6 App. Cas. 424.

**2595. — Failure to nominate curate after requisition—Invalid requisition.**—A bishop issued

a requisition under 57 Geo 3 (c. 99), s. 50, requiring the vicar of W. to nominate a curate with a stipend; on the ground that it appeared to the bishop, of his own knowledge, that the ecclesiastical duties of the vicarage & parish church of W. were inadequately performed by reason of the vicar's negligence. The vicar appointed no curate, & did not appeal to the archbishop. The bishop, after three months, licenced the Rev. B., clerk, as curate of W., with a stipend. The vicar refused to allow B. to officiate; upon which the bishop issued a mandate or summons to show cause why the vicar should not pay the stipend due, & ultimately proceeded to sequestration:—*Held*: (1) the requisition upon which the whole of the proceedings were founded was in the nature of a judgment, & void, as the party had had no opportunity of being heard; (2) such a requisition ought to state particular instances of negligence, or show how the incumbent was negligent.—*CAPELL v. CHILD* (1832), 2 Cr. & J. 558; 2 Tyr. 689; 1 L. J. Ex. 205; 149 E. R. 235.

*Annotations*.—*As to* (1) *Consd.* *Re Hammersmith Rent Charge* (1849), 4 Exch. 87; *Bonaker v. Evans* (1860), 16 Q. B. 102; 1 L. v. Canterbury Archbp. (1859), 1 E. & E. 545; 1 L. v. Cheshire Lines Committee (1873), L. R. 8 Q. B. 344. *Apld.* *Wood v. Wood* (1874), L. R. 9 Exch. 190. *Consd.* *R. v. Aspinall* (1885), 1 T. L. R. 805; *Fisher v. Jackson*, [1891] 2 Ch. 84. *Refd.* *Clarke v. Stocken* (1836), 3 Scott. 90; *Re p. Kinning* (1847), 4 C. B. 507; *Abdey v. Dale* (1860), 16 L. T. O. S. 365; *Re p. Story* (1852), 12 C. B. 767; *Smith v. R.* (1878), 3 App. Cas. 614; *Aberavenny v. Llandaff Bp.* (1888), 20 Q. B. D. 460.

**2596. — Non-payment to Queen Anne's Bounty.**—The Bishop of N. raised a sum of money for the purpose of building a house of residence on a benefice in his diocese, under Pluralities Act, 1838 (c. 100), s. 62; such sum being lent by the governors of Queen Anne's Bounty. The interest not being paid, a decree of sequestration issued against the profits of the benefice, at the promotion of the treasurer of the Governors of Queen Anne's Bounty, after proceedings in the ct. below. On appeal:—*Held*: (1) the treasurer had no authority to sue for the payment, & the sequestration was null & void.

The rector having refused to allow the bishop to enter upon the portion of glebe lands which the comrs. had reported might be appropriated to the above purpose:—*Held*: (2) the treasurer of Queen Anne's Bounty was not competent to maintain a suit for the instalments of & interest on the loan.—*BRUCE v. HODGSON* (1847), 5 Notes of Cases, 167; 11 Jur. 101.

**2597. — Non-residence—Computation of period of absence.**—To avowry by a rector for cattle taken as a distress for arrears of a rent charge in lieu of tithe on land of which pltf. was tenant, pltf. pleaded in bar, that the bishop of the diocese had, under Pluralities Act, 1838 (c. 100), s. 75, appointed a curate to perform the duties of the rectory at a stipend: that deft. was, at that time, absent from the rectory, & had not resided thereon for nine months in the year next preceding, but had, for a period exceeding three months, in the course of the year aforesaid, absented himself, etc.: that the curate complained to the bishop of non-payment of the stipend, whereupon the bishop summoned deft., & on his non-appearance, determined summarily, & adjudged £75 to be due: that, deft. not paying, the bishop issued a monition, requiring him to pay, in default of which a sequestration would issue: that deft. was served with the monition, but did not pay; & the bishop thereupon issued a sequestration, under the seal of his consistorial ct., empowering a sequestrator, whom the bishop appointed, to levy the £75 on the profits, rentcharges, etc., of the rectory;

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& that the sum now distrained for was demanded of pltf. by the sequestrator, & paid by pltf. to prevent his distraining. On demurrer to the plea:—*Held:* the above proceedings to sequestration, under Pluralities Act, 1838 (c. 106), s. 83, were not authorised by the statute, because the power to appoint a stipendiary curate is given, by sect. 75, only when an incumbent, under the circumstances there described, is absent, for a period exceeding three months altogether, or to be accounted at several times, in the course of any one year: & by sect. 120, the year is to be reckoned from Jan. 1 to Dec. 31; therefore, for want of jurisdiction in the bishop to sequester, the payment under such sequestration did not discharge pltf.—*SHARPE v. BLUCK* (1847), 10 Q. B. 280; 8 L. T. O. S. 535; 11 J. P. 407; 11 Jur. 328; 116 E. R. 100.

*Annotation:—Mentd. Re Bartlett* (1848), 3 Exch. 28.

**2598.** ———.]—*Ex p. BARTLETT*, No. 2465, ante.

**2599.** ——— **Failure to repair parsonage—Incumbent financially unable to comply with notice to repair.**—*Ex p. LOUGHMAN*, No. 3702, post.

**2600. Effect of sequestration—For one year—Avoidance of benefice—Notice to patron.**—Under sect. 58, if the benefice continues one whole year under sequestration issued under the provisions of the Act for disobedience of the order requiring residence, the benefice becomes void; the subsequent provision in that sect., as to giving notice, is only for the purpose of giving the bishop a right to present by lapse, and not for the purpose of creating an avoidance.—*Re BARTLETT* (1848), 3 Exch. 28; *Cripps' Church* (Ass. 131; 18 L. J. Ex. 25; 12 L. T. O. S. 150; 13 J. P. 6; 12 Jur. 940; 154 E. R. 741).

*Annotations:—Mentd. Bonaker v. Evans* (1850), 16 Q. B. 162; *Re Gorham v. Exeter Bp.*, *Ex p. Exeter* (Lord Bp.) (1850), 19 L. J. Ex. 376.

**2601.** ——— **Computation of time.**—In proceedings, under Pluralities Act, 1838 (c. 106), for the sequestration of a benefice for non-residence, it is not necessary that the bishop's monition, under sect. 54, should be preceded by a citation or other warning to the incumbent. Where the incumbent, in answer to such monition, sends a return assigning an excuse for non-residence which the bishop considers insufficient, that is a sufficient hearing of the incumbent to authorise the bishop to make an order upon the incumbent to return into residence within thirty days. Where the incumbent, being served with such order, sends to the bishop, upon affidavit, an excuse for not obeying the order, which the bishop considers insufficient, that is a sufficient hearing of the incumbent to authorise the bishop to sequester the benefice after the lapse of the thirty days. Under sect. 58 a benefice becomes void if it remain, for the space of a year, under sequestration for non-residence; the year commencing from the date of the decree of sequestration; the case not falling within sect. 120, which provides that for all purposes of the Act, except as therein otherwise provided, the year shall commence on Jan. 1 & be reckoned to Dec. 31, both inclusive.—*BARTLETT v. KIRWOOD* (1853), 2 E. & B. 771; 2 C. L. R. 253; 23 L. J. Q. B. 9; 18 J. P. 54; 18 Jur. 173; 2 W. R. 17; 118 E. R. 956.

*Annotation:—Reid. Poole v. London Bp.* (1859), 5 Jur. N. S. 522.

**2602.** ——— **Supersedes sequestration obtained by creditor.**—*BUNTER v. CRESSWELL*, No. 1028, ante.

**2603.** ——— **Right of bishop to surplus emoluments.**—Where a living is vacant by reason of the suspension of a clerk under sentence founded on proceedings under Church Discipline Act, 1840 (c. 86), & the proceeds have been sequestered, the fruits of the sequestration belong to the bishop, as chief pastor of the church, subject to the duty of providing for the services.—*Re THAKEHAM SEQUESTRATION MONEYS* (1871), L. R. 12 Eq. 494; 24 L. T. 902; 19 W. R. 1001.

**2604. Relaxation of sequestration—Effect—On sentence of suspension.**—Pltf., a clergyman, whilst holding a benefice in the diocese of Manchester, was found guilty in the Divorce Ct., upon his wife's petition, of adultery at a place out of the diocese. The Bishop of Manchester, after a report duly made in another diocese by a commission of inquiry under Church Discipline Act, 1840 (c. 46), investigated the charges made against pltf. in his absence after notice, & sentenced him to suspension *ab officio et a beneficio* for three years, & further, "that the said sentence shall remain in force until he, pltf., shall produce a certificate to our satisfaction signed by three neighbouring beneficed clergymen of the diocese of Manchester of his good conduct during the said period of suspension, & that such suspension be not taken off until he shall produce such certificate." Pltf. being ignorant of the terms of the sentence, resided out of the diocese during the first part of the three years of suspension, but when the period of the sentence expired he sent to the bishop certificates of good conduct covering the whole time, but as to the first part from clergymen of the diocese in which he had then lived; & at the end of three years from his coming into the Manchester diocese he sent a further certificate signed by three neighbouring beneficed clergymen of the diocese of Manchester of his good conduct during the last three years. Before the receipt of this further certificate the bishop had licensed deft. to the benefice which pltf. had held, & relaxed two sequestrations which had been decreed upon the benefice, one before & the other after the passing of the said sentence. It was declared in the sentence that pltf. had been shown to be guilty of "adultery or fornication" & there was no mention in the recitals of some of the matters required to be performed by the Act. Upon a special case stated in an action to recover possession of the church & the income received by deft.:—*Held:* (1) pltf. had not sufficiently complied with the sentence; & the relaxation of the sequestration did not alter the effect of the suspension; & the suspension *per se* incapacitated pltf. from instituting any action or suit for the profits of the benefice until the sentence was altered or satisfied; (2) the decree was not invalid for uncertainty, it being immaterial whether the charge were of fornication or adultery for the purpose of the proceedings against pltf.; (3) the jurisdiction of the Bishop of Manchester sufficiently appeared; & it was not necessary to show on the face of the sentence that the seven days' notice required by sect. 4 had been given to accused, nor that the inquiry was public, nor that the preliminary proceedings, with which the bishop was not concerned, had been strictly observed.—*MORRIS v. OGDEN* (1869), L. R. 4 C. P. 687; 38 L. J. C. P. 329; 20 L. T. 978; 17 W. R. 1103.

*Annotation:—Mentd. Combe v. Edwards* (1878), 3 P. D. 103.

**2605. Practice & procedure—Monition—Necessity for citation.**—*BARTLETT v. KIRWOOD*, No. 2601, ante.

**2606.** ——— **Service—Sufficiency.**—Where

the incumbent of a benefice cannot be found, service of a monition, by leaving it at the parsonage house, is sufficient, notwithstanding the incumbent does not habitually reside in it.—*GREEN v. COBDEN* (1836), 2 Bing. N. C. 627; 3 Scott, 80; 2 Hodg. 6; 5 L. J. C. P. 209; 132 E. R. 242.

**2607. — Necessity for notice to incumbent to show cause.**—Under Pluralities Act, 1838 (c. 106), a writ of sequestration issued from the Consistory Ct. of the diocese of W., reciting that the bishop had issued a monition, ordering the vicar of the vicarage of C., within the diocese, to reside on his benefice, that the monition was served on the vicar, & he returned that he had since commenced residence in consequence of this monition: that it had been officially reported to the bishop that the vicar had so commenced residence, but had not continued to reside, & had not been present at his vicarage house four months on the whole in the year following the monition; that the bishop thereupon, by a subsequent order, ordered him to proceed to & reside on the benefice within thirty days; which order had not been complied with; & the bishop had therefore directed the ct. to sequester the profits until the order should have been complied with, or satisfactory reason for non-compliance shown to the bishop; whereupon the ct. sequestered the profits, until, etc., directing the sequesterator to collect them & out of the same to cause the cure to be duly served, & to account for the residue, etc. The sequesterator having taking the profits accordingly, an action of debt for money had & received was brought against him by the vicar. It appeared at the trial that the sequestration had issued without notice to the vicar to show cause why it should not issue:—*Held*: (1) such notice was essential to the right of the sequesterator, although, after a proper preliminary proceeding, the judgment of the bishop is final; & a notice warning the vicar, after he had made return to the monition, that, unless he resided, the sequestration would issue, was not such a notice as was requisite; (2) the sequestration could not be considered as issuing under sect. 56, which authorises the bishop to sequester *quousque* without further monition or order, when the clerk, after being ordered to reside, begins to reside, but, before the expiration of twelve months thereafter, wilfully absents himself for one month; (3) the action of debt was well brought.

(4) It is advisable that the sequestration in such a case should recite the delinquency & the bishops adjudication thereon & that the previous monition be preceded by a summons to show cause why it should not issue.—*BONAKER v. EVANS* (1850), 16 Q. B. 162; 20 L. J. Q. B. 137; 16 L. T. O. S. 536; 15 Jur. 460; 117 E. R. 840, Ex. Ch.; *sub nom.* *BONEKER v. EVANS*, 14 J. P. Jo. 750.

*Annotations*:—*As to* (1) *Consd.* *Bartlett v. Kirwood* (1853), 2 E. & B. 771. *Refd.* *R. v. Cheshire Lines Committee* (1873), L. R. 8 Q. B. 344; *Cheetham v. Manchester Corp.* (1875), 32 L. T. 28.

**2608. — Hearing by bishop—What amounts to.**—*BARTLETT v. KIRWOOD*, No. 2601, *ante*.

**2609. — Form of order.**—*BONAKER v. EVANS*, No. 2607, *ante*.

If the sequesterator is himself an occupier he must account for the fair value.—*BIRCH v. BYGRAVE* (1820), 6 Madd. 158; 56 E. R. 1052.

**2611. Sequesterator—Powers & duties—Power to promote suit—For removal by churchwardens of church ornaments.**—*NOBLE v. REAST*, No. 1364, *ante*.

**2612. Curate appointed by sequesterator—No licence from bishop—Right to recover stipend from new incumbent.**—*DAKINS v. SEAMAN*, No. 2036, *post*.

**2613. Profits accrued during vacancy—Action against sequesterator for—Whether bishop party.**—*JONES v. BARRETT* (1724), Bunb. 192; 1 Itayn. 204; 2 Wood. 235; 145 E. R. 644.

*Annotations*:—*Refd.* *Harding v. Hall* (1842), 10 M. & W. 42; *Baylis v. London Bp.* (1913) 1 Ch. 127.

**2614. — Money had & received.**—The common law action for money had & received lies against the sequesterator of a vacant ecclesiastical benefice, at the suit of the succeeding incumbent, for the balance of profits of the benefice which have accrued during the vacancy. *RUSSELL v. LAY* (1807), 66 L. J. Q. B. 582.

## SECT. 11.—AVOIDANCE OF BENEFICES.

### SUB-SECT. 1. —MODES AND EFFECT OF AVOIDANCE.

#### A. Death.

**2615. General rule.**—*ANON.* (1507), Keil. 88; 72 E. R. 250.

#### B. Resignation.

##### (a) In General.

**2616. Jurisdiction of court of equity To enforce resignation.** A bill to compel a rector to resign in favour of another, in pursuance of covenant for that purpose, entered into when the rector was presented, will not lie. *NEWDIGATE v. HELPS* (1821), 6 Madd. 133; 56 E. R. 1043.

##### (b) Mode of Resignation.

**2617. Execution in presence of notary public—Whether necessary.** (1) It is not essential to the validity of a deed of resignation of an ecclesiastical benefice that it should be executed by the clerk in the presence of a notary public.

(2) When a clerk has executed an absolute deed of resignation of a benefice, upon an understanding that the formal declaration of acceptance by the ordinary is to be postponed for a time, he cannot afterwards revoke his resignation.

(3) The rule that the resignation of a benefice, except in the case of an exchange, must be absolute does not prevent a bishop accepting a resignation, but fixing a future time at which it shall come into operation.

(4) The fact that a resignation has been made at the request of the bishop in order to avoid the scandal of a commission to inquire into the moral conduct of the clerk does not render the resignation void.—*REICHEL v. OXFORD* (Bp.) (1889), 14 App. Cas. 259; 59 L. J. Ch. 66; 54 J. P. 101; *sub nom.* *REICHEL v. OXFORD* (Bp.), *REICHEL v. MAGRATH*, 61 L. T. 131; 5 T. L. R. 552, H. L.

**2618. Acceptance of resignation by bishop—Necessity for.**—On an issue whether a rector had resigned his benefice, the confession, in an answer in Chancery, that he had resigned, is not sufficient to prove the fact without showing that the bishop accepted the resignation.—*RILEY v. ADAMS* (1710), 11 Mod. Rep. 276; 88 E. R. 1037.

### SUB-SECT. 5.—DURING VACANCY.

**2610. Sequestration of tithes—Jurisdiction of Court of Chancery—Only if sequesterator to account.**—A sequestration of tithes during a vacancy is subject to the jurisdiction of the Ct. of Ch.

**Sect. 11.—Avoidance of benefices: Sub-sect. 1, B. (b), (c) i. & ii. & (d), C., D. & E.; sub-sect. 2. Sect. 12: Sub-sects. 1, 2 & 3, A. & B. (a).]**

**2619. — Whether bishop bound to accept.**—**ROCKINGHAM (MARCHIONESS) v. GRIFFITH (1755)**, 3 Burn's Eccl. Law, 9th ed., p. 543; 7 Bac. Abr. 246, L. C.

**2620. — Mode of—Endorsed & signed memorandum—Public act not necessary.**—Resignation of a living, sent by the post to the bishop, who indorsed & signed a memorandum of his acceptance, sufficient, though no public act.—**HEYES v. EXETER COLLEGE, OXFORD (1806)**, 12 Ves. 336; 33 E. R. 127, L. C.

**Annotation:—****Reid. Reichel v. Oxford Bp. (1887)**, 35 Ch. D. 48.

**2621. — Need not be in writing.**—**REICHEL v. OXFORD (BP.)**, No. 2617, *ante*.

**Effect of—On right of clerk to revoke resignation.**—*See* No. 2617, *ante*.

**2622. — Refusal to accept—No excuse for not resigning under resignation bond.**—**GREY v. HESKETH**, No. 2052, *ante*.

**2623. Resignation to take effect at future fixed date—Validity.**—**REICHEL v. OXFORD (BP.)**, No. 2617, *ante*.

#### (c) Effect of Resignation.

##### i. In General.

**2624. Right of retiring clerk to emblements.**—**BULWER v. BULWER**, No. 2300, *ante*.

**Resignation in pursuance of agreement for exchange of livings—Exchange falling through.**—*See* No. 2632, *post*.

##### ii. Pensions.

**Actions to recover—Jurisdiction of Ecclesiastical Court.**—*See* Part IV., Sect. 6, sub-sect. 2, A., *ante*.

**Under Incumbents' Resignation Acts.**—*See* Nos. 2625–2628, *post*.

**2625. Under Incumbents' Resignation Acts—Amount of pension—Alteration of amount—Diminution in net annual value.**—By Incumbents' Resignation Act, 1871 (c. 44), s. 8, it is provided that the pension which may be allowed to a retiring incumbent shall in no case exceed one-third part of "the annual value of the benefice resigned"; & by sect. 11 the annual value for the purposes of the Act is defined to be the "net annual value" after making certain deductions therein specified:—**Held**: the amount of the retiring pension is to be fixed with reference to the net annual value of the benefice at the date of the incumbent's resignation; & having been once fixed, it is not liable to subsequent alteration in consequence of a diminution in the net annual value of the benefice through agricultural depression or through the formation of a part of the parish into a district chapelry.—**ROBINSON v. DAND (1886)**, 17 Q. B. D. 341; 56 L. J. Q. B. 585; 54 L. T. 871; 34 W. R. 639; 2 T. L. R. 720.

**2626. — Jurisdiction of court to review bishop's decision.**—The ct. has no power to review a declaration by a bishop under Incumbents' Resignation Act, 1871 (c. 44), fixing the amount of the pension payable to a retiring incumbent out of the revenues of the benefice, though the amount so fixed may be shown to exceed the maximum allowed by the Act, namely, one-third part of the annual value of the benefice.—**MANING v. HARDY (1904)**, 20 T. L. R. 776.

**2627. — Action to recover arrears of pension—Right of incumbent to set off previous judgment debt due from retired clerk.**—By Incumbents'

Resignation Act, 1871 (c. 44), s. 10, the pension allowed to a retiring clerk is made a charge upon the revenues of the benefice, & shall be recoverable as a debt at law or in equity from the incumbent of the benefice by the retired clerk, his exors., administrators, & assigns, but shall not be transferable at law or in equity. In an action by a retired clerk against the incumbent of the benefice for payment of the arrears of the pension that had been allowed him under the Act:—**Held**: the incumbent could not set off against such arrears a judgment debt previously due to him from the retired clerk.—**GATHERCOLE v. SMITH (1881)**, 17 Ch. D. 1; 50 L. J. Ch. 671; 44 L. T. 430; 45 J. P. 812; 29 W. R. 434, C. A.; *subsequent proceedings*, 7 Q. B. D. 626, C. A.

**Annotations:—****Reid. Gathercole v. Smith (1881)**, 7 Q. B. D. 626; **McBean v. Deane (1885)**, 30 Ch. D. 520. **Mentd.** **Lucas v. Harris (1886)**, 18 Q. B. D. 127; **Re Saunders, Ex p. Saunders, [1895]** 2 Q. B. 117; **Re Fitzgerald, Surman v. Fitzgerald, [1904]** 1 Ch. 573.

**2628. — Income of benefice insufficient.**—**MONTAGUE v. TWYNE (1893)**, 9 T. L. R. 278; 57 J. P. Jo. 101.

#### (d) Revocation of Resignation.

**2629. Not after resignation approved or admitted.**—**REICHEL v. OXFORD (BP.)**, No. 2617, *ante*.

#### C. Exchange.

**2630. Arrangement falling through—Death of one incumbent before induction.**—On an exchange by two persons, if one be instituted & inducted, & the other die before induction, it is void.—**CROMWELL'S (LORD) CASE (1601)**, 2 Co. Rep. 69 b; 76 E. R. 574.

**Annotations:—****Mentd.** **Harvy v. Thomas (1591)**, Cro. Eliz. 216; **Drury's Case (1608)**, 6 Co. Rep. 73 a; **Fraunce's Case (1609)**, 8 Co. Rep. 89 b; **Itowles v. Mason (1612)**, 2 Brownl. 85; **Bowles's Case (1615)**, 11 Co. Rep. 79 b; **R. v. Zakar (1615)**, 3 Bulst. 88; **Haverhill v. Haro (1616)**, 3 Bulst. 250; **Eaton v. Butler (1628)**, W. Jo. 180; **Davies v. Kempe (1664)**, Cart. 2; **Smith v. Farnaby (1666)**, Cart. 52; **Dixon v. Harrison (1669)**, Vaugh. 36; **Adeson v. Otway (1677)**, Freem. K. B. 227; **Jones v. Morley (1697)**, 12 Mod. Rep. 159; **Italciffe's Case (1719)**, 1 Stra. 267; **Doe d. Odienne v. Whitehead (1759)**, 2 Burr. 704; **Roe d. Wrangham v. Hersey (1771)**, 3 Wils. 274; **Davies v. Bush (1824)**, McLe. & Yo. 58; **Doe d. Bruce v. Martyn (1828)**, 7 L. J. O. S. K. B. 60; **Clifford v. Turroll (1845)**, 14 L. J. Ch. 390; **Crofts v. Middleton (1856)**, 8 De G. M. & G. 192; **Gilbertson v. Richards (1860)**, 5 H. & N. 453; **Berkeley Peckage (1861)**, 8 H. L. Cas. 21.

**2631. — Effect of.**—**COMMENDAM CASE, COLT & GLOVER v. COVENTRY & LICHFIELD (BP.) (1617)**, Hob. 140; **Moore, K. B. 898**; **80 E. R. 290**; *sub nom.* **COLT v. GLOVER**, 1 Roll. Rep. 451; *sub nom.* **COLT'S CASE**, Jenk. 300, Ex. Ch.

**Annotations:—****Consd.** **Rumsey v. Nicholl (1877)**, 2 C. P. D. 179. **Reid.** **Edes v. Oxford Bp. (1887)**, Vaugh. 18; **R. v. Worcester Bp., Jervason & Hinkley (1870)**, 1 Mod. Rep. 276; **It. v. London Bp. (1894)**, Comb. 300; **Reynoldson v. Blake (1897)**, 1 Ld. Raym. 192; **Wolferstan v. Lincoln Bp. (1763)**, 2 Wils. 174; **Mirehouse v. Rennell (1833)**, 1 Cl. & F. 527. **Mentd.** **Manby v. Scott (1662)**, O. Bridg. 229; **Thomas v. Sorrell (1673)**, Freem. K. B. 85; **Shatter v. Friend (1690)**, 1 Show. 172; **Hornbee, Williamson, Smith & Stone's Petn. (1691)**, Freem. K. B. 331; **Harcourt v. Fox (1693)**, 4 Mod. Rep. 167; **Owen v. Saunders (1697)**, 1 Ld. Raym. 158; **Cole v. Hawkins (1717)**, 1 Stra. 21; **Thornby v. Fleetwood (1720)**, 1 Stra. 318; **Bollamy v. Burrow (1735)**, Cas. temp. Talb. 97; **Roe d. Berkeley v. York Archbp. (1805)**, 6 East. 86; **Denn d. Nowell v. Roake (1828)**, 5 B. & C. 720; **Re Gibbs (1845)**, 5 L. T. O. S. 475; **Osgood v. Nelson (1869)**, 10 B. & S. 119; **Roberts v. London Corpn. (1883)**, 30 W. R. 637.

**2632. — After resignation of one incumbent—Right to recover possession of vacated benefice.**—Pltf. in 1867 obtained his patron's permission to exchange his living of L. with some clergyman to be approved. The patron approved of P., & promised to do all that was necessary on his part to carry out the exchange with P. Pltf. thereupon obtained his bishop's sanction to the

exchange, & executed a deed of resignation of the living of L. & delivered it to the bishop's registrar, who knew it was executed with a view only to an exchange. The patron did not present P. to the living but deft., who accepted it with knowledge of all the premises. Pltf. brought ejectment against deft. to recover possession of the rectory house & glebe:—*Held*: on these facts ejectment would not lie against deft. at the suit of pltf.—*RUMSEY v. NICHOLL* (1877), 2 C. P. D. 204; 38 L. T. 786; 41 J. P. 741; 25 W. R. 614, C. A.  
*Annotation*:—*Reid*. *Reichel v. Oxford Bp.* (1887), 35 Ch. D. 48.

**Agreements relating to dilapidations.**—*See* Part VII., Sect. 9, sub-sect. 1, F., *post*.

**2633. Patronage exercisable in turn—Presentation on exchange equivalent to turn.**—*KEEN v. DENNY*, No. 1963, *ante*.

#### D. Cession.

**On elevation to bishopric.**—*See* Part III., Sect. 3, sub-sect. 2; Sect. 5, sub-sect. 2, B. (a), *ante*.

**On acceptance of another benefice.**—*See* Sect. 7, sub-sect. 1, *ante*.

#### E. Deprivation.

*See, generally*, Part IV., Sect. 10, sub-sect. 5, *ante*.

### SUB-SECT. 2.—CURE OF SOULS AND INCOME OF BENEFICE DURING VACANCY.

**2634. Income—Apportionment.**—*AYNSLEY v. WORDSWORTH*, No. 3343, *post*.

**2635. — Right of next incumbent to recover—Avoidance de jure & not de facto.**—Deft., being incumbent of a living with cure of souls, valued at less than £8 a year in the King's books, accepted another benefice without having a dispensation to hold both, whereby the first became void *de jure*; but he continued in possession. The patron presented another clerk, & afterwards brought *quare impedit*, & recovered against deft., upon which the new presentee was instituted & inducted. In an action by the latter against deft., founded on 28 Hen. 8, c. 11, s. 3, which gives the profits of every benefice during vacation to the next incumbent:—*Held*: pltf. could not recover the profits either from the time of his being presented, or from the suing out of the *quare impedit*, the vacation contemplated by the statute being a vacation *de facto*.—*HALTON v. COVE* (1830), 1 B. & A. 538; 109 E. R. 887; *sub nom.* *HATTON v. COVE*, 9 L. J. O. S. K. B. 71.

*Annotations*:—*Distd.* *Betham v. Gregg* (1834), 10 Bing. 352. *Reid*. *Alston v. Atlay* (1837), 7 Ad. & El. 289. *Mentd.* *Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143.

**2636. Curate appointed by sequestrator—Though not licenced by bishop—Right to recover reasonable stipend—From next incumbent if income insufficient.**—Where a curate is appointed by the special sequestrators of the bishop of the diocese, to serve the cure of a benefice during the vacation between the death of the last & the appointment of the next incumbent, he may, although not licenced by the bishop, & notwithstanding *Pluralities Act*, 1838 (c. 106), recover his reasonable stipend in an action of debt under 28 Hen. 8, c. 11, from the next incumbent, the tithes which accrued during the interval not being sufficient to pay him a reasonable stipend.—*DAKINS v. SEAMAN* (1842), 9 M. & W. 777; 11 L. J. Ex. 274; 6 J. P. 345; 6 Jur. 783.

### SECT. 12.—UNBENEFICED CLERGY.

#### SUB-SECT. 1.—POSITION AND MINISTRATIONS.

Position generally, *see* Sect. 12, sub-sect. 3, B. (b), *post*.

**Conditions precedent to ministration—Licence of bishop.**—*See* Part V., Sect. 2, sub-sect. 4, A., *ante*.

**Consent of incumbent.**—*See* Part III., Sect. 7, sub-sect. 2, C., *ante*.

#### SUB-SECT. 2.—CURATES OR MINISTERS IN CHARGE.

**During incumbents' non-residence or neglect of duty.**—*See* Sect. 12, sub-sect. 3, C., *post*.

**During sequestration of benefice.**—*See* Sect. 12, sub-sect. 3, D., *post*.

**During vacancy of benefice.**—*See* Sect. 12, sub-sect. 3, E., *post*.

**Ministers of chapels of ease.**—*See* Sect. 12, sub-sect. 5, *post*.

#### SUB-SECT. 3.—ASSISTANT CURATES.

##### A. In General.

**2637. Origin.**—*PORTLAND (DUKE) v. BINGHAM*, No. 1361, *ante*.

##### B. Licence, Stipend and Status generally.

##### (a) Admission.

**2638. Who may nominate—Whether inhabitants—Consent of incumbent or custom not alleged.**—*R. v. OXFORD (Bp.)*, No. 2268, *ante*.

**2639. — Validity of custom.**—(1) A bishop's register is evidence of the facts stated in it. (2) An allegation of a custom in parishioners to elect a curate is not supported by proof of such a custom in parishioners paying church rates. (3) *Seemle*: an ecclesiastical custom, which is not immemorial, will not, though acted on for a long time, deprive a rector of his common law right to appoint his curate.—*ARNOLD v. BATH & WELLS (Bp.)* (1829), 5 Bing. 316; 2 Moo. & P. 559; 7 L. J. O. S. C. P. 120; 130 E. R. 1083.  
*Annotation*:—*Generally*, *Mentd.* *Sturla v. Freccia* (1880), 5 App. Cas. 623.

**2640. — Proof of right of nomination.**—The question being, whether the appointment of a curate belonged to the vicar of the parish or to a corp., entries in old books of the corp. were not received as evidence against the vicar, to show that the corp. had from time to time appointed the curate.—*A.-G. v. WARWICK CORPN.* (1827), 4 Russ. 222; 38 E. R. 789.

**2641. — — — — —**—*ARNOLD v. BATH & WELLS (Bp.)*, No. 2639, *ante*.

**Patronage of new churches & chapels.**—*See* Part V., Sect. 4, sub-sect. 1, E., *ante*.

**2642. Mode of nomination—Whether compliance with charter.**—(1) Where a charter of Edward VI. granted to the governors of a corp. the right of nominating & appointing *undecum assensu majoris partis inhabitancium* of the vill of S. a chaplain to perform divine service in the vill:—*Held*: a usage for the governors to nominate a chaplain, & to give notice to the inhabitants to meet at a future day, & to assent or dissent to the nomination so made, was not inconsistent with the words of the charter.

(2) A decree by the Lord Chancellor, in 1741, had declared the right of voting to be in the inhabitants only paying rates & assessments, & the usage since that decree had been in accordance



**Sect. 12.—Unbeneficed clergy: Sub-sect. 3, B. (a), (b) & (c), C., D., E. & F.; sub-sect. 4.]**

with it, an election having been made by such inhabitants, at which the votes of non-rated inhabitants were tendered & refused:—*Held*: a *mandamus* would not be granted for a new election, as the parties applying for it had made out no case to show that the term "inhabitants," used in the charter, had a wider signification.—*R. v. DAVIE* (1837), 6 Ad. & El. 374; 6 L. J. K. B. 126; 1 J. P. 291; 112 E. R. 143; *sub nom.* *R. v. SANDFORD* (GOVERNORS), 1 Nev. & P. K. B. 328; Will. Woll. & Dav. 177.

**Conditions precedent to admission—Licence of bishop.]—See Part V., Sect. 2, sub-sect. 4, A., ante.**

**Consent of incumbent.]—See Part III., Sect. 7, sub-sect. 2, C., ante.**

**2643. Duty of vicar to admit—Curate licenced by bishop.]—*R. v. SALE* (1851), 15 J. P. Jo. 417.**

(b) *Position.*

**2644. As regards incumbent—Duty of obedience.]—*MARTYN v. HIND* (1785), Return of Appeals before the High Court of Delegates, No. 178 (Parliamentary Papers 199, April 3, 1868).**

**2645. — No contract of service—Within National Insurance Acts.]—(1) The relationship existing between a rector or vicar in the Church of England & his curate is not the relationship of master & servant.**

(2) Whether the curate is formally licenced by the bishop under seal or is a mere probationer working under the bishop's temporary permission, he is still in both cases the holder of an ecclesiastical office, & not a person whose duties & rights are defined by contract.

(3) Neither the relationship between incumbent & curate nor the relationship between bishop & curate create such a relationship between employer & employed as could be construed into anything in the nature of a contract of service, & accordingly neither curates nor assistant curates are compulsorily insurable people under the Act.

*Semble*: (4) a curate or assistant curate might come in under the Act as a voluntary contributor.—*Re NATIONAL INSURANCE ACT, 1911, Re EMPLOYMENT OF CHURCH OF ENGLAND CURATES*, [1912] 2 Ch. 563; 82 L. J. Ch. 8; 107 L. T. 643; 28 T. L. R. 579; 6 B. W. C. C. N. 3.

**2646. — Right to possession of parsonage—On termination of curacy.]—*PHILLIPS v. GODFREY* (1901), 45 Sol. Jo. 746.**

**Rights—Nomination of churchwarden.]—See No. 671, ante.**

**2647. Whether poor law settlement obtained.]—A curate officiating in a parish for above a year, under the bishop's licence to perform the office of curate at a certain annual stipend, is yet not such an annual officer as is entitled to a settlement by virtue of Poor Relief Act, 1801 (c. 11), s. 6.—*R. v. WANTAGE* (INHABITANTS) (1801), 2 East, 65; 102 E. R. 293.**

*Annotations.—Held.* *R. v. Stogursey* (1831), 1 B. & Ad. 795. *Mentd.* *R. v. St. Mary, Newington* (1833), 5 B. & Ad. 540; *R. v. Ossett* (1851), 15 J. P. 498.

—*Compare* No. 3661, *post*.

**2648. Privileges—Exemption from tolls.]—*DICKINSON v. TEMPLE*, No. 1815, *ante*.**

**2649. — — —.]—The curate of a parish was engaged by the rector of a neighbouring parish of C. to discharge clerical duties during his temporary absence through illness. There was no licence from the bishop or other authority by which the curate was empowered to perform the duties. He rode through a turnpike-gate on his way to the parish church of C. to perform the ceremony of marriage:—*Held*: he was not entitled to the exemption from toll given by Turnpike Roads Act, 1822 (c. 126), s. 32, to the curate of a parish on parochial duty within his parish.—*BRUNSKILL v. WATSON* (1868), L. R. 3 Q. B. 418; 37 L. J. M. C. 103; 18 L. T. 432; 32 J. P. 692; 16 W. R. 1009.**

**Liabilities—Dilapidations.]—See Nos. 3661–3665, *post*.**

(c) *Stipend.*

**2650. Power of bishop to fix—Contract between parties.]—The Spiritual Ct. prohibited from enforcing payment of a stipend to the curate enlarged by the bishop's order, when there was a contract between the parties.**

There being a contract between the parties, the bishop had no power to make any order (*per CUR.*).—*PIERSON v. ATKINSON* (1672), Freem. K. B. 70; 89 E. R. 52.

**2651. — Without consent of incumbent.]—A curate cannot have the benefit of a proceeding by monition for the recovery of a salary assigned by a bishop without the consent of the incumbent, the incumbent being resident on his benefice, & discharging the duties generally, but desirous of the assistance of a curate.—*R. v. PETERBOROUGH* (Bp.) (1824), 3 B. & C. 47; 4 Dow. & Ry. K. B. 720; 2 L. J. O. S. K. B. 199; 107 E. R. 652.**

**2652. Recovery of—Action of High Court.]—(1) If a rector give B. a title to the bishop & thereby appoint him curate of his church, promising to allow him a salary & to continue him in the office of curate, till otherwise provided of some ecclesiastical preferment, unless lawfully removed for any fault, he cannot afterwards remove him without cause; & if the salary be in arrear, B. may maintain *assumpsit* upon the title. (2) A readership is not an ecclesiastical preferment within the meaning of such title.—*MARTYN v. HIND* (1779), 1 Doug. K. B. 142; 2 Cowp. 437; 90 E. R. 94.**

*Annotations.—As to* (1) *Held.* Barford v. Stuckey (1820), 2 Brod. & Bing. 333. *Generally.* *Mentd.* Down & Connor & Dromore (Lord Bp.) v. Miller, Down & Connor & Dromore (Lord Bp.) v. Potter (1861), 5 L. T. 30.

**2653. — Pluralities Act, 1838 (c. 106), s. 83.]—Pluralities Act, 1838 (c. 106), s. 83, provides that differences between the incumbent of a benefice & his curate touching the curate's stipend shall be decided summarily by the bishop of the diocese on complaint to him made. Deft. agreed to employ pttf. as his curate at an annual stipend of £110, besides board & lodging in the vicarage house. These terms were set out in the nomination of the curate to the bishop. Differences having arisen relative to the board & lodging, pttf. brought an action in the High Ct. against deft. to recover damages in lieu of board & lodging. Upon deft.'s motion to stay:—*Held*: (1) the action would lie; (2) the High Ct. had jurisdiction to try it, since it was neither within the language nor spirit of the above enact-**

**PART V. SECT. 12, SUB-SECT. 3.—B. (c).**

**a. Recovery of—No evidence of contract.]—Pttf. sued defts., as churchwardens, for his stipend as the incumbent or minister of a church. It appeared that several resolutions were**

adopted in vestry as to the salary of the clergyman, but only one subsequent to defts.' acceptance of office, which related to an old balance:—*Held*: as pttf.'s claim rested on a voluntary undertaking of the vestry, not founded upon a consideration

moving from pttf. or upon any executed consideration of services rendered, & the evidence showed no contract between pttf. & defts. founded upon a consideration between them, defts. were entitled to judgment.—*CARRY v. WALLACE* (1862), 12 C. P. 372.—*CAN.*

ment that the bishop should be constituted a judge without a jury to assess damages, or that plff. should be deprived of the ordinary means of recovering them.—*FRASER v. DENISON* (1888), 57 L. J. Q. B. 550; 4 T. L. R. 782; *sub nom.* *FRAZER v. DENISON*, 52 J. P. 678.

*C. During Incumbent's Non-Residence or Neglect of Duty.*

**2654. Position—As regards incumbent—Liability for rates, taxes & dilapidations.**—Where a curate is licenced to a benefice during the absence of the incumbent, whose licence for non-residence enjoins that he shall "keep the premises in good repair," & it does not appear that the curate's stipend has been fixed at not less than the full value of the benefice under Pluralities Act, 1838 (c. 106), s. 94, the curate cannot set off the amount paid by him for rates & taxes of the vicarage premises, for he would be liable for them as occupier; but as to the repairs, he would be entitled to set them off at common law, in an action by the vicar for the use & occupation of other premises held under him.

*Semble*: in such a case the jurisdiction of the bishop, under sect. 100 is not exclusive.—*PALMER v. BULL* (1841), 8 J. P. 776.

**2655. Stipend—Recovery of.**—*DANIEL v. MORTON*, No. 2434, *ante*.

*D. On Sequestration of Benefice.*

**2656. Position—Whether poor law settlement obtained.**—*R. v. OVER (INHABITANTS)* (1773), Burr. S. C. 746.

*Annotations*:—*Refd.* *R. v. Lew* (1828), 3 Man. & Ry. K. B. 362; *R. v. Stogursey* (1831), 1 B. & Ad. 795; *R. v. Ossett* (1851), 16 Q. B. 975.

*Compare* No. 2647, *ante*.

**Right to appoint parish clerk.**—*See* No. 912, *ante*.

**2657. Stipend—Recovery of—From next incumbent.**—*DAKINS v. SEAMAN*, No. 2636, *ante*.

*E. During Vacancy of Benefice.*

**Position—Right to appoint parish clerk.**—*See* No. 929, *ante*.

*F. Duration and Termination of Curacy.*

**2658. Termination by Incumbent—Whether curate removable at will.**—Curate is removable at the will of the parson.—*BIRCH v. WOOD* (1698), 2 Salk. 506; 12 Mod. Rep. 249; 91 E. R. 432.

**2659.**—*PRICE v. PRATT*, No. 1831, *ante*.

**2660.**—*Contract between parties.*—*MARTYN v. HIND*, No. 2652, *ante*.

**2661. Curate holding as chaplain.**—A spiritual person, who, in virtue of his office of chaplain of a college, holds a curacy with a dwelling attached thereto, & ceasing to hold the office of chaplain retains possession of the dwelling, is not a curate within the meaning of 57 Geo. 3. c. 99, s. 57, & may be evicted by notice to quit forthwith, & is not entitled to the three months' notice required to be given by that statute, with the consent of the bishop.—*GOODTITLE d. LINCOLN COLLEGE (MASTER & FELLOWS) v. LEE* (1823), 2 Dow. & Ry. K. B. 718; 1 L. J. O. S. K. B. 165.

**2662.**—*R. v. ROCHESTER (Bp.)* (1890), 6 T. L. R. 165, D. C.

**2663.**—*Notice to quit by Incumbent—Formalities—Under Pluralities Act, 1838 (c. 106), ss. 95 & 112.*—A notice by an incumbent to a curate to quit his curacy, given under above Act, sect. 95, is not a notice within or subject to the

regulations prescribed by sect. 112 of the same statute.—*TANNER v. SCRIVENER* (1888), 13 P. D. 128; Trist. 125.

**2664. Termination by revocation of licence—Power of bishop to revoke licence.**—*BADDELEY'S CASE* (1872), cited in 1 Phillimore's Ecclesiastical Law, 2nd ed. at p. 439.

**2665.**—*Necessity for calling on curate to show cause against revocation—Form of notice.*—*DENISON'S CASE* (1872), cited in 1 Phillimore's Ecclesiastical Law, 2nd ed. at p. 438.

**2666.**—*Grounds for revoking licence—Curate accused of felony—No judicial investigation.*—*Ex p. SINANKI* (1864), 28 J. P. Jo. 325; *sub nom. Re SINYANKI*, 12 W. R. 825.

**2667.**—*Objectionable past acts—No opportunity of obeying proposed prohibition thereof.*—*DENISON'S CASE* (1872), cited in 1 Phillimore's Ecclesiastical Law, 2nd ed. at p. 438.

**2668.**—*Form of instrument of revocation.*—*DENISON'S CASE* (1872), cited in 1 Phillimore's Ecclesiastical Law, 2nd ed., at p. 438.

**2669.**—*Appeal to Archbishop—Duties of Archbishop on.*—Under Pluralities Act, 1838 (c. 106), s. 98, the Archbishop is bound, if requested by the curate, to hear him, either in person or by counsel, as to the validity of the grounds of revocation, & to receive fresh evidence tendered on his behalf upon that point. The Archbishop may regulate the mode in which the proceedings at such hearing are to be conducted; but he cannot, if so requested to hear, confirm or annul the revocation merely upon the statements made by the curate in his petition of appeal, & the written documents referred to in such petition. Where the Archbishop had confirmed a revocation upon such last mentioned written evidence only, the ct. issued a *mandamus* to him to hear the appeal & decide the merits thereof. *R. v. CANTERBURY (ARCHB.)* (1850), 1 E. & E. 515; 28 L. J. Q. B. 154; 5 Jur. N. S. 958; 7 W. R. 212; 120 E. R. 1011.

*Annotations*:—*Appld.* *R. v. Housing Appeal Tribunal*, [1920] 3 K. B. 334. *Refd.* *Re Brook, Deaconyn & Badart* (1864), 16 C. B. N. S. 403; *Wood v. Wood* (1874), L. R. 9 Exch. 190; *Smith v. R.* (1878), 3 App. Cas. 611.

**Whether appeal to Privy Council maintainable.**—*See* No. 1133, *ante*.

SUB-SECT. 1.—LECTURERS OR PREACHERS.

**2670. Origin & nature of office.**—Lecturers first began to be established in the reign of Queen Elizabeth; & Archbishop Laud was for suppressing them, by reason that they did not come in by presentation, but by the choice of the parishioners (*LAUD HARDWICKE, C.*)—*A.-G. v. GARDNER* (1711), Barn. Ch. 483; 27 E. R. 729.

**2671.**—*Readership.*—*MARTYN v. HIND*, No. 2652, *ante*.

**Conditions precedent to appointment—Licence of bishop.**—*See* Part V., Sect. 2, sub-sect. 4, A., *ante*.

*Consent of Incumbent.*—*See* Part III., Sect. 7, sub-sect. 2, C., *ante*.

**2672. Rights—Time of lecture—Whether preacher or trustees entitled to fix.**—Trustees of a lecture to be preached at a convenient hour may appoint any hour they please, & vary their appointment.—*R. v. BATHURST* (1760), 1 Wm. Bl. 210; 96 E. R. 115.

**2673. Duration & termination of lectureship.**—*R. v. ST. BARTHOLOMEW'S (CHURCHWARDENS)* (1700), 13 East, 421, n.; 104 E. R. 434; *sub nom.*

*Sect. 12.—Unbeneficed clergy: Sub-sects. 4, 5, 6 & 7. Sect. 13: Sub-sect. 1, A.]*

**ST. BARTHOLOMEW'S (CHURCHWARDENS) CASE**, Holt, K. B. 418; 3 Salk. 87.

*Annotations:—***Refd.** Ferguson v. Kinnoull (1842), 9 Cl. & Fin. 251. **Mentd.** R. v. London, Bp. (1743), 13 East, 420, n.

**2674. — Dismissal after seven years—Right to compensation—Municipal Corporations Act, 1835 (c. 76), s. 68.]**—The corpn. of Liverpool, in compliance with certain local Acts, built a church, & appointed a person to officiate therein by the name of minister. They also of their own accord & independently of these Acts appointed a clergyman as lecturer to assist him in the general duties of his office. The lecturer having been removed, after receiving a regular stipend for more than seven years, before the passing of above Act, claimed compensation for the loss of his office as "minister" under sect. 68:—**Held:** the word "minister" was to be interpreted liberally, & without reference to the way in which it was used in the local Acts, & the claimant was entitled to compensation.—**R. v. LIVERPOOL CORPN.** (1838), 8 Ad. & El. 176; 3 Nev. & P. K. B. 280; 7 L. J. Q. B. 134; 2 Jur. 855; 112 E. R. 804; *sub nom.* R. v. LIVERPOOL CORPN., *Ex p.* Moss, 1 Will. Woll. & II. 153.

**SUB-SECT. 5.—MINISTERS OF CHAPELS AT EASE.**

**Who may nominate.]—***See* Part V., Sect. 4, sub-sect. 1, E., *ante*.

**Conditions precedent to appointment—Licence of bishop.]—***See* Part V., Sect. 2, sub-sect. 4, A., *ante*.

**2675. Rights—Curate wrongfully dispossessed—Mandamus to restore to chapel.]—***Mandamus* lies to restore a curate to a chapel, being a donative endowed with lands.

A *mandamus* to restore is the true specific remedy where a person is wrongfully dispossessed of any office or function which draws after it temporal rights; in all cases where the established course of law has not provided a specific remedy by another form of proceeding which is the case with regard to rectories & vicarages (**LORD MANSFIELD, C.J.**).—**R. v. BLOOMER** (1760), 2 Burr. 1043; 97 E. R. 697.

*Annotations:—***Apprvd.** R. v. Barker (1761), 1 Wm. Bl. 300. **Consd.** R. v. Stafford (1790), 3 Term Rep. 646. **Refd.** R. v. Chester, Bp. (1786), 1 Term Rep. 396; R. v. Canterbury, Archbp. & London, Bp. (1812), 15 East, 117; Ferguson v. Kinnoull (1842), 9 Cl. & Fin. 251.

**2676. —**—**]**—*Mandamus* the proper remedy to restore a curate to his chapel.—**R. v. BARKER** (1761), 1 Wm. Bl. 300; 90 E. R. 169; *subsequent proceedings* (1762), 3 Burr. 1265, 1379.

*Annotations:—***Expld.** Doe d. Jones v. Jones (1830), 5 Man. & Ry. K. B. 616. **Refd.** R. v. Jotham (1790), 3 Term Rep. 575; *Re* Orton Vicarage (1849), 13 Jur. 1049; Collier v. King (1861), 11 C. B. N. S. 14. **Mentd.** R. v. City of London Union, *Ex p.* London Corpn. (1907), 76 L. J. K. B. 1087.

**SUB-SECT. 6.—MINISTERS OF PROPRIETARY CHAPELS.**

**2677. Who may be appointed—"Regular clergyman"—Appointment of inhibited clerk.]—**Ptfs. were the owners of a proprietary chapel, & in 1801 granted a lease of the chapel to B., containing a covenant by the lessee not to permit or suffer any clergyman or person to officiate in the chapel, or perform public divine service therein, but such as should be a regular clergyman of the Church of England. The lease was afterwards assigned to

defts. G. & F., who allowed D. to preach & perform divine service in the chapel. D. was a clergyman of the Church of England, who had been inhibited by the Bishop from performing divine service within the diocese in which the chapel was situated. The vicar of the parish had not consented to the performance of D. of service within the chapel:—**Held:** "regular clergyman" meant a person who could officiate in the chapel without being guilty of irregularity, & as it was irregular of D. to pray & preach in defiance of the inhibition & without the vicar's consent, D. was not a regular clergyman, & must be restrained by injunction from continuing his performance.—**FOUNDLING HOSPITAL (GOVERNORS) v. GARRETT** (1882), 47 L. T. 230, C. A.

**2678. Position.]—****MOYSEY v. HILLCOAT**, No. 438, *ante*.

**2679. Duration & termination of appointment—Termination by revocation of licence.]—****HODGSON v. DILLON**, No. 1850, *ante*.

**2680. — Appeal to archbishop—Whether maintainable.]—**S., a duly ordained clergyman of the Church of England, was licensed by the Bishop of M. to perform divine service within an unconsecrated church, which was built by subscription, in the city & diocese of M. S. had no nomination or stipend, & no district was assigned to the church. His licence having been revoked by the bishop, S. appealed to the archbishop of the province:—**Held:** the appellant was not a licensed curate within 36 Geo. 3, c. 83, s. 6, or Benefices Act, 1838 (c. 106), s. 98, & no appeal lay from the decision of the bishop.—**SEDGWICK v. MANCHESTER (Bp.)** (1869), 38 L. J. Eccl. 30; 33 J. P. 564.

**— Termination by revocation of incumbent's consent.]—***See* No. 418, *ante*.

**SUB-SECT. 7.—CHAPLAINS.**

*See* Part IX., *post*.

**SECT. 13.—ECCLESIASTICAL OFFENCES.**

**SUB-SECT. 1.—OFFENCES IN RESPECT OF DOCTRINE.**

*A. What are.*

**2681. Blasphemy.]—****WOODWARD v. ATTWOOD** (1866), Return of Appeals before the High Court of Delegates, p. 20, No. 48 (Parliamentary Papers 190, Apr. 3, 1868).

*Annotation:—***Refd.** Martin v. Mackonochie (1883), 8 P. D. 191.

**— At common law.]—***See* CRIMINAL LAW, Vol. XV., pp. 733-735, Nos. 7914-7949.

**Seditious libel.]—***See* LIBEL & SLANDER.

**2682. Contradicting articles of religion.]—**Proceedings under 13 Eliz. c. 12, against a clergyman, for preaching doctrines contrary to the articles of religion.

That any clergyman should assume the liberty of inculcating his own private opinions, in direct opposition to the doctrines of the Established Church, in a place set apart for its own public worship is not more contrary to the nature of a National Church than to all honest & rational conduct. Nor is this restraint inconsistent with Christian liberty. It is therefore a restraint essential to the security of the Church, & it would be a gross contradiction to its fundamental purpose to say that it is liable to the reproach of persecution if it does not pay its ministers for maintaining doctrines contrary to its own (**LORD STOWELL**).—

(3) Arts. of charge against a clerk in holy orders & incumbent of a vicarage & parish church, for an offence against the laws ecclesiastical of the realm, in having printed, published, & set forth certain volumes of sermons, in which he advisedly maintained & affirmed doctrines directly contrary or repugnant to, & inconsistent with, divers of the Thirty-Nine Articles of Religion & Formularies

*Sect. 13.—Ecclesiastical offences: Sub-sect. 1, A., B., C. & D.; sub-sects. 2 & 3, A., B. & C.; sub-sect. 4.]*

of the Church of England, the alleged errors being—first, concerning the reconciliation of God to man by the sacrifice or propitiation of Our Lord Jesus Christ, & as to the necessity of such reconciliation; secondly, as to the Incarnate Godhead of Our Lord & the doctrine of the Holy Trinity; thirdly, as to the authority of the Scriptures or Holy Writ—admitted & sustained:—*Held*: such several errors & doctrines so charged to have been maintained & affirmed, were sufficiently proved by the incriminated passages extracted from the sermons, & set forth in the arts. of charge, as being respectively repugnant to, & inconsistent with, the several Articles of Religion to which they were pleaded as contrary to & opposed, without reference to the Formularies of the Church to which they were also pleaded to be repugnant & inconsistent. (4) Sentence of deprivation of all ecclesiastical promotion, especially from the vicarage of which he was incumbent, was pronounced against such clerk, unless within a week from the delivery of the judgment he should expressly & unreservedly retract the several errors in which he had so offended, & which he refused to do.

(5) Their Lordships have been earnestly requested by both applt. & resp. to retain the principal cause, & proceed to the hearing without remitting it to the ct. below. This they have authority to do under the statutes constituting this tribunal, Privy Council Appeals Act, 1832 (c. 92), Judicial Committee Acts, 1833 (c. 41), & 1843 (c. 38), by which all the authority which could have been exercised by the Ct. of Delegates is vested in the Judicial Committee, except the power of giving final sentence (LORD HATHERTLEY, C.).—*VOYSEY v. NOBLE*, *NOBLE v. VOYSEY* (1871), L. R. 3 P. C. 357; 7 Moo. P. C. C. N. S. 167; 40 L. J. Eccl. 11; 25 L. T. 167; 35 J. P. 259; 19 W. R. 629; 17 E. R. 65, P. C.

*Annotation:—Generally, Rehd. Martin v. Mackonochie* (1883), 8 P. D. 191.

**2689.** ————]—*SHEPPARD v. BENNETT* (SECOND APPEAL), No. 2987, *post*.

**2690.** ————]—*Authority of articles.*—The authority of Parliament has established that the Thirty-nine Articles must be taken to be the true expression of Scripture on every subject to which they advert (DR. LUSHINGTON).—*Re DENISON* (VENERABLE ARCHDEACON) (1850), 27 L. T. O. S. 300.

*Annotation:—Mentd. Denison v. Ditcher* (1856), 28 L. T. O. S. 164.

**2691.** ————]—*“Advisedly.”*—*HEATH v. BURDER*, No. 2685, *ante*.

**2692.** ————]—*Construction of articles—Not according to private individual opinion.*—*H.M. PROCURATOR GENERAL v. STONE*, No. 2682, *ante*.

**2693.** ————]—*HODGSON v. OAKLEY*, No. 2683, *ante*.

**2694.** ————]—*By court.*—*GORHAM v. EXETER* (BP.), No. 2184, *ante*.

**2695.** ————]—*Article ambiguous.*—*HEATH v. BURDER*, No. 2685, *ante*.

**2696.** ————]—*SALISBURY (BP.) v. WILLIAMS*, No. 1596, *ante*.

**2697.** ————]—*Authority denied.*—*VOYSEY v. NOBLE*, *NOBLE v. VOYSEY*, No. 2688, *ante*.

**2698.** *Depraving Book of Common Prayer.*—*SANDERS v. HEAD*, No. 1402, *ante*.

**2699.** ————]—*HEATH v. BURDER*, No. 2685, *ante*.

## B. Jurisdiction of Courts to try.

*See, generally, Part III., ante.*

**2700. Ecclesiastical courts.**—*COX v. GOODDAY* (1811), 2 Hag. Con. 138; 161 E. R. 694.

*Annotations:—Consd. Sanders v. Head* (1843), 3 Curt. 565; *Combe v. Edwards* (1878), 3 P. D. 103. *Rehd. Burder v. Langley* (1842), 1 Notes of Cases, 542; *Enraght v. Penance* (1882), 7 App. Cas. 240.

**2701.** ————]—*Court of Arches.*—*PELLING v. WHISTON* (1714), 1 Hag. Con. 433, n.; 1 Com. 199; 92 E. R. 1033.

*Annotations:—Rehd. Butler v. Dolben* (1756), 2 Lec. 312; *Sheppard v. Bennett* (1869), L. R. 2 A. & E. 335. *Mentd. Hodgson v. Oakley* (1845), 4 Notes of Cases, 180.

**2702.** ————]—*SANDERS v. HEAD* (1843), 3 Curt. 565; 2 Notes of Cases, 370; 7 J. P. 580; 7 Jur. 728; 163 E. R. 827; *sub nom.* *SAUNDERS v. HEAD*, 1 L. T. O. S. 433.

*Annotations:—Rehd. Combe v. De La Bere* (1881), 6 P. D. 157. *Mentd. Hodgson v. Oakley* (1845), 1 Rob. Eccl. 322; *Heath v. Burder* (1862), 15 Moo. P. C. C. 1; *Pusey v. Jowett* (1863), 1 New Rep. 488; *Martin v. Mackonochie*, *Flamank v. Simpson* (1868), L. R. 2 A. & E. 116; *Beneficed Clerk v. Lee*, [1897] A. C. 226; *St. Albans Bp. v. Fillingham*, [1906] P. 163.

— *Under Church Discipline Act, 1840 (c. 86).*—*See* No. 1500, *ante*.

**2703. Vice-Chancellor of University.**—*PUSEY v. JOWETT*, No. 1482, *ante*.

## C. Practice and Procedure.

*Pleadings.*—*See* Nos. 2685, 2686, *ante*.

*Hearing—Function of court.*—*See* No. 2687, *post*.

— *Construction of Thirty-Nine Articles.*—*See* Nos. 1596, 2184, 2682, 2683, 2685, 2688, *ante*.

## D. Punishments.

*See, generally, Part IV., Sect. 10, ante.*

**2704. General rule—Judicial discretion of court.**—*SALISBURY (BP.) v. WILLIAMS*, No. 1596, *ante*.

**2705. Writ de hæretico comburendo.**—The writ *de hæretico comburendo* having been taken away by 29 Car. 2, c. 9, the penalty for heresy is limited to excommunication & a liability if not reconciled to be taken by the civil power under the writ *de excommunicato capiendo*.—*SAUTRE'S CASE* (1400), 1 State Tr. 163.

**2706.** ————]—The writ *de hæretico comburendo* does not lie upon the conviction of a heretic, before the ordinary.—*WRIT DE HÆRETICO COMBURENDO CASE* (1612), 12 Co. Rep. 93; 77 E. R. 1308.

**2707. Excommunication.**—*SAUTRE'S CASE*, No. 2705, *ante*.

**2708. Deprivation.**—*CAUDREY'S CASE*, No. 12, *ante*.

**2709.** ————]—*POCKLINGTON'S CASE* (1641), 5 State Tr. 748.

**2710.** ————]—*SANDERS v. HEAD* (1843), 3 Curt. 565; 2 Notes of Cases, 370; 7 J. P. 580; 7 Jur. 728; 163 E. R. 827; *sub nom.* *SAUNDERS v. HEAD*, 1 L. T. O. S. 433.

*Annotations:—Appld. Combe v. De La Bere* (1881), 6 P. D. 157. *Rehd. Beneficed Clerk v. Lee*, [1897] A. C. 226; *St. Albans Bp. v. Fillingham*, [1906] P. 163. *Mentd. Hodgson v. Oakley* (1845), 1 Rob. Eccl. 322; *Heath v. Burder* (1862), 15 Moo. P. C. C. 1; *Pusey v. Jowett* (1863), 1 New Rep. 488; *Martin v. Mackonochie*, *Flamank v. Simpson* (1868), L. R. 2 A. & E. 116.

**2711.** ————]—*VOYSEY v. NOBLE*, *NOBLE v. VOYSEY*, No. 2688, *ante*.

**2712. Suspension.**—*JONES v. PUSEY* (1707), Return of Appeals before the High Court of Delegates, No. 118 (Parliamentary Papers 199, April 3, 1868), cited in 3 P. D. 110.

*Annotation:—Consd. Combe v. Edwards* (1878), 3 P. D. 103.

**2713.** ————]—*SALISBURY (BP.) v. WILLIAMS*, No. 1596, *ante*.

**2714. Unbeneficed clerk—Revocation of licence—Prohibition to perform divine office.]—**HODGSON v. OAKELEY, No. 2683, *ante*.

**SUB-SECT. 2.—OFFENCES IN RESPECT OF FABRIC OR ORNAMENTS OF CHURCH OR OF RITUAL.**

*See, generally,* Sub-sect. 3, A., & Part. VI., *post*.  
**Non-repair—Of chancel.]—***See* No. 2720, *post*.

**SUB-SECT. 3.—OFFENCES IN CONNECTION WITH CLERICAL DUTIES.**

**A. Neglect of, or Refusal to perform Duties.**

**2715. General neglect of duty.]—**MUGG v. LEY (1709), Return of Appeals from the High Court of Delegates, No. 124 (Parliamentary Papers 199, April 3, 1868).

**2716. —.]—**(1) A clergyman may be prosecuted by any one for neglect of his clerical duty.

(2) A licence from the ordinary is a legal authority to a clergyman to solemnise a marriage, but if a clergyman suspects fraud, delay may be justifiable for the sake of inquiry.—**ARUAR v. HOLDSWORTH** (1758), 2 Lee, 515; 161 E. R. 424.

*Annotations:—As to (1) Consd. R. v. Oxford, Bp. (1879), 4 Q. B. D. 525. As to (2) Consd. Ex p. Brinkman (1895), 11 T. L. R. 387. Rejd. Banister v. Thompson, [1908] P. 362; R. v. Dildon, [1910] P. 57.*

**2717. —.]—**BURGOYNE v. FREE (1829), 2 Hag. Ecc. 450; 102 E. R. 921; *affd.*, *sub nom.* FREE v. BURGOYNE (1830), 2 Hag. Ecc. 602; *previous proceedings, sub nom.* FREE v. BURGOYNE (1828), 2 Bli. N. S. 65, H. L.

*Annotations:—Mentd. Kitson v. Loftus (1845), 4 Notes of Cases, 323; Trower v. Hurst (1845), 4 Notes of Cases, 52; Davidson v. Davidson (1856), Dea. & Sw. 167; Bonwell v. London, Bp. (1861), 14 Moo. P. C. C. 395; Martin v. Mackonochie (1883), 8 P. D. 191.*

**2718. Refusal to obey—Incumbent—By assistant curate.]—**MARTYN v. HIND (1785), Return of Appeals before the High Court of Delegates, No. 178 (Parliamentary Papers 199, April 3, 1868).

**2719. — Bishop—By incumbent.]—**Two chapelries, each having a church within its limits, were united in one benefice by an Ord. in Council; the incumbent of the benefice on certain Sundays omitted to perform any service in one of the churches, but had two full services on those days in the other. The bishop of the diocese gave him notice that he would require him to perform alternate morning & evening service in each church; which notice the incumbent disobeyed:—**Held:** the bishop has a discretion in such a matter, & the incumbent's disobedience to his orders was an ecclesiastical offence.—**WINCHESTER (Bp.) v. RUGG** (1868), L. R. 2 A. & E. 217; 37 L. J. Ecc. 85; 18 L. T. 486; 32 J. P. 467; *affd. sub nom.* RUGG v. WINCHESTER (Bp.), L. R. 2 P. C. 223, P. C. *Annotation:—Consd. Mackonochie v. Penzance* (1881), 6 App. Cas. 424.

**Non-residence.]—***See* Part V., Sect. 8, sub-sect. 3, *ante*.

**Failure to hold divine service.]—***See* Part VI., Sect. 1, sub-sect. 1, *post*.

**Refusal to administer Holy Communion.]—***See* Part VI., Sect. 3, sub-sect. 3, *post*.

**Refusal to marry—Persons entitled to be married.]—***See* Part VI., Sect. 4, *post*.

**Refusal to bury parishioner.]—***See* BURIAL, Vol. VII., pp. 530, 531, Nos. 106–108, 112–118.

**2720. Failure to repair—Parsonage—Curate's house.]—**KING v. AYLESBURY (1635), Return of Appeals before the High Court of Delegates, No. 10 (Parliamentary Papers 199, April 3, 1868).

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**2721. —.]—**MUGG v. LEY (1709), Return of Appeals before the High Court of Delegates, No. 124 (Parliamentary Papers 199, April 3, 1868).

**2722. — Chancel.]—**KING v. AYLESBURY (1635), Return of Appeals before the High Court of Delegates, No. 40 (Parliamentary Papers 199, April 3, 1868).

**Offences within Church Discipline Act, 1840 (c. 86) & Public Worship Regulation Act, 1874 (c. 95).]**—*See* Part IV., Sect. 9, sub-sects. 1 & 2, *ante*.

**B. Unlawful Solemnisation of Marriage.**

**2723. Without banns of licence.]—**LEWYS v. CLESTER (1678), Return of Appeals before the High Court of Delegates, No. 67 (Parliamentary Papers 199, April 3, 1868).

**2724. By banns without proper inquiry One party being ward of court.]—**Commitment for eloping with a ward of the ct., & against another person for assisting; ignorance, that she was a ward of ct. not admitted as an excuse. (Clergymen celebrating marriage by banns without making the inquiry, directed by the Marriage Act liable to ecclesiastical censure, at least, perhaps to other consequences. The marriage however good; though neither party was resident in the parish.—**NICHOLSON v. SQUIRE** (1800), 16 Ves. 250; 33 E. R. 983, L. C.

*Annotations:—Rejd. Wynn v. Davies & Weaver* (1835), 1 Curt. 69; *Tuckness v. Alexander* (1863), 2 Drew. & Sm. 614.

**2725. Of non-parishioners.]—**Arts., against a clergyman, for publishing banns of marriage between persons not parishioners of, nor resident in his parish; & for marrying such persons, admitted.—**WYNN v. DAVIES & WEEVER** (1835), 1 Curt. 69; 163 E. R. 24.

**Liability at common law.]—***See* CRIMINAL LAW, Vol. XV., p. 745, Nos. 8030, 8040.

**Validity of marriages.]—***See* HUSBAND & WIFE.

**C. Other Offences.**

**Officiating without licence of bishop.]—***See* Part V., Sect. 2, sub-sect. 4, A., *ante*.

**Officiating without consent of incumbent.]—***See* Part III., Sect. 7, sub-sect. 2, C., *ante*.

**2726. Taking & demanding extortionate fees.]—**BURGOYNE v. FREE (1829), 2 Hag. Ecc. 450; 102 E. R. 921; *affd.*, *sub nom.* FREE v. BURGOYNE (1830), 2 Hag. Ecc. 602; *previous proceedings, sub nom.* FREE v. BURGOYNE (1828), 2 Bli. N. S. 65, H. L.

*Annotations:—Mentd. Kitson v. Loftus* (1845), 4 Notes of Cases, 323; *Trower v. Hurst* (1845), 4 Notes of Cases, 52; *Davidson v. Davidson* (1856), Dea. & Sw. 167; *Bonwell v. London, Bp.* (1861), 14 Moo. P. C. C. 395; *Martin v. Mackonochie* (1883), 8 P. D. 191.

**2727. Purporting to ordain priest when not consecrated bishop.]—**ST. ALBANS (Bp.) v. FILLINGHAM, No. 1495, *ante*.

**2728. Irreverent conduct in pulpit.]—**Articles against a clerk in holy orders, for irreverent conduct in the pulpit, & brawling in his own church, sustained.—**BURDER v. HALE** (1849), 6 Notes of Cases, 611.

**SUB-SECT. 4.—OFFENCES AGAINST PROPRIETY AND MORALITY.**

**2729. Drunkenness.]—**MORTIMER v. FREEMAN (1611), 1 Brownl. 70; 123 E. R. 671.

*Annotation:—Rejd. Combe v. De La Bere* (1881), 6 P. D. 157.

**2730. —.]—**ROWLAND v. JONES (1755), 2 Lee, 191; 161 E. R. 309.

**Sect. 13.—Ecclesiastical offences: sub-sect. 4. Part VI.**

**Sect. 1: Sub-sects. 1, 2, 3 & 4, A. & B. (a).]**

**2731. —**—[BURDER v. JENKINS (1838), 4 Notes of Cases, 314, n.

**Annotation:—***Reid*. Lincoln, Bp. v. Day (1845), 4 Notes of Cases, 299.

**2732. — During divine service.**—[BURDER v. SPEER, No. 1356, *ante*.

**2733. —**—[LINCOLN (BP.) v. DAY, No. 1526, *ante*.

**2734. — Accompanied by bad language—Second offence.**—[A clergyman of the Church of England pleaded guilty to gross acts of intoxication & the use of profane & indecent language with which he was charged; he had already been suspended for a similar offence & reinstated in his curacy. The ct. refused to deprive him of his cure, but suspended him *ab officio et beneficio* for five years.—BURDER v. PUGHE (1855), 26 L. T. O. S. 127; 1 Jur. N. S. 1178.

**2735. Frequenting alehouses & tippling.**—[GWYN v. WATKINS (1700), Return of Appeals before the High Court of Delegates, p. 51, No. 106 (Parliamentary Papers 199, April 3, 1868).

**2736. Incontinence.**—[DARGAVELL v. LANGDON (1678), Return of Appeals before the High Court of Delegates, p. 31, No. 68 (Parliamentary Papers 199, April 3, 1868).

**2737. —**—[PAWLET v. HEAD, No. 2475, *ante*.

**2738. —**—[RICH v. GERARD & LODER, No. 1103, *ante*.

**2739. —**—[Articles against a clerk in holy orders, incumbent of a parish, for lewd & indecent conduct & adultery, fornication, or incontinence, sustained:—*Held*: he should be deprived of his preferment.—KITSON v. LOFTUS (1845), 4 Notes of Cases, 323.

**Annotations:—***Reid*. Bonwell v. London, Bp. (1861), 14 Moo. P. C. C. 395. *Mentl*. Farnall v. Craig (1847), 6 Notes of Cases, 557.

**2740. Brawling in church.**—[BURDER v. HALE, No. 2728, *ante*.

**2741. Indecent behaviour during divine service.**—

(1) Indecent behaviour of a clergyman in a church of the Church of England during the celebration of divine service, though punishable by magistrates under Ecclesiastical Courts Jurisdiction Act, 1800 (c. 32), is an offence against the general ecclesiastical law.

(2) The consistory ct. of the diocese within which a clergyman holds preferment has jurisdiction under Clergy Discipline Act, 1892 (c. 32), s. 2, to try & sentence him under that Act, in case he is convicted by a temporal ct. of having committed an act constituting an offence against ecclesiastical law, not being a question of doctrine or ritual, notwithstanding that the offence he is charged with is not an offence against morality.—GIRT v. FILLINGHAM, [1901] P. 176.

**2742. Cruelty to servant.**—[*Re* MONTGOMERY (1906), *Times*, Mar. 12.

**Offences within Clergy Discipline Act, 1892 (c. 32).**—[*See* Part IV., Sect. 9, sub-sect. 3, *ante*.

## Part VI.—Public Worship and Church Ministrations.

### SECT. 1.—DIVINE SERVICE GENERALLY.

#### SUB-SECT. 1.—DUTIES OF THE CLERGY.

**2743. Object of Act of Uniformity.**—[MARTIN v. MACKONCHIE, No. 2948, *post*.

**2744. Form of service—According to Prayer Book.**—[A clergyman in the performance of divine worship is not at liberty to alter or omit any part of the service.

The law also, not merely the statute of Edw. 6 but the general ecclesiastical law, protects the sanctity of public worship—and still more endeavours to prevent every circumstance which may lead to the disturbance of persons engaged in solemn acts of devotion; it prohibits all quarrelling, chiding & brawling in the church or churchyard, & requires decent & orderly behaviour (SIR JOHN NICOLL).—NEWBERRY v. GOODWIN (1811), 1 Phillim. 282; 101 E. R. 985.

**Annotations:—***Reid*. Girt v. Fillingham, [1901] P. 176. *Mentl*. Sanders v. Head (1843), 2 Notes of Cases, 355; Martin v. Mackonchie (1879), 4 Q. B. D. 697.

**2745. —**—[HART v. CAREY (undated), Return of Appeals before the High Court of Delegates, No. 58 (Parliamentary Papers 199, April 3, 1868), cited 3 P. D. at. p. 110.

**Annotation:—***Reid*. Combe v. Edwards (1878), 3 P. D. 103.

**2746. —**—[MARTIN v. MACKONCHIE, No. 2948, *post*.

**2747. Departure from authorised form—What constitutes.**—[HUTCHINS v. DENZLOE & LOVELAND, No. 773, *ante*.

**2748. — Whether important or trivial—Jurisdiction to judge.**—[MARTIN v. MACKONCHIE, No. 2948, *post*.

**2749. — How punished—By indictment—Form of indictment.**—[An indictment lies at sessions on 1 Elis. c. 2, & 13 & 14 Car. 2, c. 4, for using other prayers instead of the Common Prayers; but it must state, that they were used

instead of the prayers enjoined.—R. v. SPARKEN (1685), 2 Show. 447; 3 Mod. Rep. 78; 89 E. R. 1034.

**Annotation:—***Reid*. Martin v. Mackonchie, Flamank v. Simpson (1868), L. R. 2 A. & E. 116.

**By proceedings in Ecclesiastical Courts.**—[*See, generally*, Part IV., Sect. 9, *ante*.

**2750. — Remedy of parishioners.**—[HUTCHINS v. DENZLOE & LOVELAND, No. 773, *ante*.

**Service in unconsecrated place.**—[*See* No. 1839, *ante*.

**2751. Notices—What notices may be given—Observance of holidays not authorised by church.**—

(1) Tippets, stoles, dalmatics, & maniples are unlawful ornaments, & may not be used by a minister during Divine service.

(2) Processions proceeding round the interior of a church, immediately before the commencement of morning or evening service, or immediately after the conclusion of morning or evening service, so conducted as to constitute a rite or ceremony in connection with the service, are illegal.

(3) No addition can be permitted to the rites & ceremonies ordered by the Book of Common Prayer, & the performance during Divine service of any ceremony not prescribed by the Book of Common Prayer is unlawful. The ceremonial use of crucifixes or images during Divine service is unlawful.

(4) It is lawful to place vases of flowers on the holy table, & to keep them there during the performance of Divine service, provided they are used as decorations only.

(5) The leaving of the holy table wholly bare & uncovered during Divine service is unlawful.

(6) It is improper for a minister to give notice during Divine service of holidays which the church has not directed to be observed.—ELPHINSTONE v.



**PURCHAS (1870), L. R. 3 A. & E. 60 ; 39 L. J. Eccl. 28 ; on appeal, sub nom. HEBBERT v. PURCHAS (1871), L. R. 3 P. C. 605, P. C.**

*Annotations.*—As to (1) *Consd. Martin v. Mackonochie (Second Suit) (1874), L. R. 4 A. & E. 279. Refd. Sorjeant v. Dale (1879), 43 J. P. 220 ; Heywood v. Manchester, 11p. (1894), 12 Q. B. D. 404 ; Re Robinson, Wright v. Tugwell (1897) 1 Ch. 85 ; Gore-Booth v. Manchester, 11p. (1920) 2 K. B. 412. As to (3) *Consd. Martin v. Mackonochie (Second Suit) (1874), L. R. 4 A. & E. 279. Refd. Sheppard v. Bennett (1870), 23 L. T. 399 ; Hudson v. Tooth (1877), 2 P. D. 125. Generally, Refd. R. v. Oxford, 11p. (1879), 4 Q. B. D. 525. Mentd. Boyd v. Philpotts (1874), L. R. 4 A. & E. 297 ; Ridsdale v. Clifton (1877), 2 P. D. 276 ; Read v. Lincoln, 11p. (1892) A. C. 644 ; L. C. C. v. Dundas, [1904] P. 1 ; St. John the Evangelist, Clevedon (Vicars & Churchwardens) v. All Having Interest [1909] P. 6 ; Lord Advocate v. Walker Trustees, [1912] A. C. 95 ; Bourne v. Keane, [1919] A. C. 815 ; Rhondda's Claim, [1922] 2 A. C. 339.**

— **Notice of vestry meeting.]—See Nos. 480, 499, ante.**

**2752. Collection of alms—Whether ministering or celebrating sacrament on service—Ecclesiastical Courts Jurisdiction Act, 1860 (c. 32), s. 2.]—COPPE v. BARBER, No. 811, ante.**

#### SUB-SECT. 2.—DUTIES AND RIGHTS OF INCUMBENTS.

**2753. Sunday service.]—By the general law the church service ought to be performed regularly every Sunday morning & evening. Any relaxation is to be supposed to have been permitted by the diocesan, owing to the circumstances of the parish & the terms prescribed must be strictly observed.—BENNETT v. BONAKER (1828), 2 Hag. Ecc. 25 ; 162 E. R. 773.**

*Annotation.*—*Refd. Steward v. Francis (1843), 3 Curt. 209.*

**2754. Daily service.]—A. gave £1,000, which he vested in trustees, for the endowment of a new district church. After it had been consecrated, A. & the trustees, by deed, declared that the funds were held on trust to pay the income to the incumbent, so long as he "conducted the services according to the rites & ceremonies of the Church of England, in strict & literal accordance with the order of the Book of Common Prayer," & they also provided that disputes were to be referred to the bishop:—*Held*: daily service was not required, & disputes as to the conduct of the services ought to be referred to the ordinary. *Qu.*: whether, under the above circumstances, A. had any power, after the consecration of the church, to regulate the trusts of the endowment fund.—*Re HARTSHILL ENDOWMENT (1861), 30 Beav. 130 ; 54 E. R. 838.***

**2755. Service in all places of worship in parish Chapel.]—LLANDAFF (BP.) v. BELCHER (1887), Return of Appeals before the High Court of Delegates, No. 91 (Parliamentary Papers 190, April 3, 1888).**

**2756. ———.]—HANCOCK v. BOMER (1902), Return of Appeals before the High Court of Delegates, No. 99 (Parliamentary Papers 190, April 3, 1888), cited in 3 P. D. at p. 111.**

*Annotations.*—*Refd. Combe v. Edwards (1878), 3 P. D. 103. Mentd. Mackonochie v. Penzance (1881), 6 App. Cas. 424.*

**2757. ———.]—JONES v. STONE, No. 1236, ante.**

**2758. ———.]—JONES v. CURTIS (1715), Return of Appeals before the High Court of Delegates, No. 119 (Parliamentary Papers, 190, April 3, 1868), cited 4 Q. B. D. at p. 727.**

*Annotations.*—*Refd. Martin v. Mackonochie (1879), 1 Q. B. D. 697. Mentd. Mackonochie v. Penzance (1881), 6 App. Cas. 424.*

— **Private chapel of Lord of Manor.]—See No. 1172, ante.**

**2759. — Two churches in benefice—Under Act of Uniformity.]—RUGG v. WINCHESTER (BP.), No. 162, ante.**

**2760. ——— Under Pluralities Act, 1838 (c. 106), s. 77.]—RUGG v. WINCHESTER (BP.), No. 162, ante.**

**2761. ———.]—BRISTOL (BP.) v. POWELL (1911), Times, Mar. 9.**

**Duty to preach.]—See No. 394, ante.**

**Control of alms & offertories.]—See Nos. 438, 440, ante.**

**Control of ministrations by stranger.]—See Part III., Sect. 7, sub-sect. 2, C., ante.**

#### SUB-SECT. 3.—BRAWLING.

*See, generally, CRIMINAL LAW & PROCEDURE, Vol. XV., pp. 650 et seq.*

**Duty of churchwardens to maintain order.]—See Nos. 765-767, 974, ante.**

**Proceedings in ecclesiastical courts—Removal from Consistory Court to Court of Arches.]—See No. 1295, ante.**

— **Brawling by parson.]—See No. 2728, ante.**

#### SUB-SECT. 4.—RITUAL OFFENCES.

##### A. In General.

**Proceedings in respect of ritual offences—Under Public Worship Regulation Act, 1874.]—See Part IV., Sect. 8, sub-sect. 2, ante.**

##### B. Ornaments and Decorations of the Church.

##### (a) In General.

**2762. Ornaments—Defined—Distinguished from decorations.]—(1) Crosses, as distinguished from crucifixes which are images, have been in use as ornaments of churches from the earliest periods of Christianity, & when used as mere emblems of the Christian faith, & not as objects of superstitious reverence, may still lawfully be erected as architectural decorations of churches. Hence a wooden cross erected on a chancel screen, being an architectural ornament, will not be ordered to be removed ; but a cross attached to a Communion Table will be removed for it is inconsistent with the idea of a table.**

(2) The Communion Table, now sometimes called an altar, differs essentially in its uses & purposes from the altar used in Roman Catholic churches. It must be movable & wood seems to be the proper material of which it is to be made. Hence an immovable stone altar was ordered to be removed though one which was of highly carved wood, in form resembling a tomb & massive in weight, was not ordered to be removed.

The Communion Table intended by the Canon was a table in the ordinary sense of the word, flat & movable, capable of being covered with a cloth (*per Cur.*).

(3) A credence-table, which is simply a small side table on which the bread & wine are placed so that they may be conveniently reached by the officiating minister & be transferred at the proper time to the Communion Table, is unobjectionable.

(4) The canon, which orders the Communion Table to be covered during divine service with a carpet of silk or other decent stuff, does not imply that it should always be covered with the same cloth or a cloth of the same colour or texture. The object of the canon seems to be to secure a

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(a) & (b) i.]*

cloth of a sufficiently handsome description, not to guard against too much splendor.

It is said that the canon orders a covering of silk, or of some other proper material, but that it does not mention, & therefore by implication excludes, more than one covering. Their Lordships are unable to adopt this construction. An order that a table shall always be covered with a cloth surely does not imply that it shall always be covered with the same cloth, or with a cloth of the same colour or texture (*per CUR.*).

(5) Any embroidery & lace in or about the fair white linen cloth used on the table at the ministration of the Communion, are inconsistent with the rubric & canon.

Large massive candlesticks & candles placed on the Communion Table are contrary to law, except where they are lighted for the purpose of giving necessary light; accordingly they should not be of a form & size merely ornamental. But the *et.* will be slow to interfere to order their removal.

(7) Brazen gates & a rood screen separating the nave from the chancel arc, perhaps, not contrary to law, & the *et.* will not order their removal; yet no bishop should consecrate a church so fitted up.

(8) The canon imperatively requires that the Ten Commandments should be set up at the east end, not merely of the chancel, but of the nave.

(9) All articles used in the performance of the services & rites of the Church are "ornaments" within the meaning of the rubric at the beginning of the Prayer Book. This rubric is confined to those arts., the use of which in the services & ministrations of the Church is prescribed by the first Prayer Book of Edward VI. & does not apply to arts. set up in churches as decorations.

(10) It was urged at the bar that the present rubric, which refers to the second year of Edward VI., cannot mean ornaments mentioned in the first Prayer Book, because, as it is said, that Act was probably not passed, & the Prayer Book was certainly not in use till after the expiration of the second year of Edward VI., & that therefore the words "by authority of Parliament" must mean by virtue of canons or royal injunctions having the authority of Parliament made at an earlier period. There seems no reason to doubt that the Act in question received the royal assent in the second year of Edward VI. It is very true that the new Prayer Book could not come into use until after the expiration of that year, because time must be allowed for printing & distributing the books; but its use & the injunctions contained in it were established by authority of Parliament in the second year of Edward VI.; & this is the plain meaning of the rubric (*per CUR.*).

(11) The distinction between an altar & a Communion Table is in itself essential, & deeply founded in the most important difference in matters of faith between Protestants & Romanists, namely, in the different notions of the nature of the Lord's Supper which prevailed in the Roman Catholic Church at the time of the Reformation, & those which were introduced by the reformers. By the former it was considered as a sacrifice of the body & blood of the Saviour. The altar was the place on which the sacrifice was to be made; the elements were to be consecrated, & being so consecrated were treated as the actual body & blood of the victim. The reformers on the other hand considered the Holy Communion not as a sacrifice, but as a feast to be celebrated at the Lord's table; though, as to the consecration of the elements, & the

effect of this consecration, & several other points, they differed greatly among themselves (*per CUR.*).—*LIDDELL v. WESTERTON* (1857), Brod. & F. 117; 29 L. T. O. S. 54; 21 J. P. 499; 5 W. R. 470; *sub nom.* *LIDDELL v. WESTERTON*, *LIDDELL v. BEALE*, Bro. Ecc. Rep. 42; *sub nom.* *WESTERTON v. LIDDELL & HORNE*, *BEAL v. LIDDELL, PARKE & EVANS*, Moore's Special Report 1, P. C.; *subsequent proceedings*, *sub nom.* *LIDDELL v. BEAL* (1860), 14 Moo. P. C. C. 1, P. C.

*Annotations*:—As to (1) *Consd. & Foll.* *Durst v. Masters* (1876), 1 P. D. 373. *Consd.* *Ridsdale v. Clifton* (1877), 2 P. D. 274; *Re St. Mark's, Marylebone Rd., St. Mark's (Vicar) v. St. Mark's (Parishioners)*, [1898] P. 114; *Davey v. Hinde*, [1903] P. 221; *Re Tenbury Parish Church* (1919), 36 T. L. R. 188. *Reid*, *Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113; *Hebbert v. Purchas* (1871), L. R. 3 P. C. 605; *Lee v. Ridsdale* (1873), 37 J. P. 804; *St. Ethelburga Faculty Case* (1878), Trist 69; *R. v. London*, Bp. (1889), 23 Q. B. D. 414; *Barham, Suffolk (Rector, etc.) v. Same (Parishioners)*, [1896] P. 256; *Fuller & Johnston v. Bishop, St. Mark's, Marylebone* (1897), 14 T. L. R. 103; *Great Bardfield (Vicar & Churchwardens) v. All Having Interest*, [1897] P. 185; *Davey v. Hinde*, [1901] P. 95; *Re St. Anselm, Pinner*, [1901] P. 202; *Markham v. Shirebrook Overseers*, [1906] P. 239; *Wimbleton (Vicar & Churchwardens) v. Eden, Re St. Marks, Wimbleton*, [1908] P. 167; *Re St. Luke, Southport* (1920), 36 T. L. R. 733. As to (2) *Consd.* *St. Luke's, Chelsea (Rector) v. Wheeler*, [1904] P. 257. *Apld.* *Wimbleton (Vicar & Churchwardens) v. Eden, Re St. Marks, Wimbleton*, [1908] P. 167. *Reid*, *Davey v. Hinde*, [1901] P. 95. As to (3) *Apld.* *Re Holy Trinity Church, Stroud Green* (1887), 12 P. D. 199. *Reid*, *St. James, Norland (Vicar, etc.) v. Same (Parishioners)*, [1894] P. 256. As to (4) *Reid*, *Evans v. Kingsford* (1866), 31 J. P. 179. As to (6) *Consd.* *Martin v. Mackonochie* (1868), L. R. 2 P. C. 365; *Sumner v. Wix* (1870), L. R. 3 A. & E. 58; *Wimbleton (Vicar & Churchwardens) v. Eden, Re St. Marks, Wimbleton*, [1908] P. 167. *Reid*, *St. Paul, Camden Square* (1897), 14 T. L. R. 156. As to (7) *Consd.* *Bradford v. Fry* (1878), 4 P. D. 93; *St. Johns, Isle of Dogs* (1888), 4 T. L. R. 661; *St. Andrew, Romford (Rector & Churchwardens) v. All Persons Having Interest*, [1891] P. 220; *St. John the Baptist, Timberhill (Vicar, etc.) v. Same (Rectors, etc.)*, [1895] P. 71. *Reid*, *Re St. Augustine, Haggerstone Annunciation (Christchurch (Vicar) v. Parishioners* (1878), 4 P. D. 111; *St. James Norland (Vicar, etc.) v. Same (Parishioners)*, [1894] P. 256; *Richmond (Vicar) & St. Matthias, Richmond (Chapelwardens) v. All Persons Having Interest*, [1897] P. 70; *Paignton (Vicar) v. All Having Interest*, [1905] P. 111. As to (9) *Apld.* *Martin v. Mackonochie* (1868), L. R. 2 P. C. 365. *Consd.* *Martin v. Mackonochie* (1869), L. R. 3 P. C. 52; *White v. Bowron* (1873), L. R. 4 A. & E. 207; *Phillipotts v. Boyd* (1875), L. R. 6 P. C. 435; *Ridsdale v. Clifton* (1877), 2 P. D. 276; *Kensit v. St. Ethelburga, Bishopsgate Within (Rector)*, [1900] P. 80; *St. Paul, Bow Common (Vicar, etc.) v. Same (Inhabitants)*, [1909] P. 245. *Reid*, *Sheppard v. Bennett (Second Appeal)* (1872), L. R. 4 P. C. 371; *Re St. Anselm, Pinner*, [1901] P. 202; *Gore-Booth v. Manchester Bp.* (1920), 89 L. J. K. B. 1123. As to (10) *Consd.* *Martin v. Mackonochie* (1868), L. R. 2 P. C. 365; *Hebbert v. Purchas* (1871), L. R. 3 P. C. 605. As to (11) *Consd.* *Sheppard v. Bennett (Second Appeal)* (1872), L. R. 4 P. C. 371. *Generally*, *Reid*, *Martin v. Mackonochie (Second Suit)* (1874), L. R. 4 A. & E. 279; *R. v. Oxford*, Bp. (1879), 4 Q. B. D. 525. *Mentd.* *Re Palatine Estate Charity* (1888), 39 Ch. D. 54.

2763. — What are legal—Construction of rubric.]—*MARTIN v. MACKONOCHE*, No. 2948, *post*.

2764. — Effect of Ornaments Rubric of 1662.]—*RIDSDALE v. CLIFTON*, No. 1145, *ante*.

2765. — Whether legal—Tests—Superstitious reverence.]—What is legal or illegal with respect to images, crosses, crucifixes, & other things of the sort in churches depends on whether they do or do not, or will or will not, encourage or lead to idolatrous or superstitious worship in the place where they are or are to be put; & if in any particular case the bishop is of opinion that a particular image, cross, crucifix, or other piece of sculpture has no tendency to encourage such worship, he is, in my opinion, perfectly justified in stopping litigation on the subject (*LINDLEY, L.J.*).—*R. v. LONDON (Bp.)* (1889), 24 Q. B. D. 213; 59 L. J. Q. B. 169; 62 L. T. 167; 45 J. P. 340; 38 W. R. 214; *sub nom.* *R. v. LONDON (Bp.)*, *Re St. Paul's REREDOS*, 6 T. L. R. 112, C. A.; *affd.* *sub nom.* *ALLCROFT v. LONDON (LORD Bp.)*,

**LIGHTON v. LONDON (LORD BP.)**, [1891] A. C. 600, H. L.

*Annotations*.—**Consd.** St. John the Baptist, Timberhill (Vicar, etc.) v. Same (Rectors, etc.), [1895] P. 71; **Great Bardfield (Vicar) v. All Having Interest**, [1897] P. 185. **Re St. John, Pondebury (Vicar, etc.) v. Same (Parishioners)**, [1895] P. 178; **Barham, Suffolk (Rector, etc.) v. Same (Parishioners)**, [1896] P. 256; **Fild v. Ommamney** (1920), 36 T. L. R. 895. **Mentd.** Poulton v. Moore, [1915] 1 K. B. 400; **Re St. Luke's, Southport** (1920), 36 T. L. R. 733.

*See, also*, Nos. 1115, 2762, *ante*, Nos. 2780, 2842, 2844, 2861, 2871, 2874–2876, 2883, 2888, 2891–2893, 2900, 2944, *post*.

**Ornaments distinctive of Roman Church.**—*See* Nos. 2851, 2889, *post*, & *compare* No. 2839, *post*.

**Representation of historical event.**—*See* Nos. 2013, 2038, *post*.

**2766.** — **"Prescribed by authority of Parliament."**—**LIDDELL v. WESTERTON**, No. 2762, *ante*.

**2767.** — — — — — **MARTIN v. MACKONCHIE**, No. 2948, *post*.

**2768.** — **Effect of sentence of consecration by bishop.**—(1) The tenant of a house within the limits of an ecclesiastical district formed into a separate parish with a new parish church under New Parishes Act, 1856 (c. 104), who has his name on the rate-book of the civil parish out of which the separate parish has been formed, & pays the civil parochial rates levied on him, has a sufficient interest to promote a faculty suit for the removal of illegal ornaments set up in the new parish church, notwithstanding that he does not reside in the ecclesiastical district & has become tenant of the house for the sole purpose of qualifying as a parishioner & ratepayer.

(2) A bishop cannot by a sentence of consecration legalise the retention in a parish church of an ornament which is forbidden by law to be there.

The following ornaments & things in the church at the time of its consecration were ordered by the Ordinary to be removed from a parish church as illegal:—

(3) The fourteen Stations of the Cross; (4) three confessional boxes; (5) a large crucifix fixed near the pulpit; (6) a tabernacle on the Communion Table in the chancel before which a lamp was kept burning.

The following ornaments & things introduced into the church since its consecration were ordered by the ordinary to be removed as illegal:—

(7) A piece of furniture applicable for receiving confessions; (8) two water stoups for holding Holy Water; (9) a tabernacle on the Communion Table in the side chapel of the church used for the reservation of the Sacrament; (10) an image representing the Good Shepherd, on a pedestal at the west end of the church, with candles on each side & a lighted lamp in front; (11) an image representing the Virgin Mary, on a pedestal standing against the chancel screen with candles on each side, vases of flowers, & a lighted blue lamp before it with canopy, crown, & star over it; (12) an image representing the Sacred Heart & St. Joseph, on either side of the Communion Table in the side chapel of the church; (13) several Crucifixes, one over the Communion Table in the chancel, another on the chancel screen, & another with a crown over it over the Holy Table in the side chapel of the church.

(14) The patent appointing the Chancellor of the Diocese of Chichester confers on him jurisdiction to proceed in the absence of the Bishop of the diocese from the Consistory Ct. of Chichester in all ecclesiastical suits, the decision of which is known by law or custom of the realm to belong to the

ecclesiastical etc., & finally to decide & determine them without breach of the laws & statutes of the kingdom, "nevertheless first consulting us" [the Bishop of the diocese] " & our successors, & having our consent, in case either party earnestly craves our judgment."

(15) The opponents in a cause of faculty instituted in the Consistory Ct. of Chichester for the removal of certain ornaments out of a parish church alleged in their answer that before any decision or final determination of the cause, the Bishop of the diocese should be first consulted & his consent had, & earnestly craved his judgment in the premises, & complained & supplicated that the Bishop should examine & determine the cause in his own proper person in the Consistory Ct. of the diocese. Petitioner in his reply submitted that the consent of the Bishop prayed for in the answer was not necessary to the hearing & determination of the cause, & supplicated that the cause might be examined & determined by the Chancellor of the diocese. Subsequently the hearing of the cause took place in the Consistory Ct. of Chichester. The Chancellor of the diocese heard the cause sitting alone, the Bishop not being present, & determined it, delivering judgment without consulting the Bishop, & decreeing a faculty to issue for the removal of the illegal ornaments referred to in the petition, holding that the validity of the reservation in his patent in favour of the Bishop was a matter for the determination of the temporal etc.; it being within the province of these etc. alone to decide whether a custom for the Bishop to exercise the right reserved to him by the patent was valid in law:—*Semble*: the custom in question, i.e. a custom for the Bishop to veto a judgment come to after the hearing of a suit by the Chancellor, would be unreasonable & bad in law & not a legal custom, as no trace of its exercise could be found in recent times or since the Reformation.

(16) Observations as to the institution of criminal suits against the churchwardens for the purpose of obtaining the removal of illegal church ornaments.—**DAVEY v. HINDE**, [1901] P. 95; *subsequent proceedings*, [1903] P. 221.

*Annotations*.—As to (2) **Re St. Markham v. Shirebrook Overseers**, [1906] P. 239. As to (11) **Consd. Re St. Luke's, Southport** (1920), 36 T. L. R. 733.

**2769.** — **Effect of consecration of church—Existing ornaments.**—**MARKHAM v. SHIREBROOK OVERSEERS**, No. 1115, *ante*.

**Erection removal—Necessity for faculty.**—*See* Part VII., Sect. 3, sub-sect. 7, *post*.

#### (b) *The Communion Table and Retable.*

##### i. *In General.*

**2770. Distinguished from altar.**—**LIDDELL v. WESTERTON**, No. 2762, *ante*.

**2771.** — — — — — **PARKER v. LEACH**, No. 3053, *post*.

**2772. Material—Whether stone permissible.**—**Faulkner v. Litchfield & Stearn** (1845), 1 Rob. Eccl. 184; 3 Notes of Cases, 511; 5 L. T. O. S. 21; 9 Jur. 234; 163 E. R. 1007.

*Annotations*.—**Fold**, Liddell v. Westerton, Liddell v. Beale (1887), 20 L. T. O. S. 64. **Appl.** Hayes (Rector, etc.) v. Falford, [1910] P. 18. **Re St. Martin v. Mackonchie, Flamank v. Simpson** (1868), L. R. 2 A. & E. 116; **St. James, Norland (Vicar, etc.) v. Same (Parishioners)**, [1864] P. 256; **St. Luke's, Chelsea (Rector) v. Wheeler**, [1904] P. 257; **Re St. George, Newcastle-on-Tyne**, [1907] P. 381 n.; **Wimbledon (Vicar & Churchwardens) v. Eden, Re St. Marks, Wimbledon**, [1908] P. 167.

**2773.** — — — — — **LIDDELL v. WESTERTON**, No. 2762, *ante*.

**2774.** — — — — — **Stone block in top of wooden table.**—**Re St. Mary, Madingley** (1902), [1910] P. 23, n.

*Sect. 1.—Divine service generally: Sub-sect. 4, B.*  
*(b) i. & ii.]*

**2775.** ——— **Suspended slabs of slate & marble mosaic.]**—A movable marble Communion Table is not a legal article of church furniture; but a faculty may, in the discretion of the ordinary, be granted for a movable wooden Communion Table, on the front & sides of which are suspended slabs of slate decorated with marble mosaics & detachable at will without damage to the table.

The rector & one of the churchwardens of a parish church, who had petitioned the chancellor of the diocese for a faculty for the introduction into the chancel of the church of a movable Communion Table of marble, by leave of the ct. brought in a supplementary petition whereby they prayed that, instead of a faculty being granted for the Communion Table proposed by their original petition, they might be authorised to place in the chancel of the church a movable Communion Table of wood standing on castors, with licence to suspend by wooden screws on the front & sides of the table thin slabs of slate decorated with marble mosaics. The prayer of this supplementary petition was not opposed; & at the hearing of the suit it appeared that the proposed decorated slabs of slate would be detachable at will without damage to the table & be in keeping with the decorations of the rest of the chancel, & that the whole of the surface of the proposed table would be of wood, & no marble mosaic of any kind would rest thereon:—*Held*: a faculty could be granted authorising the proposed wooden Communion Table to be placed in the church with the slate slabs decorated with marble mosaics suspended on the front & sides of the table in the manner proposed in the supplementary petition.—*ST. LUKE'S, CHELSEA (RECTOR) v. WHEELER*, [1904] P. 257; *sub nom. ST. LUKE'S, CHELSEA*, 20 T. L. R. 422.

*Annotation*:—*Consd. Hayes (Rector, etc.) v. Fulford*, [1910] 11. 18.

**2776.** ——— **Top composed of marble slab.]**—A faculty cannot legally be granted for a Communion Table with a marble slab forming the top of the table though the rest of the table is of wood.—*HAYES (RECTOR, ETC.) v. FULFORD*, [1910] P. 18; *sub nom. HAYES PARISH CHURCH*, 26 T. L. R. 89.

**2777. Position.—Altarwise at upper end of chancel.]**—*ST. GREGORY'S (CHURCH CASE (1633)*, 2 Card. Doc. Ann., No. 140, 2nd ed. 237.

*Annotations*:—*Reid. Faulkner v. Litchfield & Stearn (1845)*, 9 Jur. 234; *Hebbert v. Purchas (1871)*, L. R. 3 P. C. 605; *Read v. Lincoln, Bp.*, [1891] P. 9.

**2778.** ——— **]—CRAYFORD CASE (1633)**, 2 Card. Doc. Ann., No. 137, 2nd ed., p. 220, n.

*Annotation*:—*Reid. Hebbert v. Purchas (1871)*, L. R. 3 P. C. 605.

**2779.** ——— **]—R. v. BASTWICK, BURTON & PRYNN (1637)**, 3 State Tr. 711.

*Annotations*:—*Reid. Wilson v. Rastall (1792)*, 4 Term Rep. 753; *Faulkner v. Litchfield (1845)*, 3 Notes of Cases, 511.

**2780.** ——— **In aisle.—For services for children.]**—*ST. MICHAEL, BROMLEY (1908)*, 25 T. L. R. 95.

**2781. Must be movable.]**—*FAULKNER v. LITCHFIELD & STEARN (1845)*, 1 Rob. Eccl. 184; 3 Notes of Cases, 511; 5 L. T. O. S. 21; 9 Jur. 234; 163 E. R. 1007.

*Annotations*:—*Consd. Liddell v. Westerton, Liddell v. Beale (1857)*, 29 L. T. O. S. 54. *Reid. St. Luke's, Chelsea v. Wheeler*, [1904] P. 257; *Wimbledon (Vicar & Churchwardens) v. Eden, Re St. Mark's, Wimbledon*, [1908] P. 167; *Hayes (Rector, etc.) v. Fulford*, [1910] P. 18. *Mend. Martin v. Mackenochie, Flammank v. Simpson (1865)*, L. R. 2 A. & E. 116; *Re St. George, Newcastle-on-Tyne (1839)*, [1907] P. 381, n.; *St. James Norland (Vicar & Churchwardens) v. St. James Norland (Parishioners)*, [1894] P. 356.

**2782.** ——— **]—LIDDELL v. WESTERTON, No. 2762 ante.**

*See, also, Nos. 2774, 2775, 2777, 2778, ante.*

**2783. Must be capable of being covered.]**—*LIDDELL v. WESTERTON, No. 2762, ante.*

**2784. Elevation.—Whether permissible.]**—Confirmatory faculty granted for the raising of the Holy Table in St. Andrew's, Haverstock-hill; for placing a retable at the back of the Holy Table with six candlesticks thereon; for the removal of two seats in the church & the choir stalls to make room for the procession of the clergy; & for the retention of a side chapel with a Holy Table therein for the use of small congregations; but confirmatory faculty refused for the retention of a dossal with side wings so far as it blocked out the east window & covered the tables of the Commandments, but granted so far as it was used for covering the unfinished walls. The costs of the hearing & of the faculty ordered to be paid by the vicar in consequence of his having made the various alterations without a faculty.—*ST. ANDREW'S, HAVERSTOCK-HILL (1900)*, 25 T. L. R. 408.

**2785.** ——— **Three steps above chancel floor.]**—*BRADFORD v. TRY, No. 1784, ante.*

**2786.** ——— **On platform extending round north end of table.]**—(1) The incumbent of a parish church having, without a faculty, & contrary to the vote of the vestry & the wishes of the parishioners, introduced into the church pictures representing the "Stations of the Cross" proved to have been used superstitiously, & four crucifixes, placed curtains over the Ten Commandments, the Lord's Prayer, & the Apostles' Creed engraved on the east chancel wall, & darkened the chancel by affixing permanent blinds on the east window & a side chancel window, the ct. ordered that within three months the "Stations of the Cross," the crucifixes, & the curtains should be removed out of the church by the incumbent, & the outside blinds over the above mentioned windows taken down by him.

If the incumbent should not comply with the order of the ct. within three months of its date, the ct. would be prepared to issue a faculty to the parishioners' churchwarden to carry out the order.

(2) The erection in the chancel of a Communion Table with a reredos in substitution for the Communion Table formerly there, though made by the incumbent in opposition to a vote of the vestry, was sanctioned by a confirmatory faculty from the ct. on the ground of its being an artistic improvement to the church, subject to the platform on which the Communion Table stood being extended round the north end of the Table so as to enable the minister to officiate during the Communion Service standing at the north end.

The ct. also sanctioned by confirmatory faculty the erection in the church of a side chapel with a Communion Table in it, though objected to by the parishioners, subject to the chapel being separated from the church on a plan to be approved of by the ct.—*Re ST. MARK'S, MARYLEBONE ROAD, ST. MARK'S (VICAR) v. ST. MARK'S (PARISHIONERS)*, [1898] P. 114; *sub nom. Re ST. MARK'S, MARYLEBONE, FULLER & JOHNSTON v. BISHOP*, 14 T. L. R. 103.

*Annotations*:—*As to (1) Reid. Re St. Anselm, Pinner*, [1901] P. 202; *Re St. Luke's, Southport (1920)*, 36 T. L. R. 733. *Generally, Reid. Davey v. Hinde*, [1901] P. 95.

**2787.** ——— **On platform extending round both ends of table.]**—*HENDON PARISH CHURCH, No. 2872, post.*

**2788.** ——— **Two steps above floor of church.]**—Circumstances in which a faculty was granted

for placing a Communion Table, with a cross & candlesticks, in the chancel of a chapel of ease in substitution for the Communion Table originally placed there; the Communion Table to be so newly erected to be elevated on two steps above the floor of the church, & curtains to be fixed behind, & at the north & south ends of, the Communion Table, but not so as to prevent the minister, if so desirous, officiating in the Communion Service at the north end of the table.—*WIMBLEDON (VICAR & CHURCHWARDENS) v. EDEN, Re ST. MARK'S, WIMBLEDON, [1908] P. 167.*

**2789. Substitution of new table for old—Whether reconsecration necessary.]—PARKER v. LEACH, No. 3053, *post*.**

**2790. Protective railing—Whether legal.]—R. v. BASTWICK, BURTON & PLYNN (1837), 3 State Tr. 711.**

*Annotations:—*Reid. Wilson v. Rastall (1792), 4 Term Rep. 753; Faulkner v. Litchfield & Stearn (1845), 1 Rob. Ecol. 184.

**2791. Retable — Whether permissible.]—ST. ANDREW'S, HAVERSTOCK HILL, No. 2784, *ante*.**

## ii. Ornaments.

**2792. Covering—"Fair white linen cloth."—LIDDELL v. WESTERTON, No. 2762, *ante*.**

**2793. ——— Whether more than one permissible.]—LIDDELL v. WESTERTON, No. 2762, *ante*.**

**2794. ——— Necessity for.]—ELPHINSTONE v. PURCHAS, No. 2751, *ante*.**

— *Baldachino.*—See Sub-sect. 4, B. (e), *post*.

**2795. Cross.]—LIDDELL v. BEAL, No. 1125, *ante*.**

**2796. ———.]—WIMBLEDON (VICAR & CHURCHWARDENS) v. EDEN, Re ST. MARK'S, WIMBLEDON, No. 2788, *ante*.**

**2797. ———.]—(1) A faculty may, at the discretion of the ordinary, be lawfully granted for the erection of a second Communion Table in a parish church or chapel of ease.**

(2) It is not essential to the legal existence of a second Communion Table authorised by such a faculty that the portion of the church or chapel of ease where the second Communion Table is placed should be partitioned off from the rest of the church or chapel, but the circumstances which warrant the grant of the faculty & the structural & other arrangements which should be made in any particular church or chapel when a second Communion Table is sanctioned are matters to be decided by the ct. granting the faculty in each case.

(3) The vicar & churchwardens & certain parishioners of a parish church in the diocese of S. applied in the consistory ct. of S. for a faculty authorising & empowering the vicar & churchwardens to place an altar with a cross & two candlesticks thereon, or on a ledge in rear, & a credence table adjoining, at the north end of the south transept of the church of St. James the Baptist, a chapel of ease within the same parish, the costs to be defrayed privately. At the hearing of the application it was proved that the use of the nave of St. James' Church for early celebrations of the Holy Communion was inconvenient, & that by the use of the south transept for such celebrations great expense in lighting the church in the winter would be saved; that a resolution in favour of the application had been passed by the parish vestry without opposition; & that the south transept would hold about fifty people, & had for some time been in use for daily morning service. The ct. came to the conclusion that the case before it was one in which, if the faculty prayed for could be legally granted, a decree for

its issue should as a matter of discretion be made, but refused to decree the grant, on the ground that it had legally no power to grant a faculty for the erection of a second Holy Table in a parish church or chapel of ease. The appets. for the faculty appealed. The Dean of the Arches allowed the appeal, & directed that the faculty applied for should issue.—*Re ST. JAMES THE GREAT, BUXTON, ST. JOHN THE BAPTIST, BUXTON (VICAR) v. ST. JOHN THE BAPTIST, BUXTON (PARISHIONERS), [1907] P. 308; 23 T. L. R. 694.*

**2798. — Affixed to table.]—LIDDELL v. WESTERTON, No. 2762, *ante*.**

**2799. ——— On retable.]—A movable wooden cross, without the sanction of a faculty or the concurrence of applt., the parishioners' churchwarden, but with the concurrence of the vicar's churchwarden, was by the vicar's authority placed on a retable or wooden ledge at the back of & immediately above the Communion Table in a parish church, with the intention that it should remain there permanently. Two days afterwards the cross was removed by applt., as churchwarden, without the authority of a faculty, from the retable, & taken by him out of the church, & retained by him. In a criminal suit promoted by the vicar in the Ct. of Arches against applt. for having removed the same:—*Held*: the cross, in the position which it occupied while in the church, is forbidden by law; but as both parties were in the wrong in having acted without a faculty, the suit was dismissed without costs.—*DURST v. MASTERS (1876), 1 P. D. 373; sub nom. MASTERS v. DURST, 45 L. J. P. C. 51; 35 L. T. 37; 40 J. P. 660; 24 W. R. 1019, P. O.***

*Annotations:—*Dtd. Wimbledon (Vicar, etc.) v. Eden, Re St. Mark's, Wimbledon, [1908] P. 167. *Reid.* Combe v. Edwards (1877), 2 P. D. 354; Combe v. De La Here (1881), 6 P. D. 157; R. v. London, Bp. (1889), 54 J. P. 340; St. Andrew's, Haverstock Hill (1909), 25 T. L. R. 408.

**2800. ———.]—Re ST. JAMES THE GREAT, BUXTON, ST. JOHN THE BAPTIST, BUXTON (VICAR) v. ST. JOHN THE BAPTIST, BUXTON (PARISHIONERS), No. 2797, *ante*.**

**2801. Tabernacle for reservation of sacrament.]—KENSIT v. ST. ETHELBURGA, BISHOPS CATE WITHIN (RECTOR), No. 2892, *post*.**

**2802. ——— With burning light.]—DAVEY v. HINDE, No. 2768, *ante*.**

**2803. ———.]—DAVEY v. HINDE, No. 2903, *post*.**

**2804. ——— In side chapel.]—DAVEY v. HINDE, No. 2903, *post*.**

**2805. Candlesticks.]—LIDDELL v. WESTERTON, No. 2762, *ante*.**

**2806. ———.]—Re ST. JAMES THE GREAT, BUXTON, ST. JOHN THE BAPTIST, BUXTON (VICAR) v. ST. JOHN THE BAPTIST, BUXTON (PARISHIONERS), No. 2797, *ante*.**

**2807. ———.]—WIMBLEDON (VICAR & CHURCHWARDENS) v. EDEN, Re ST. MARK'S, WIMBLEDON, No. 2788, *ante*.**

**2808. ——— On retable.]—Re ST. JAMES THE GREAT, BUXTON, ST. JOHN THE BAPTIST, BUXTON (VICAR) v. ST. JOHN THE BAPTIST, BUXTON (PARISHIONERS), No. 2797, *ante*.**

**2809. ———.]—ST. ANDREW'S, HAVERSTOCK HILL, No. 2784, *ante*.**

**2810. Lighted candles—Not required for light—On Communion Table.]—LIDDELL v. WESTERTON, No. 2762, *ante*.**

**2811. ——— During communion service.]—MARTIN v. MACKONCHIE, No. 2948, *post*.**

**2812. ———.]—(1) To cause lighted candles to be held one on each side of the priest when reading the gospel, such lighted candles**

*Secl. 1.—Divine service generally: Sub-sect. 4, B. (b) ii. & iii., (c) & (d).]*

not being required for the purpose of giving light, is unlawful.

(2) The ceremonial lighting & burning of candles, placed on a ledge or shelf over the holy table, & of candles placed on each side of the holy table, is during the communion service unlawful.

(3) The ceremonial use of incense immediately before the celebration of the Holy Communion, so as to be preparatory, or subsidiary, to the celebration of the Holy Communion, is unlawful.—*SUMNER v. WIX* (1870), L. R. 3 A. & E. 68; *Bro. Ecc. Rep.* 261; 39 L. J. *Ecc.* 25; 21 L. T. 766; *sub nom. WINCHESTER (Bp.) v. WIX*, 34 J. P. 180.

*Annotations:—As to (1) Refd. Elphinstone v. Purchas* (1870), L. R. 3 A. & E. 66. *As to (2) Refd. Elphinstone v. Purchas* (1870), L. R. 3 A. & E. 66.

2813. —————.]—*READ v. LINCOLN (Bp.)*, No. 1146, *ante*.

2814. ————— *During morning prayer.*]

—Motion to enforce obedience to a monition to carry into effect an Ord. in Council which, among other things, prohibited resp. from elevating the cup & paten during the administration of the Holy Communion, & from kneeling or prostrating himself before the consecrated elements, & from using lighted candles on the Communion Table during the celebration of the Holy Communion, when such lighted candles were not wanted for the purpose of giving light. It appeared that the elevation of the cup & paten for which resp. had been article & complained of in the ct. below, was an elevation above his head, which was the only mode of elevation pleaded in the article, after it had been reformed, to have been practised by him, & was, therefore, that prohibited by the sentence of the ct. below, which sentence had been affirmed on appeal, but that resp. had substituted for such an elevation only to the level of his head:—*Held*: (1) though disapproving & discountenancing any elevation of the elements whatever, in the state of the pleadings, the illegality of the elevation since practised by resp. not being raised, he had technically complied with the terms of the original sentence & order, & could not be held to have disobeyed the monition in that respect; (2) with regard to the kneeling, it was proved by the evidence, as well as the admission of resp., that he did prostrate & bow his knee at the times alleged, in such a manner as to be unable himself to say, whether he touched the ground with his knee, or to make it possible for any one to see, whether he was kneeling or not; & such prostration was, literally kneeling, & alike contrary to the rubric & to the letter & spirit of the monition; (3) respecting the lighted candles, it appeared that the candles on the Communion Table, though lighted & burning during the whole service before the celebration of the Holy Communion, & until the commencement thereof, were then extinguished; therefore, there had been a literal compliance with the strict terms of the monition; though the charge made by the motion & established by the evidence was, as in part contained in the original order, for using candles on the Communion Table at times when they were not wanted for the purpose of giving light.

Under the circumstances, the ct. expressed its opinion, that the monition had been disobeyed with reference to the kneeling during the prayer of consecration, & monished resp. to abstain therefrom for the future; & to mark its disapprobation

of his course of proceeding, ordered him to pay the costs of the motion.

(4) A literal compliance with the terms of a monition is all that is required; but a mere literal compliance in an evasive manner will not suffice. In considering whether a monition has been disobeyed, the monition in the first instance will be looked to; but the monition cannot go beyond the matters charged against deft., nor beyond the judgment pronounced thereon; & the judgment may be referred to to interpret the terms of the monition.—*MARTIN v. MACKONCHIE* (1869), L. R. 3 P. C. 52; 6 Moo. P. C. C. N. S. 274; 39 L. J. *Ecc.* 11; 21 L. T. 512; 34 J. P. 71; 18 W. R. 217; 16 E. R. 729, P. C.; *subsequent proceedings* (1870), L. R. 3 P. C. 409, P. C.; *previous proceedings* (1868), L. R. 2 P. C. 365, P. C.

*Annotations:—As to (1) Refd. Sheppard v. Bennett* (1872), 20 W. R. 804; *Heywood v. Manchester, Bp.* (1884), 12 Q. B. D. 404. *As to (2) Distd. Hobbert v. Purchas* (1871), 40 L. J. *Ecc.* 33. *Refd. Sheppard v. Bennett* (1872), 20 W. R. 804. *Generally, Mentd. Martin v. Mackonochie* (1870), L. R. 3 P. C. 409; *Martin v. Mackonochie* (1879), 4 Q. B. D. 697; *Mackonochie v. Penzance* (1881), 29 W. R. 633.

2815. —————.]—(1) It is unlawful for a minister of a Church of England to use lighted candles on the Communion Table or on a ledge immediately above the same during the performance of morning prayer when such candles are not wanted for the purpose of giving light; (2) to cause to be said or sung during the performance of the service for the administration of the Holy Communion, after the prayer of consecration, & before the reception of the elements by the communicants, the hymn or prayer known as the "Agnus."

(3) Though it is illegal for the minister to cross himself in the air to the congregation, it is not illegal for him to cross himself as a matter of private devotion.

(4) It is illegal for a minister to use wafers instead of bread, to stand with his back to the people, & to wear certain vestments during the communion service.

(5) The law of evidence as formerly administered in the Ct. of Arches is modified by Ecclesiastical Courts Act, 1855 (c. 41).

(6) It is competent for the judge of a ct. of first instance [such as the Ct. of Arches] in his discretion, to have points decided by a ct. of appeal re-argued before him, when the judgment of such ct. has been delivered on the hearing of an *ex parte* case, is founded on a mistake of fact, & is irreconcilable with other decisions.—*MARTIN v. MACKONCHIE (SECOND SUIT)* (1874), L. R. 4 A. & E. 279; 32 L. T. 569; 30 J. P. 260.

*Annotations:—Generally, Mentd. Enraght v. Penzance & Perkins* (1882), 30 W. R. 753; *Marshall v. Graham, Bell v. Graham* (1907), 71 J. P. 270.

2816. ————— *On retable.*—*ST. PAUL, CAMDEN SQUARE* (1897), 14 T. L. R. 85, 156.

2817. ————— *During communion service.*—*SUMNER v. WIX*, No. 2812, *ante*.

2818. ————— *During morning prayer.*—*MARTIN v. MACKONCHIE (SECOND SUIT)*, No. 2815, *ante*.

2819. *Flowers — For decoration only.*—*ELPHINSTONE v. PURCHAS*, No. 2751, *ante*.

*See, also*, No. 791, *ante*.

2820. *Movable shelf or super-altar—Whether permissible.*—*LIDDELL v. BEAL*, No. 1125, *ante*.

2821. —————.]—*EVANS v. KINGSFORD*, No. 2041, *post*.

*Stone or marble tops.*—*See* Nos. 2774, 2776, *ante*.

*Suspended Mosaic decorations.*—*See* No. 2775, *ante*.



iii. *Additional Tables in Side Chapels.*

**2822. Whether allowed.**—*Re* ST. GEORGE, NEWCASTLE-ON-TYNE (1880), [1907] P. 381, n.

*Annotation*:—*Consd.* *Re* St. James the Great, Buxton, St. John the Baptist, Buxton (Vicar) v. Same (Parishioners), [1907] P. 388.

**2823.** ————]—*St.* ANDREW'S, HAVERSTOCK HILL, No. 2784, *ante*.

**2824.** ————]—Where the church already contained two holy tables the ct. granted a faculty for erecting in a corner of the church a small chapel with a third holy table.—*St.* MARGARET'S, TOX-TETH PARK (1924), 40 T. L. R. 687.

**2825.** ————]—*As of course.*—*St.* MAGNUS THE MARTYR, LONDON BRIDGE (1924), *Times*, Oct. 22.

**2826.** ————]—*On what terms faculty granted—Separation from church.*—A faculty granted for the construction of a side chapel in a church, with leave to place a Holy Table in the chapel. There must be such a separation between the chapel & the church that it shall appear to be in fact a chapel, though under the same roof as the church.—*Re* ST. PAUL'S, WILTON PLACE (1889), *Trist.* 120.

**2827.** ————]—The Consistory Ct. of London, before granting a faculty authorising the placing of a second Communion Table in a side chapel under the same roof as a parish church, requires to be satisfied that the side chapel in which it is proposed to place the second Communion Table is separated from the aisle of the church by trellis work or otherwise, so as to indicate that it is, in Ecclesiastical law, a side chapel, intended for use as such when the chancel or nave of the church is not used for divine service.—*St.* PETER'S, EATON SQUARE (VICAR) v. ST. PETER'S, EATON SQUARE (PARISHIONERS), [1894] P. 356.

**2828.** ————]—*Re* ST. MARK'S, MARYLEBONE ROAD, ST. MARK'S (VICAR) v. ST. MARK'S (PARISHIONERS), No. 2786, *ante*.

**2829.** ————]—*Discretion of court granting faculty.*—*Re* ST. JAMES THE GREAT, BUXTON, ST. JOHN THE BAPTIST, BUXTON (VICAR) v. ST. JOHN THE BAPTIST, BUXTON (PARISHIONERS), No. 2797, *ante*.

**2830.** ————]—*Reservation of power to remove in case of unlawful use.*—A faculty was granted on the application of the rector of a parish for the erection & use of a second Communion Table in a side chapel of the parish church, though both the churchwardens of the parish & the parish vestry expressed opinions adverse to the grant, but the ct. directed that a proviso should be inserted in the faculty reserving to the ct., on being satisfied that ornaments other than those sanctioned by the present or any future faculty had been introduced into the chapel or unlawful services performed there, to order the removal of the second Communion Table from the chapel.—*St.* ANNE'S, LIMEHOUSE (RECTOR) v. ST. ANNE'S, LIMEHOUSE (PARISHIONERS), [1901] P. 73; *sub nom.* *Re* ST. ANNE, LIMEHOUSE, 17 T. L. R. 27.

**2831.** ————]—*Approval of decorations & fittings.*—*St.* MAGNUS THE MARTYR, LONDON BRIDGE (1924), *Times*, Oct. 22.

*See, also*, No. 2936, *post*.

**2832. Grounds for granting faculty.**—“*Convenience & economy.*”—The ct., on the ground of convenience & saving of expense, decreed a faculty for the erection of a Communion Table in a side chapel of a church in which there was already a Communion Table.—*Re* HOLY TRINITY CHURCH, STROUD GREEN (1887), 12 P. D. 190;

*Trist.* 117; *sub nom.* *Re* TRINITY CHURCH, STROUD GREEN, 36 W. R. 288.

*Annotations*:—*Consd.* *Re* St. George, Newcastle-on-Tyne, [1907] P. 381, n. *Etld.* *Re* St. Paul's, Wilton Place (1889), *Trist.* 120.

**2833.** ————]—*St.* MICHAEL, BROMLEY, (1908), 25 T. L. R. 95.

**2834.** ————]—*Re* ST. JAMES THE GREAT, BUXTON, ST. JOHN THE BAPTIST, BUXTON (VICAR) v. ST. JOHN THE BAPTIST, BUXTON (PARISHIONERS), No. 2797, *ante*.

(c) *Credence Table.*

**2835. Nature of.**—*LIDDELL v. WESTERTON*, No. 2762, *ante*.

**2836. Whether permissible.**—*FAULKNER v. LITCHFIELD & STEARN* (1815), 1 Rob. Eccl. 184; 3 Notes of Cases, 511; 5 L. T. O. S. 21; 9 Jur. 231; 163 E. R. 1007.

*Annotations*:—*Consd.* *Liddell v. Westerton*, *Liddell v. Beale* (1857), 29 L. T. O. S. 54. *Etld.* *St. James Norland* (Vicar & Churchwardens) v. *St. James Norland* (Parishioners), [1894] P. 256; *St. Luke's, Chelsea v. Wheeler*, [1904] P. 257; *Hayes* (Rector, etc.) v. *Fulford*, [1910] P. 18. *Nota*: *Martin v. Mackonochie, Flammank v. Simpson* (1868), L. R. 2 A. & E. 116; *Re* St. George, Newcastle-on-Tyne (1889), [1907] P. 381, n.; *Wimbledon* (Vicar & Churchwardens) v. *Eden*, *Re* St. Mark's, Wimbledon, [1908] P. 167.

**2837.** ————]—*LIDDELL v. WESTERTON*, No. 2762, *ante*.

**2838.** ————]—*Re* ST. JAMES THE GREAT, BUXTON, ST. JOHN THE BAPTIST, BUXTON (VICAR) v. ST. JOHN THE BAPTIST, BUXTON (PARISHIONERS), No. 2797, *ante*.

(d) *Reredos and Dossal.*

**2839. Reredos.—Whether permissible—What court will consider.**—A wooden carving, containing thirty figures & forming no part of the structure of the church, the gift of a non-parishioner, was fixed at the east end of the chancel by the rector, without the sanction of the vestry, & without a faculty. The rector applied for a faculty, confirmatory of its erection. The application was unopposed:—*Held*: (1) the ct., before granting the faculty, should be satisfied that it was sanctioning a fitting & necessary church decoration for the place where it is erected, & one not likely with reason to be unacceptable to parishioners present or future; (2) the present structure (though not an unlawful church decoration taken in detail), being of a description not heretofore erected in churches in this country but frequently to be seen at the back of altars in Roman Catholic churches abroad & having been disapproved of after inspection by the Bishop of London, it would not be a wise exercise of the discretion of the ct. to sanction its retention by a faculty. The ct. ordered its removal.—*ST. ETHELBERGA FACULTY CASE* (1878), *Trist.* 69.

**Possibility of superstitious reverence.**—*See* Nos. 2842, 2844, *post*.

**2840.** ————]—*Artistic improvement.*—*Re* ST. MARK'S, MARYLEBONE ROAD, ST. MARK'S (VICAR) v. ST. MARK'S (PARISHIONERS), No. 2786, *ante*.

**2841.** ————]—*Ascension, Transfiguration & Descent of Holy Ghost in relief.*—*PHILLIPOTS v. BOYD*, No. 185, *ante*.

**2842.** ————]—*Crucifix & figures of St. John & the three Marys.*—A reredos, of which the central compartment consisted of a sculptured panel representing the crucifixion, having the figure of our Saviour on the cross & the figures of St. John & the three Marys on either side, all such figures being in high relief, was erected in a newly-built parish church. The bishop of the diocese



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refused to consecrate the church unless the central compartment of the reredos was removed, & it was accordingly removed, & the church was consecrated. Subsequently the churchwardens of the parish petitioned the ordinary for the grant of a faculty authorising the replacement of such central compartment in the church, & the ordinary sent the case by Letters of Request to this ct. The Letters of Request having been accepted, an appearance was entered for a parishioner, who opposed the grant of the faculty on the ground that the central compartment of the reredos proposed to be replaced would, if so replaced, be either illegal or likely to receive superstitious reverence & be abused, or be inexpedient & likely to cause scandal & offence.—The ct. ordered a faculty to issue for the restoration of the central compartment of the reredos.—*HUGHES v. EDWARDS* (1877), 2 P. D. 361; 42 J. P. 228.

*Annotations:—*Consd. *It. v. London*, Bp. (1888), 23 Q. B. D. 414; *Great Bardfield* (Vicar) v. All having Interest, [1897] P. 186. *Appl. Re St. Anselm, Pinner*, [1901] P. 202. Consd. *Paignton* (Vicar) v. All having Interest, [1905] P. 111. *Re St. Lawrence, Pittington* (1880), 5 P. D. 131; *It. v. London*, Bp. (1889), 24 Q. B. D. 213; *St. John the Baptist, Timberhill* (Vicar, etc.) v. Same (Rectors, etc.), [1895] P. 71; *St. John, Pendlebury* (Vicar, etc.) v. Same (Parishioners), [1895] P. 178; *Barsham, Suffolk* (Rector, etc.) v. Same (Parishioners), [1896] P. 256; *St. John the Evangelist, Clevedon* (Vicar & Churchwardens) v. All having Interest, [1909] P. 6; *All Saints, Westbury* (Vicar & Churchwardens) (1914), 30 T. L. R. 389; *Re St. Paul's, Carlisle*, [1919] P. 134; *Re Tenbury Parish Church* (1919), 36 T. L. R. 188; *Re St. Luke's, Southport* (1920), 36 T. L. R. 733.

**2843.** ——— **Thirty figures—Wooden carving.]—***ST. ETHELBURGA FACULTY CASE*, No. 2839, *ante*.

**2844.** ——— **Depiction of adoration.]—**The incumbent of a parish church applied to the ordinary for a faculty authorising the decoration of the reredos of his parish church with a painted design, intended to represent the Adoration of Our Lord in Majesty by the Faithful, of which the following individual figures formed a part. In the centre of the three compartments into which the reredos was divided, a figure intended to represent Our Lord seated as King. In the right hand compartment figures representing St. Lawrence & the Blessed Virgin. In the left hand compartment figures representing St. Stephen & St. John; the four last-mentioned figures being represented with their faces turned towards the centre compartment of the reredos. The grant of the faculty was not opposed:—*Held*: there would be danger of the representation contained in the centre compartment of the reredos being abused by receiving "superstitious reverence," in the sense explained in *Clifton v. Ridsdale*, No. 2900, *post*; & therefore, the ct. ought, in its discretion, to refuse to sanction its introduction into the church.—*Re St. Lawrence, Pittington* (1880), 5 P. D. 131.

*Annotations:—**Re St. v. London*, Bp. (1889), 24 Q. B. D. 213; *St. John the Baptist, Timberhill* (Vicar, etc.) v. Same (Rectors, etc.), [1895] P. 71; *St. John, Pendlebury* (Vicar, etc.) v. Same (Parishioners), [1895] P. 178; *Re Christ Church, Ealing*, [1908] P. 289; *Re St. Luke's, Southport* (1920), 36 T. L. R. 733.

**2845.** ——— **On what terms allowed—Triptych.]—**(1) The Chancellor of the diocese of Manchester decreed a faculty to issue for the erection in a parish church of that diocese of an oaken reredos about eight feet in height, in the form of a triptych with painted panels, of which panels the two side ones or wings, being hung to the centre panel by hinges, could be closed over it when divine service was not being performed; the centre panel to

have painted thereon a representation of The Last Supper, & on the one wing to be represented in painting "The Agony in the Garden" & on the other "The Risen Christ with the Marys at the Tomb"; the reverse sides of the wings to be plain; the whole to be surmounted by a figure of Our Lord carved in plain oak eighteen inches high between figures of Moses & Elias of the same height beneath pillared canopies connected by an arch of tracery work over the central figure, & flanked by angels. The faculty so decreed to be issued was required to contain a proviso that the triptych was always to remain open during the performance of divine service.

(2) It appears that the sole test which now governs the legality or otherwise of figures in churches is whether or not they are free from the imputation or the risk of being abused by becoming the objects of adoration or superstitious reverence. Whether they are represented in stained glass, wood, or stone; whether they are painted, or in bas-relief, or completely formed; whether they are in groups, historical, or otherwise, or stand as independent statues—whatever be their position in the sacred edifice, & whatever may have been the intention or object in erecting them, they will all be tried by this one test, & by no other (*per Cur.*).—*ST. JOHN, PENDLEBURY* (VICAR, ETC.) v. *ST. JOHN, PENDLEBURY* (PARISHIONERS), [1895] P. 178.

*Annotations:—*As to (1) *Re St. Barsham, Suffolk* (Rector, etc.) v. *Barsham, Suffolk* (Parishioners), [1896] P. 256. As to (2) *Apprvd. St. Magnus the Martyr, London Bridge* (1924), *Times*, Oct. 22.

**2846.** **Dossal—Whether permissible.]—***WIMBLEDON* (VICAR & CHURCHWARDENS) v. *EDEN*, *Re St. Mark's, WIMBLEDON*, No. 2788, *ante*.

**2847.** ——— **—**—*ST. ANDREW'S, HAVERSTOCK-HILL*, No. 2784, *ante*.

**2848.** ——— **Extent of—Interference with position of minister at north end of communion table.]—***WIMBLEDON* (VICAR & CHURCHWARDENS) v. *EDEN*, *Re St. Mark's, WIMBLEDON*, No. 2788, *ante*.

**2849.** ——— **—**—*HENDON PARISH CHURCH*, No. 2872, *post*.

**2850.** ——— **Covering tablets of ten commandments.]—***ST. ANDREW'S, HAVERSTOCK-HILL*, No. 2784, *ante*.

(c) *Baldachino*.

**2851.** **Whether permissible—As church ornament—Or architectural decoration.]—**The vicar & churchwardens of St. Barnabas, Pimlico, petitioned for a faculty to authorise the erection, in the chancel of St. Barnabas, of a baldachino, being a handsome marble structure or canopy standing apart from the east wall of the chancel, with a pointed roof & three gables pointing different ways, supported by four columns extending two or more feet beyond the Holy Table, & described as a small house in which the altar was to stand:—*Held*: (1) the ciborium, or altar canopy, known & used in England prior to the Reformation, was an ornament or article of church furniture within the meaning of that term as used in the First Prayer Book of Edw. VI., having all the characteristics of a church ornament as regards its form, the materials of which it was constructed (silk), its symbolical significations, & the uses to which it was applied; the proposed erection was not an architectural adornment for the east end of the church, as if the Holy Table were moved from underneath it, it would be there without meaning. It must, therefore, be an erection in connection with the Holy Table, & if so, must be either a structure so attached to it as to form part of it, or a structure separate from but in connection

with it. If the former, it was the Table with the baldachino added to it, instead of the decent Communion Table required by the Canon 82. If the latter, it was a church ornament; (2) there was no distinction between the Pre-Reformation altar canopies & the baldachino proposed to be erected to take it out of the category of church ornaments; as a church ornament, it being neither sanctioned by the First Prayer Book of Edw. VI., nor by the Rubrics, & not being subsidiary to the performance of the services of the church, the duty of the ct. was to decline to authorise its erection by faculty.

The Ct. dismissed the petition with costs.—  
WHITE v. BOWRON (1873), L. R. 4 A. & E. 207;  
43 L. J. Eccl. 7; 37 J. P. 820; *sub nom.* ST.  
BARNABAS, PIMLICO (VICAR & CHURCHWARDENS)  
v. BOWRON, Trist. 1.

*Annotations*—As to (2) *Apld.* Kensit v. St. Ethelburga, Bishopsgate Within, (1900) p. 80; St. Paul, Bow Common (1909), 25 T. L. R. 425. *Fold.* Grosvenor Chapel, South Audley Street (1913), 29 T. L. R. 288. *Generally, Mend.* Boyd v. Phillpotts (1874), 1. 1t. 4 A. & E. 297; Keet v. Smith (1875), 1. L. R. 4 A. & E. 398.

**2852.** ———.]—GROSVENOR CHAPEL,  
SOUTH AUDLEY STREET (1913), 20 T. L. R. 286;  
*subsequent proceedings*, 20 T. L. R. 411.

(f) Chancel Screen and Rood Beam.

**2853. Screen without gates — Whether permissible.**—**BRADFORD v. FRY**, No. 1784, *ante*.

1854. — [No impediment to view.] —  
It, the vicar of the parish of the Annunciation,  
C., has petitioned in this case for a faculty author-  
ising certain alterations & decorations in the  
chancel of the parish church, one of such altera-  
tions being the erection of a chancel screen of  
considerable height, in one part thirteen feet  
one inch from the floor of the chancel, in other  
parts higher, with entrance gates, & a large cross  
on the top of the screen, its centre two feet nine  
inches in height, & two feet one inch across the  
upper part. The plan of the proposed screen  
was, according to the practice of the diocese, sub-  
mitted to the Archbishop of Canterbury for his  
approval before the citation issued, & he declined  
to endorse his approval of it. As the vicar says,  
he is content that the faculty should go without  
the gates & the cross, & as the screen is an open one,  
& does not in any way impede the view, & having  
been just informed by the registrar that the  
Archbishop would not object to the plan as altered,  
the faculty may go for all the matters prayed,  
except for the gates & cross (Dr. TRISTRAM). —  
CHURCH OF THE ANNUNCIATION, CHISLEHURST  
(1877), Trist, 65; *sub nom. Re St. AUGUSTINE,  
HAGGERSTONE, CHURCH OF THE ANNUNCIATION,  
CHISLEHURST (VICAR) v. CHURCH OF THE AN-  
NUNCIATION, CHISLEHURST (PARISHIONERS)*, 4 P. D.  
111. n.

**Annotations:—**Consd. St. James Norland (Vicar, etc.) v. St. James Norland (Parishioners), [1894] P. 256. **Mentd.** St. John's, Isle of Dogs (1888), 4 T. L. R. 661.

2855. — — — — —]—The rector & churchwardens of a parish church in the diocese of St. Albans petitioned the ordinary for a faculty to authorise the erection in the church of a chancel screen with gates in the centre, by the closing of which access to the chancel from the nave of the church would be wholly cut off, & at the hearing of the suit it appeared that if the faculty were granted & the screen erected as proposed, the gates to it would be kept open during the performance of divine service, but would be fastened at other times when the church was opened, & being so fastened, would afford protection against the contents of the chancel & vestries being injured or stolen.

The Chancellor of the diocese of St. Albans being of opinion that the grant of a faculty, authorising the erection of the gates would be an exercise of his discretion in opposition to the decision of the Ct. of Arches in *Bradford v. Fry*, No. 1784, *ante*, refused the faculty as prayed, but intimated that if the petitioners desired, the ct. would decree a faculty to issue for the erection of the chancel screen without any gates to it.—**STR. ANDREW, ROMFORD (RECTOR & CHURCHWARDENS)**  
**t. ALL PERSONS HAVING INTEREST, [1894] P. 220**  
**2856. Screen with gates—Whether permissible.]**

—LIDDELL v. WESTERTON, No. 2762, *ante*.

2857. — — — — — J.—A faculty for gates to a chancel screen, it not being shown that the gates would afford any practical protection to the books & other church property in the chancel, refused.—*Re* St. AUGUSTINE, HAGGERSTONE (1877), *Trist.* 60; *sub nom.* *Re* St. AUGUSTINE, HAGGERSTONE, CHURCH OF THE ANNUNCIATION, CHISLEHURST (VICAR) v. CHURCH OF THE ANNUNCIATION, CHISLEHURST (PARISHIONERS), 4 P. D. 111. n.

**Annotations:—***Bald. It. St. Agnes* (1885), 11 P. D. 1; *St. John's, Isle of Dogs* (1888), 4 T. L. R. 661; *St. James Norland* (Vicar, etc.) v. *St. James Norland* (Parishioners), [1894] P. 256; *St. John the Baptist, Timberhill* (Vicar, etc.) v. *St. John the Baptist, Timberhill* (Rectors, etc.), [1895] P. 71.

2858. ———.]— BRADFORD v. FRY, No. 1784,  
*ante.*

2859. — [A petition by the vicar & churchwardens of the parish church of It., & the chapelwardens of a chapel of ease in the parish of It., asking for a faculty to authorise the erection in the chapel of a chancel screen with gates, & with a crucifix & figures of the Virgin Mary & St. John placed on the top of the screen, was supported by a resolution of a meeting of the pew-renters of the chapel. The vestry for ecclesiastical purposes of the parochial area in which both the parish church & the chapel of ease were situate, was a select vestry of the whole civil parish of It., which comprised a larger area than the parochial area above mentioned, & the vestry had passed no resolution either in favour of or against the grant of the faculty :—*Held* : (1) a resolution of the select vestry might be dispensed with ; (2) a faculty for chancel screen gates ought not to be granted ; (3) a faculty for a crucifix with or without figures on either side placed on a chancel screen ought not to be granted.—RICHMOND (VICAR) & ST. MATTHIAS, RICHMOND (CHAPELWARDENS) v. ALL PERSONS HAVING INTEREST, ETC., [1897] P. 70.

**Annotations** :- *Generally, Revd.* (Great Bardfield (Vicar) v. All having Interest, [1897] P. 185; *Re* St. Anselm, Pinner, [1901] P. 202; Fulginton (Vicar) v. All having Interest, [1905] P. 111; *Re* St. Luke's, Southampton (1920), 36 T. L. R. 733. **Menda.** Wimbledon (Vicar & Churchwardens) v. Eden, *Re* St. Mark's, Wimbledon, [1908] P. 167.

*See, also, No. 2854, ante.*

2860. — Necessary for protection of property.]—A faculty for chancel gates was granted, it being shown that the chancel, from its richness, required protection.—*Re* ST. AGNES (1885), 11 P. D. 1.

2861. ————]—The vicar & church-wardens of a parish church in the diocese of Norwich petitioned the ordinary to authorise by faculty the retention in the church of the following works introduced into the church since its consecration & without the sanction of a faculty: A chancel screen without gates, but surmounted by a loft resting on the top of the screen, four feet wide, & with sides three feet high, to which access was obtained by the old rood-loft stairs. A beam extending across the west end of the chancel at a

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height of four feet above the chancel screen, & placed upon such beam a figure of Our Lord upon the Cross, & on one side a figure of the Virgin Mary, & on the other side a figure of St. John; all such figures being graven in wood & of about life-size. And the erection of the following new works: The placing upon the above mentioned beam of two other figures, one to represent Mary Magdalene, & the other a centurion together with the figure of a cherub at each end of the beam, the erection of gates to the chancel screen, of screens across the aisles, & of choir stalls with screens behind them. It appeared that a dedication service had been held in the church on the occasion when the figures on the beam across the chancel had been put up, & that every year on Palm Sunday members of the church choir went into the loft above the chancel screen & sang there:—

*Held:* (1) a faculty would not be granted for the retention in the church of the loft over the chancel screen or of the figures placed on the beam above the same:—in the opinion of the ct. & rood loft & rood, or for the erection of the additional figures proposed to be placed thereon, such loft & such figures so placed being unlawful within the ruling of LORD PENZANCE in *Clifton v. Ridsdale*, No. 2900, *post*, & matters as to which in the discretion of the ct. a faculty ought not to be granted, there being danger of “superstitious reverence” being paid to the rood; (2) a faculty would issue for the chancel screen without the loft surmounting it; for the addition of gates to such screen, for the screens across the aisles with gates attached & for the choir stalls & screens; there being evidence before him that the expense of the works yet to be done would be met by voluntary subscriptions, & that the organ & other property in the chancel & aisles required protection.—*ST. JOHN THE BAPTIST, TIMBERHILL (VICAR, ETC.) v. ST. JOHN THE BAPTIST, TIMBERHILL (RECTORS, ETC.)*, [1895] P. 71.

*Annotations:—As to* (1) *Distd. Barsham, Suffolk* (Rectors & Churchwardens) *v. Barsham*, Suffolk (Parishioners), [1896] P. 256. *Consd. Great Bardfield* (Vicar) *v. All having Interest*, [1897] P. 185; *Paignton* (Vicar) *v. All having Interest*, [1905] P. 111; *St. John the Evangelist, Clevedon* (Vicar & Churchwardens) *v. All having Interest*, [1909] P. 6. *Reid. Re St. Anselm, Pinner*, [1901] P. 202. *Generally, Reid. Re St. Luke's, Southport* (1920), 36 T. L. R. 733.

**2862.** ————] —So much of an application for a faculty for a chancel screen & other works in a parish church as asked that the ct. would sanction by faculty the placing above the centre of the chancel screen a sculptured group of life-size figures in oak, representing our Saviour upon the Cross & the Virgin Mary & St. John, was refused where it appeared that, if the faculty was granted as prayed, the ct. would be thereby authorising the restoration of the pre-Reformation screen & rood formerly in the church.

The vicar & churchwardens of a parish church, in which the ancient rood stairs & rood door were still existing, petitioned the ordinary for a faculty authorising the placing in the church of a second Communion Table & a chancel screen with gates, having on its top a platform, gallery or loft on which the ancient rood door would directly open, & above its centre, upon a carved pedestal somewhat higher than the level of the loft door, a sculptured group of life-size figures in oak representing our Saviour upon the Cross & the Virgin Mary & St. John; the loft to be about six feet in width, & the cornice of the screen to stand on each side about a foot or 8 inches higher

than the loft floor. The suit was undefended, & it was proved in evidence that the services in the church were conducted strictly in accordance with the Book of Common Prayer, with extra services as allowed by the bishop of the diocese, subject to the reservation of the sacrament in certain cases. It was also proved that the church was left open in the daytime without a caretaker, & that the organ, the service books, & other articles of church furniture in the chancel required protection:—*Held:* the erection in the church of the pre-Reformation screen & rood as proposed in the identical positions occupied by them before the Reformation would, so far as related to the group of sculptured figures proposed to be placed on the screen, be unlawful, or if not unlawful be inexpedient, & consequently a faculty must only be decreed for the chancel screen without the group of figures surmounting it. A faculty was also granted for a second Communion Table; & the ct. authorised the chancel screen being provided with gates, on the ground that sufficient necessity for a chancel screen with gates had been shown in evidence.—*PAIGNTON (VICAR) v. ALL HAVING INTEREST*, [1905] P. 111.

*Annotations:—Feld. St. John the Evangelist, Clevedon* (Vicar & Churchwardens) *v. All having Interest*, [1909] P. 6. *Reid. Re St. Luke's, Southport* (1920), 36 T. L. R. 733.

**2863.** ———— *Useful for protection of property.*—A faculty for a chancel screen with gates decreed, on the ct. being satisfied on the evidence, that the gates would be of practical use in protecting the music & other books & property in the chancel of the church, which was kept open during the week for private devotion.—*ST. JOHN'S, ISLE OF DOGS* (1888), 4 T. L. R. 661; *Trist*, 67.

*Annotations:—Consd. St. James Norland* (Vicar, etc.) *v. Same* (Parishioners), [1894] P. 256. *Reid. St. John the Baptist, Timberhill* (Vicar, etc.) *v. Same* (Rectors, etc.), [1895] P. 71.

**2864.** ————] —*ST. JAMES NORLAND (VICAR, ETC.) v. ST. JAMES NORLAND (PARISHIONERS)*, [1894] P. 256.

*Annotations:—Reid. St. John the Baptist, Timberhill* (Vicar, etc.) *v. Same* (Rectors, etc.), [1895] P. 71.

**2865.** ———— *Useful.*—*ST. ANDREW, ROMFORD (RECTOR & CHURCHWARDENS) v. ALL PERSONS HAVING INTEREST*, No. 2855, *ante*.

**2866. Screen surmounted by cross—Whether permissible.**—*LIDDELL v. WESTERTON*, No. 2702, *ante*.

**2867.** ————] —*BRADFORD v. FRY*, No. 1784, *ante*.

*See, also*, No. 2854, *ante*.

**2868. Screen surmounted by crucifix—Whether permissible.**—*CLIFTON v. RIDSDALE*, No. 2900, *post*.

**2869. — Figures of Virgin & St. John—Whether permissible.**—*RICHMOND (VICAR) & ST. MATTHIAS, RICHMOND (CHAPELWARDENS) v. ALL PERSONS HAVING INTEREST, ETC.*, No. 2859, *ante*.

**2870.** ————] —*PAIGNTON (VICAR) v. ALL HAVING INTEREST*, No. 2802, *ante*.

**2871.** ———— *No evidence of probability of superstitious reverence.*—A figure of Our Lord upon the Cross was in 1880 placed in a parish church above, & on the centre of the screen separating the chancel from the nave; & in 1893 there were placed on one side thereof a figure of the Virgin Mary, & on the other side thereof a figure of St. John. All the figures were carved in wood, were about two feet nine inches in height, the central figure being rather higher than the two others, & all had been placed in the church without the sanction of a faculty. There was not in the

church anything of the nature of a rood-loft or rood-stairs, & no candles were round or in front of the figures. In 1896 the rector & churchwardens of the parish instituted a cause of faculty praying the ordinary to authorise by faculty the retention of the three figures on the screen, & filed affidavits stating that the services of the church had been conducted in accordance with the directions of the Book of Common Prayer, & that there was not & had not been anything in the services or in the attitude of those attending the services to indicate or suggest any probability of worship, adoration, or any superstitious reverence being paid to the figures on the screen. No person appeared to oppose the grant of the faculty. The Chancellor of the Diocese of Norwich ordered the faculty to issue as prayed.—**BARSHAM, SUFFOLK (RECTOR, ETC.) v. BARSHAM, SUFFOLK (PARISHIONERS)**, [1896] P. 256.

*Annotations* :—**Consd.** *Re* St. Anselm, Pinner, [1901] P. 202 ; *St. John the Evangelist*, Clevedon (Vicar & Churchwardens) *v.* All having Interest, [1909] P. 6 ; *Re* St. Luke's, Southport (1920), 36 T. L. R. 733. **Refd.** *Great Bardfield* (Vicar) *v.* All having Interest, [1897] P. 185 ; *Palguton* (Vicar) *v.* All having Interest, [1905] P. 111.

**2872.** — — — — —.]—Faculty granted for the erection of a chancel screen surmounted by a figure of the crucified Saviour in the centre, with figures of the Blessed Virgin on one side & St. John on the other. Wherever on an application to the ct. for a faculty it is proposed to place the Holy Table on a raised platform, the ct. will require that there should be standing room on the platform at the ends as well as at the front of the Holy Table, & that there should be no fixed curtains at the sides cutting off access to those ends. The ct. in granting a faculty for alterations in the arrangement of the chancel required that all choir stalls should run from east to west, & none from north to south.—**HENDON PARISH CHURCH** (1912), 28 T. L. R. 438.

*Annotation* :—**Refd.** *Re* St. Luke's, Southport (1920), 36 T. L. R. 733.

**2873.** — — — — — **Ordinary rules as to images apply.**]—**ST. MAGNUS THE MARTYR, LONDON BRIDGE** (1924), *Times*, Oct. 22.

**2874. Screen with crucifix attached to upper part—Figures of Virgin & St. John—Whether permissible.**]

—A crucifix with the accompanying figures of the Virgin Mary & St. John is not forbidden by law to be erected on a chancel screen, but may be placed in that position in a parish church under a faculty where the ordinary is satisfied that it is not likely to be abused by superstitious reverence being paid to it. A faculty authorising the restoration in a parish church of a stone chancel screen or interior chancel arch of pre-Reformation date by placing on three existing pedestals springing from ornamental tracery in the upper parts of such screen or interior arch three stone figures without gilding or painting, each two feet three inches high—one, the central figure, representing Our Lord upon the Cross, & the other two representing respectively the Virgin Mary & St. John—was granted by the Consistory Ct. of St. Albans on the ordinary being satisfied that the figures would be for the purpose of architectural decoration only, & that there was no ground for reasonable apprehension that they would be abused or made the subject of superstitious reverence.—**GREAT BARDFIELD (VICAR) v. ALL HAVING INTEREST**, [1897] P. 185.

*Annotations* :—**Foll.** *Re* St. Anselm, Pinner, [1901] P. 202. **Consd.** *Hendon Parish Church* (1912), 28 T. L. R. 438. **Refd.** *Palguton* (Vicar) *v.* All having Interest, [1905] P. 111 ; *Re* St. Luke's, Southport (1920), 36 T. L. R. 733.

**2875.** — — — — —.]—A chancel screen, to

the upper portion of the tracery of which is attached over the entrance archway the figure of Our Lord upon the Cross, & on one side of the archway the figure of the Virgin Mary, & on the other side the figure of St. John, is not, either from its character, nature, or position, in itself unlawful in churches or chapels of the Church of England, & may be authorised by faculty, provided the ordinary is of opinion in his discretion that it is not probable that it will be abused for superstitious purposes.

The mere suggestion that the figures on the screen may cause offence is not a sufficient reason for the ordinary refusing in his discretion to grant the faculty.

The vicar & churchwardens of a parish church in the diocese of London & the chapelwardens of a chapel of ease in the parish petitioned for a faculty to authorise the erection in the chapel of a chancel screen of oak with the figure of Our Lord on the Cross upon the centre of it, & the figure of the Virgin Mary on one side, & of St. John on the other: the figures not to surmount the screen, but to be attached to the upper portion of the tracery, the central figure immediately over the entrance archway, & the other two figures, one on the right & one on the left, at a somewhat less elevation, upon pedestals affixed to the woodwork. The grant of the faculty was unopposed, & no evidence was given as to whether the figures on the screen would or would not be likely to be abused by superstitious reverence. The Chancellor of the Diocese of London refused to grant a faculty for the figures on the proposed screen, being of opinion that the erection of a chancel screen with the figures as proposed was illegal in itself under the ruling of the Arches Ct. & the Privy Council in *Cifton v. Ridsdale*, No. 2000, *post*. The petitioners appealed to the Arches Ct.

The Dean of Arches at the hearing of the appeal admitted fresh evidence as to the mode in which the services in the chapel were conducted, & finding that there was nothing in them to lead the ct. to suppose that the proposed screen & figures were likely to be treated otherwise than as architectural decoration, allowed the appeal, retained the cause, & ordered the faculty as prayed to issue from the registry of the Arches Ct. —*Re* **ST. ANSELM, PINNER**, [1901] P. 202 ; 17 T. L. R. 312.

*Annotations* :—**Consd.** *Hendon Parish Church* (1912), 28 T. L. R. 438. **Refd.** *Palguton* (Vicar) *v.* All having Interest, [1905] P. 111 ; *Re* Holy Trinity, Shirebrook (1906), 22 T. L. R. 278 ; *St. John the Evangelist*, Clevedon (Vicar & Churchwardens) *v.* All having Interest, [1909] P. 6 ; *Grosvenor Chapel*, South Audley-street (1913), 29 T. L. R. 286 ; *All Saints, Westbury* (Vicar & Churchwardens) (1914), 30 T. L. R. 389 ; *Re* **TENBURY PARISH CHURCH** (1919), 36 T. L. R. 188 ; *Re* **ST. LUKE'S, SOUTHPORT** (1920), 36 T. L. R. 733.

**2876.** — — — — —.]—Where the erection of a chancel screen with a rood loft & beam surmounted by the figures of our Lord upon the Cross, the Virgin Mary, & St. John is proposed as an architectural decoration & there is no probability of the figures being subjected to the superstitious reverence, the Consistory Ct. is entitled, in its discretion, to grant a faculty for the erection.—**ALL SAINTS, WESTBURY (VICAR & CHURCHWARDENS)** (1911), 30 T. L. R. 389.

*Annotation* :—**Refd.** *Re* St. Luke's, Southport (1920), 36 T. L. R. 733.

**2877. Screen surmounted by candles—Whether permissible.**]—**CIFTON v. RIDSDALE**, No. 2000, *post*.

**2878. Screen surmounted by rood loft—Whether permissible.**]—**ST. JOHN THE BAPTIST, TIMBERHILL (VICAR, ETC.) v. ST. JOHN THE BAPTIST, TIMBERHILL (RECTORS, ETC.)**, No. 2801, *ante*.

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2879. ———.]—PAIGNTON (VICAR) *v.* ALL HAVING INTEREST, No. 2862, *ante*.

2880. ———.]—ALL SAINTS, WESTBURY (VICAR & CHURCHWARDENS), No. 2876, *ante*.

2881. Rood beam—With crucifix & figures of Virgin & St. John—Whether permissible.]—ST. JOHN THE BAPTIST, TIMBERHILL (VICAR, ETC.) *v.* ST. JOHN THE BAPTIST, TIMBERHILL (RECTORS, ETC.), No. 2861, *ante*.

2882. ———.]—A rood with the accompanying figures of the Virgin Mary & St. John erected on a beam surmounting the chancel screen is not a lawful church ornament in churches of the Church of England.

The vicar & churchwardens of a parish church in the diocese of London petitioned the ordinary to authorise by faculty the erection of a beam across the entrance to the chancel of their parish church bearing the following inscription in Latin on its face, "O Lord God, Lamb of God, Son of the Father, that takest away the sins of the world," & surmounted by, on a central cross, the figure of our Lord, "crowned & reigning on the tree," & towards the ends of the beam on the one side the figure of the Virgin Mary & on the other side the figure of St. John; the crucifix & the other figures to be carved in wood, the height of the crucifix to be thirteen feet ten inches, & the two figures of the Virgin Mary & St. John to be each three feet six inches high & to be raised above the level of the beam on brackets or pedestals:—*Held*: the faculty petitioned for must be refused, as the rood beam surmounted as proposed by the crucifix & the accompanying figures of the Virgin Mary & St. John was an illegal church ornament forbidden in churches of the Church of England.—ST. PAUL, BOW COMMON (VICAR & CHURCHWARDENS) *v.* ST. PAUL, BOW COMMON (INHABITANTS), [1909] P. 245; 25 T. L. R. 425.

*Annotation*:—*Reid. Re St. Luke's, Southport* (1920), 36 T. L. R. 733.

2883. ———.]—The vicar & churchwardens of a parish church in the diocese of Bath & Wells petitioned the ordinary for a faculty for, amongst other alterations in the church, the erection of a carved oaken beam across the chancel arch to be surmounted by a crucifix & the figures of St. John & the Virgin Mary, & also for certain structural alterations so that one of the church bells might be rung from the interior of the church. It appeared in evidence that no exceptional services were held in the church, but that ornaments of the minister other than surplices were worn by the officiating clergy in the Communion Service; that the sacrament was reserved to take to the sick; that there was a crucifix in the vestry & also one in the church; & that one of the church bells was rung from the belfry or tower of the church at certain moments in the Communion Service as a sanctus bell. It further appeared that the vicar of the parish intended that the proposed crucifix upon the rood beam with its attendant figures should be an aid to devotion & a defence against erroneous teaching, & that the main object of the proposed alteration in respect of one of the church bells was that the bell might be rung from the interior of the church during the celebration of the Holy Communion.

The Chancellor of the diocese of Bath & Wells refused in his discretion to grant a faculty for the erection of a crucifix & its attendant figures upon the rood beam, being of opinion that the erection was not contemplated simply & purely as a

matter of decoration. He also refused to sanction by faculty the alterations proposed to enable one of the church bells to be used from the interior of the church as a sanctus bell. The tolling or ringing of one of the church bells of a parish church during the consecration prayer in the Communion Service at the moment of the elevation of each of the sacred elements as a sanctus bell is illegal.—ST. JOHN THE EVANGELIST, CLEVEDON (VICAR & CHURCHWARDENS) *v.* ALL HAVING INTEREST, [1909] P. 6.

*Annotation*:—*Reid. Re St. Luke's, Southport* (1920), 36 T. L. R. 733.

2884. ——— With inscription—Whether permissible.]—ST. PAUL, BOW COMMON (VICAR & CHURCHWARDENS) *v.* ST. PAUL, BOW COMMON (INHABITANTS), No. 2882, *ante*.

2885. ———.]—The ct. granted a faculty for the removal from a rood beam of the inscription "O Lord God, Lamb of God, Son of the Father, that takest away the sins of the World," & when that was done authorising the retention of the figures of the Saviour, St. Mary, & St. John on the rood beam.—ST. PAUL, BOW COMMON (1912), 28 T. L. R. 584.

*Annotation*:—*Reid. Re St. Luke's, Southport* (1920), 36 T. L. R. 733.

(g) *Crosses and Crucifixes.*

2886. Cross—Whether permissible.]—LIDDELL *v.* WESTERTON, No. 2762, *ante*.

— On Communion Table.]—*See* Nos. 2788, 2797, *ante*.

— On Chancel Screen.]—*See* Nos. 2859, 2862, 2871, *ante*, No. 2900, *post*.

2887. Crucifix—Whether permissible.]—*Re* ST. MARK'S, MARLBOROUGH ROAD, ST. MARK'S (VICAR) *v.* ST. MARK'S (PARISHIONERS), No. 2786, *ante*.

2888. ———.]—An isolated crucifix, without incidents or adjuncts, is of itself unlawful as an architectural decoration in or upon a church. The petitioners applied for a faculty authorising the erection, as a decoration, on the outside south wall of a parish church, of a war shrine containing a figure of Christ on the Cross, with an inscription in memory of the men from the parish who lost their lives in the Great War:—*Held*: the faculty must be refused, because an isolated crucifix, not associated with other figures so as to embody the scene of the crucifixion & form a group capable of artistic treatment, was an unlawful decoration, & because it was an image to which it was probable that superstitious regard or reverence might be paid.—*Re* TENBURY PARISH CHURCH (1919), 36 T. L. R. 188.

*Annotation*:—*Reid. Re St. Luke's, Southport* (1920), 36 T. L. R. 733.

2889. ———.]—*Re* ST. LUKE'S, SOUTHPORT (1920), 36 T. L. R. 733.

2890. ——— Ceremonial use.]—ELPHINSTONE *v.* PURCHAS, No. 2751, *ante*.

2891. ——— What court will consider.]—CHRIST CHURCH, LEEDS, CASE (1898), cited, [1901] P. 202.

*Annotation*:—*Reid. Re St. Anselm, Pinner*, [1901] P. 202.

2892. ———.]—(1) A crucifix is neither a lawful church ornament nor an architectural decoration the retention of which in a church can be authorised by faculty, & where a crucifix has been introduced into a parish church the ordinary has jurisdiction to direct its removal by the churchwardens without proof that it is likely to have superstitious reverence paid to it.

(2) A parishioner of a parish in the City of London whose name is on the rate-book as occupier of a room in the parish taken solely to enable him to bring a civil suit in the ct., has a sufficient

interest to promote a cause of faculty to obtain the removal of unlawful church ornaments out of the parish church of the parish of which he is a parishioner.

(3) The curate in charge of a parish in which the incumbent was non-resident introduced into the parish without lawful authority two crucifixes, one a movable crucifix of brass about eighteen inches high placed on a Tabernacle for the Reserved Sacrament standing on the Retable in the chancel of the church, & the other a crucifix three feet in height affixed to the north wall of the church by the side of & slightly above the level of the pulpit; & during his tenure of office, from about 1880 to 1894, there were in the church, besides these crucifixes & Tabernacle, a censer & the Stations of the Cross; incense was used in the church, & during the Communion Service the wine was mixed with water. Between 1894 & 1898 a succeeding curate, the crucifixes & Tabernacle still remaining in the church, introduced there a picture of the Virgin Mary, & the next year a shrine to the Virgin Mary called an "Altar of Repose," & a statue of the Madonna & Child; & services were conducted in the church in which the crucifixes were used by the minister & members of the congregation for superstitious purposes. Afterwards an application was made by three parishioners for a faculty to authorise the removal of the crucifixes out of the church, & the incumbent & churchwardens appeared as opponents, & prayed for a confirmatory faculty for the retention of the crucifixes.

It appeared that several past churchwardens & many of the parishioners had disapproved of & protested against the introduction & retention of the crucifixes, & that in 1898 another curate in charge had been appointed, whilst there was no evidence that during the time he had been the officiating minister the crucifixes had been used superstitiously.

It further appeared that before the hearing of the suit the Tabernacle for the Reserved Sacrament had been removed out of the church:—*Held*: the ct. must refuse the prayer for a confirmatory faculty, & issue a faculty directing & authorising the churchwardens as officers of the ordinary to remove the crucifixes out of the church, because—first, they were either in themselves illegal church ornaments or illegal architectural decorations; & secondly, if not in themselves illegal as church ornaments or architectural decorations, they were—having regard to the facts that they were introduced into the church for superstitious purposes, & were so used for nearly twenty years, & might be so used again, & had been a cause of offence to several churchwardens & parishioners, some of whom, though supporting a resolution of vestry against the petitioners, did not thereby express any opinion for their retention—articles & things the retention of which in the church it would be an unwise exercise of the discretion of the ct. to authorise.

(4) *Semble*: a Tabernacle for the reception of the Reserved Sacrament is not a lawful church ornament.—*KENSIT v. ST. ETHELBURGA, BISHOPSGATE WITHIN (RECTOR)*, [1900] P. 80; 15 T. L. R. 549.

*Annotations*:—As to (1) & (3) *Fold*. *Davey v. Hinde*, [1901] P. 95. *Re St. Anselm, Pinner*, [1901] P. 202; *Davey v. Hinde*, [1903] P. 221; *Re St. Luke's, Southport* (1920), 36 T. L. R. 733. As to (4) *Re St. Luke's, Southport*, [1901] P. 95; *Gore-Booth v. Manchester, Bp.* (1920), 89 L. J. K. B. 1123.

2893. —————.]—There is no legislation in force, either secular or ecclesiastical, which forbids crucifixes, but the ct. ought not to allow

the erection of a crucifix if improper practices are likely to ensue.—*FIELD v. OMMANNEY* (1920), 36 T. L. R. 695.

*Annotation*:—*Re St. Luke's, Southport* (1920), 36 T. L. R. 733.

2894. —————.]—By pulpit—Whether permissible.—*DAVEY v. HINDE*, No. 2768, *ante*.

2895. —————.]—*MARKHAM v. SHIREBROOK OVERSEERS*, No. 1115, *ante*.

2896. —————.]—*ST. MAGNUS THE MARTYR, LONDON BRIDGE* (1924), *Times*, Oct. 22.

2897. —————.]—Surmounted by canopy or crown—Whether permissible.—*DAVEY v. HINDE*, No. 2903, *post*.

2898. —————.]—As war memorial shrine—Outside church—Whether permissible.—*Re ST. LUKE'S, SOUTHPORT*, No. 2889, *ante*.

2899. —————.]—*Re TENBURY PARISH CHURCH*, No. 2888, *ante*.

—————.]—On chancel screen.—*See Nos.* 2859, 2862, 2871, *ante*, No. 2900, *post*.

—————.]—On Reredos.—No. 2812, *ante*.

#### (h) Stations of the Cross.

2900. *Whether permissible*.—On the top & in the centre of a screen, stretching across a church at the entrance to the chancel, was placed a figure of Our Saviour on the Cross, in full relief, & about eighteen inches long, facing the congregation. A row of candles at distances of about a foot apart ran along the top of the screen, & were continued up the central portion, which was raised, the last candles coming close up to the crucifix on either side:—*Held*: in a proceeding under Public Worship Regulation Act, 1874 (c. 85) (1), as it was not proved that the candles were used for other than lighting purposes, their position & the manner in which they were used, did not constitute a ceremonial observance, & were not, therefore, illegal; (2) the figure, being in danger of becoming the object of superstitious reverence, must be removed from the cross. (3) *Semble*: the set of delineations used in Roman Catholic churches, & commonly called "Stations of the Cross & Passion," are decorations forbidden by law in churches of the Church of England. (4) In cases under the Public Worship Regulation Act, 1874 (c. 85), where questions of law & fact are involved, the ct. will hear two counsel on each side, & one counsel in reply.

(5) It is unlawful for the minister in the Church of England to consecrate or receive the sacrament when there are less than three communicants besides himself.—*CLIFTON v. RIDSDALE* (1876), 1 P. D. 316; 35 L. T. 432; 41 J. P. 70; *on appeal*, *sub nom.* *RIDSDALE v. CLIFTON* (1877), 2 P. D. 276, P. C.

*Annotations*:—As to (1) *Consd.* *Re St. Anselm, Pinner*, [1901] P. 202; *Re St. Luke's, Southport* (1920), 36 T. L. R. 733. *Re St. Luke's, Southport*, [1902] A. C. 644; *St. John the Baptist, Timberhill (Rector, etc.) v. St. John the Baptist, Hughes v. Edwards* (1877), 2 P. D. 301. *Consd.* (2) *Dist.* *Re St. Luke's, Southport*, [1901] P. 71; *St. John the Baptist, Timberhill (Rector, etc.) v. St. John the Baptist, Timberhill (Rector, etc.)*, [1895] P. 71; *St. John, Pendlebury (Vicar, etc.) v. St. John, Pendlebury (Parishioners)*, [1895] P. 178; *Barham, Suffolk (Rector, etc.) v. Barham, Suffolk (Parishioners)*, [1896] P. 256; *Great Bardfield (Vicar) v. All having Interest*, [1897] P. 185; *Re St. Mark's, Marylebone Road, St. Mark's (Vicar) v. St. Mark's (Parishioners)*, [1898] P. 114; *Re St. Anselm, Pinner*, [1901] P. 202. *Apld.* *Patington (Vicar) v. All having Interest*, [1905] P. 111. *Consd.* *Markham v. Shirebrook Overseers*, [1906] P. 239; *Re Tenbury Parish Church* (1919), 36 T. L. R. 148; *Re St. Luke's, Southport* (1920), 36 T. L. R. 733. *Re St. Lawrence, Pittington* (1880), 5 P. D. 131; *St. v. London, Bp.* (No. 2) (1896), 63 L. T. 819; *Allcroft v. London, Bp. & St. Paul's (Dean & Chapter)*, *Lighton v. London, Bp. & St. Paul's (Dean & Chapter)* (1891), 61 L. J. Q. B. 62; *Richmond (Vicar) & St. Matthias, Richmond (Chapelwardens) v. All Persons*



**Sect. 1.—Divine service generally: Sub-sect. 4, B.**  
**(h), (i), (j), (k), (l), (m), (n) & (o).]**

having interest, etc., [1897] P. 70; *Re Christ Church, Railing*, [1906] P. 289; *St. John the Evangelist, Clevedon* (Vicar & Churchwardens) v. All having interest, [1909] P. 6; *St. Paul, Bow Common* (Vicar & Churchwardens) v. *St. Paul, Bow Common* (Inhabitants), [1909] P. 245; *St. Paul, Bow Common* (1912), 28 T. L. R. 584; *Re St. Paul's, Carlisle*, [1919] P. 134. *As to (3) Conseq.* *Re St. Mark's, Marylebone Road, St. Mark's (Vicar) v. St. Mark's (Parishioners)*, [1898] P. 114; *Markham v. Shirebrook Overseers*, [1906] P. 239. *Reid. Davey v. Hinde*, [1903] P. 221. *Generally, Mentd.* *Combe v. Edwards* (1877), 2 P. D. 354; *Howard v. Bodington* (1877), 2 P. D. 203; *Hudson v. Tooth* (1877), 2 P. D. 125; *Serjeant v. Dale* (1879), 43 J. P. 220; *Combe v. De la Bere* (1881), 6 P. D. 157; *Heywood v. Manchester, Bp.* (1884), 12 Q. B. D. 404; *The Vera Cruz* (No. 2) (1884), 9 P. D. 96; *Tooth v. Power*, [1891] A. C. 284; *Re Robinson, Wright v. Tugwell*, [1897] 1 Ch. 85; *Fowke v. Berington*, [1914] 2 Ch. 308; *Gore-Booth v. Manchester, Bp.* (1920), 89 L. J. K. B. 1123.

**2901.** —.—.]—*Re St. MARK'S, MARYLEBONE ROAD, ST. MARK'S (VICAR) v. ST. MARK'S (PARISHIONERS)*, No. 2786, *ante*.

**2902.** —.—.]—*DAVEY v. HINDE*, No. 2768, *ante*.

**2903.** —.—.]—The opponents in a cause of faculty instituted in the Consistory (A. of Chichester for the purpose of obtaining a faculty for the removal from a parish church in the diocese of Chichester of certain ornaments & articles of church furniture objected to as illegal, after denying in their answer that the promoter was a parishioner or resident inhabitant of the parish, & submitting that he had therefore no interest cognisable by the ct., alleged therein that before any decision or final determination of the suit the Bishop of Chichester should be first consulted & his consent had, & earnestly craved his judgment in the premises, & complained & supplicated that the bishop should examine & determine the cause in his own proper person. The Chancellor of the diocese heard the cause sitting alone, the bishop not being present, & petitioner having objected to the bishop being consulted, determined it, delivering judgment without consulting the bishop, holding that petitioner had a sufficient interest to promote the suit, & dealing with the merits of the case. Subsequently, a writ of prohibition having issued prohibiting the Chancellor from proceeding with the cause until he had consulted the Bishop & obtained his consent to hear, decide & determine the suit, the bishop authorised the Chancellor to hear, decide & determine the suit. Thereupon a second hearing of the suit took place before the Chancellor; the pleadings filed & the evidence taken on the former proceedings being treated as filed & taken anew, & additional oral evidence being given both on the question of interest & on the merits; the substance of the evidence on the question of interest being that the parish church was a new parish church within a separate ecclesiastical parish formed under New Parishes Act, 1856 (c. 101); that petitioner at the date of his petition, & thenceforth during the proceedings in the suit, was a weekly tenant of a six-roomed house in this ecclesiastical parish, five rooms in which he underlet, keeping in his own occupation one room into which he occasionally went, but where he had never slept; that the house had been taken by him for the sole purpose of giving him a *locus standi* to bring the suit; & that he was entered in the rate-book of the civil parish out of which the ecclesiastical parish had been formed from before the commencement of the suit up to the time of the hearing, & had paid all rates due & payable by him during that period:—*Held*: (1) petitioner had a sufficient interest to entitle him to promote the suit.

*Held, also, a faculty must issue authorising the promoter to remove from the parish church the following ornaments & articles of church furniture objected to as illegal*: (2) fourteen Stations of the Cross hanging on the walls of the church; (3) three confessional boxes; (4) all the crucifixes in the church with any canopy or crown over any of them; (5) the tabernacle on or over the communion table in the chancel & the lamp burning before it; (6) the tabernacle on or over the communion table in the side chapel used for the reservation of the sacrament & the light burning before it; (7) two movable holy water stoups; (8) the image of the Good Shepherd on a pedestal at the west end of the church, & the candles on each side of it & the lighted lamp in front of it; (9) the image of the Virgin Mary on a pedestal against the chancel screen, & the candles on each side of it & the vases of flowers, & the lighted blue lamp in front of it & the curtain & canopy or crown or star over it; (10) the images of the Sacred Heart & St. Joseph on either side of the communion table in the side chapel.—*DAVEY v. HINDE*, [1903] P. 221.

*Annotation*:—*As to (4) Reid. Re St. Luke's, Southport* (1920), 36 T. L. R. 733.

**2904.** —.—.]—*MARKHAM v. SHIREBROOK OVERSEERS*, No. 1115, *ante*.

*See, also*, No. 2891, *post*.

**(i) Images.**

**2905. General rule.**—*ST. JOHN, PENDLEBURY (VICAR, ETC.) v. ST. JOHN, PENDLEBURY (PARISHIONERS)*, No. 2845, *ante*.

**2906.** —.—.]—The task of the Ecclesiastical Judge when asked to sanction the introduction of an image into a church is not the simple one of applying an inflexible rule of exclusion, but he has to consider whether if he grants the faculty there is or is not, in the circumstances of the particular case, a danger, & if so, what degree of danger, of the image being used for purposes condemned by the 22nd Article (SIR LEWIS DIBDIN).—*ST. MAGNUS THE MARTYR, LONDON BRIDGE* (1924), *Times*, Oct. 22.

**2907. Ceremonial use—Whether permissible.**—*ELPHINSTONE v. PURCHAS*, No. 2751, *ante*.

**2908. The Good Shepherd—At west end of church—With candles & lamp—Whether permissible.**—*DAVEY v. HINDE*, No. 2768, *ante*.

**2909.** —.—.]—*DAVEY v. HINDE*, No. 2903, *ante*.

**2910.** —.—.]—*By chancel arch—As architectural decoration.*—*MARKHAM v. SHIREBROOK OVERSEERS*, No. 1115, *ante*.

**2911. The Sacred Heart—Beside communion table in side chapel—Whether permissible.**—*DAVEY v. HINDE*, No. 2768, *ante*.

**2912.** —.—.]—*DAVEY v. HINDE*, No. 2903, *ante*.

**2913. Our Saviour in act of blessing—Whether permissible—Representation of historical event.**—The vicar & churchwardens of a parish church applied for a faculty to authorise them to remove the organ of the church from the east end of the north aisle to another position in the church; to separate the end of the north aisle from which the organ was so proposed to be removed by a screen from the rest of the church; to decorate the portion of the church within the proposed screen in conformity with the decoration of the rest of the church, & with that view, to place at the east end of the north aisle a figure of Our Saviour represented as standing & in the act of blessing, the figure to be sculptured in stone in high relief, under life size, about five feet high, &



surrounded by a frame in which were to be representations of angels, & the whole to be supported on a single stone pedestal springing from the floor of the church.

The application was not opposed, & a faculty was granted as prayed, the ordinary being of opinion that the alteration of the position of the organ would be an improvement for the parish, that the rest of the alterations were desirable & advantageous, & that the proposed figure might be lawfully erected as a representation of an historical event set up for the purpose of decoration only.—*Re* CHRIST CHURCH, EALING, [1906] P. 289.

**2914. The Virgin Mary—Against chancel screen—With candles, flower & lamp—Whether permissible.**—DAVEY v. HINDE, No. 2768, *ante*.

**2915.** ————]—DAVEY v. HINDE, No. 2903, *ante*.

**2916. The Virgin & Child—Probability of veneration.**—ST. MAGNUS THE MARTYR, LONDON BRIDGE (1921), *Times*, Oct. 22.

**2917. St. Joseph—Beside Communion Table in side chapel—Whether permissible.**—DAVEY v. HINDE, No. 2768, *ante*.

**2918.** ————]—DAVEY v. HINDE, No. 2903, *ante*.

**Images on chancel screen.**—*See* Sub-sect. 1, B. (f), *ante*.

**Images on reredos.**—*See* Nos. 185, 2839, 2842, *ante*.

(j) *Tables of the Ten Commandments, Lord's Prayer and Creed.*

**2919. Position—At east end of nave.**—LIDDELL v. WESTERTON, No. 2762, *ante*.

**2920.** ————]—Each side of chancel screen—Whether sufficient.]—LIDDELL v. BEAL, No. 1125, *ante*.

**2921.** ————]—Removal to west end of church.]—The ct. granted a faculty for the removal of the Ten Commandments from a reredos which was about to be placed at the east end of a church, & the placing of them in the west end, it being impossible to place them at the east end without removing certain monuments which were there already, & the west end being the place where they could be most conveniently seen & read.—ST. GILES'S, CRIPPLEGATE (1901), 17 T. L. R. 672.

**2922. Concealment—By curtains—Whether permissible.**—*Re* ST. MARK'S, MARYLEBONE ROAD, ST. MARK'S (VICAR) v. ST. MARK'S (PARISHIONERS), No. 2786, *ante*.

**2923.** ————]—By dossal—Whether permissible.]—ST. ANDREW'S, HAVERSTOCK-HILL, No. 2784, *ante*.

(k) *Holy Water Stoups.*

**2924. Whether permissible.**—DAVEY v. HINDE, No. 2768, *ante*.

**2925.** ————]—Movable stoup.]—DAVEY v. HINDE, No. 2903, *ante*.

(l) *Confessional Boxes.*

**2926. Whether permissible.**—DAVEY v. HINDE, No. 2768, *ante*.

**2927.** ————]—DAVEY v. HINDE, No. 2903, *ante*.

(m) *Screens, Choir Stalls, and Side Chapels.*

**2928. Screen—Whether permissible—Screen separating south transept from body of church.**—BRADFORD v. FRY, No. 1784, *ante*.

**2929.** ————]—Screens across aisles.]—ST. JOHN THE BAPTIST, TIMBERHILL (VICAR, ETC.) v. ST. JOHN THE BAPTIST, TIMBERHILL (RECTORS, ETC.), No. 2861, *ante*.

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**2930.** ————]—Choir screen.]—ST. JOHN THE BAPTIST, TIMBERHILL (VICAR, ETC.) v. ST. JOHN THE BAPTIST, TIMBERHILL (RECTORS, ETC.), No. 2861, *ante*.

—Chancel screen.]—*See* Sub-sect. 4, B. (f), *ante*.

**2931. Choir stalls—& screen—Whether permissible.**—ST. JOHN THE BAPTIST, TIMBERHILL (VICAR, ETC.) v. ST. JOHN THE BAPTIST, TIMBERHILL (RECTORS, ETC.), No. 2861, *ante*.

**2932.** ————]—Position of.]—HENDON PARISH CHURCH, No. 2872, *ante*.

**2933.** ————]—Removal to make way for procession of clergy.]—ST. ANDREW'S, HAVERSTOCK-HILL, No. 2784, *ante*.

**2934. Side chapels—Whether permissible—Separated from body of church.**—*Re* ST. PAUL'S, WILTON PLACE, No. 2826, *ante*.

**2935.** ————]—ST. ANDREW'S, HAVERSTOCK-HILL, No. 2784, *ante*.

**2936.** ————]—Portion of aisle.]—Faculty granted authorising the fitting up of a small portion of the north aisle of a church with a Holy Table & prayer & reading desks, such portion of the aisle to be used as a side chapel.—ST. PAUL'S, BURETFORD (1909), 25 T. L. R. 228.

**2937.** ————]—ST. MARGARET'S TOWTHER PARK, No. 2824, *ante*.

—Communion Table in.]—*See* Sub-sect. 1, B. (h) iii., *ante*.

(n) *Lights.*

**On Communion Table.**—*See* Nos. 2762, 2812, 2814, *ante*.

**On retable.**—*See* Nos. 2812, 2815, *ante*.

**On chancel screen.**—*See* No. 2900, *ante*.

**Before images.**—*See* Nos. 2768, 2903, *ante*.

**Before tabernacle for reservation of sacrament.**—*See* Nos. 2768, 2903, *ante*.

**Held each side of gospeller.**—*See* No. 2812, *ante*.

(o) *Other Ornaments.*

**2938. Paintings of the Apostles—Isolated figures.**—COCKE v. TALLENTS (1981), cited in L. R. 4 A. & E., at pp. 330, 373.

*Annotations.*—*Consd.* Phillpotts v. Boyd (1875), L. R. 6 P. C. 435. *Reid.* *Re* St. Luke's, Southport (1920), 36 T. L. R. 733.

**2939 Organs Whether necessary or ornamental.**—ST. JOHN'S, MARGATE (CHURCHWARDENS) v. ST. JOHN'S, MARGATE (PARISHIONERS), No. 1749, *ante*.

**2940.** ————]—Discretion of ordinary.]—The ordinary is to judge whether the circumstances of the parish offer an objection to the erection of an organ; the parish is to decide on any expenses to be incurred. A faculty confirming the erection of an organ binds the parish to nothing prospectively, & a clause providing against future expenses falling on the parish need not be inserted.—JAY v. WEBBER (1830), 3 Hag. Ecc. 4; 162 E. R. 1061.

*Annotation.*—*Reid.* L. C. C. v. Dundas, [1901] P. 1.

**2941. Coloured coverings for sacramental vessels—Whether permissible.**—A clergyman has no right to make alterations in the interior of his church without a faculty first being obtained, or at least the private sanction of the bishop or archdeacon. Coloured coverings for sacramental vessels, a movable shelf or super altar, & glass jugs containing water to be used at the administration of the sacrament, will be ordered to be removed.—EVANS v. KINGSFORD (1866), 31 J. P. 179.

**2942. Glass jugs of water for sacrament—Whether permissible.**—EVANS v. KINGSFORD, No. 2941, *ante*.

*See, also*, Nos. 36, 2815, *ante*.

**Sect. 3.—Holy Communion: Sub-sects. 1, 2 & 3.]**

(6) the doctrine that adoration is due to the consecrated elements is contrary to law, & has been condemned (*Martin v. Machonochie*, No. 2048, *ante*); the Church of England has forbidden all acts of adoration to the sacrament, understanding by that the consecrated elements: she has been careful to exclude any act of adoration on the part of the minister, at or after the consecration of the elements, & to explain the posture of kneeling prescribed by the Rubric: Article 28 lays down that "the Sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped." In Article 25 it is affirmed that "the Sacraments were not ordained by Christ to be gazed upon, or to be carried about, but that we should duly use them."

(7) In the absence of a charge of any outward act of adoration, a general charge:—*Held*: in the circumstances, not sufficient to support a penal proceeding.

(8) The successive alterations & omissions in the Book of Common Prayer, by which words or passages, inculcating particular doctrines, or assuming a belief in them, have been struck out, are evidence that the Church has ceased to affirm those doctrines; but the effect of such changes, when they stand alone, is that it ceases to be unlawful to contradict such doctrines, & not that it becomes unlawful to maintain them.

(9) Though it has been the practice of the Arches Ct., on the remission of arts. directed on appeal to be reformed as to a particular charge, for the judge himself to reform the arts. by striking out such parts of the arts. as he conceives to be within the original decree appealed from & confirmed, notwithstanding objections made by the promoter of the cause, such practices, as tending to create delay, if not a miscarriage of justice, if the judge should erroneously strike out parts not affected by the Order in Council, ought to be discontinued, & before an appeal from any decree directing the reformation of arts. is perfected, the actual reformation which appears to the judge to be required should be made by him & appear on the face of the decree that the very passages directed to be omitted may be brought under the judgment of the Ct. of Appeal.

(10) It is not the part of the Ct. of Arches nor of the Judicial Committee to usurp the functions of a synod or council. Their duty is to ascertain whether statements are so far repugnant to or contradictory of the language of the arts. & formularies, construed in their plain meaning, that they should require judicial condemnation.—*SHEPPARD v. BENNETT (SECOND APPEAL)* (1871), L. R. 4 P. C. 371; 9 Moo. P. C. C. N. S. 140; Bro. Ecc. Rep. 209; 41 L. J. Eccl. 1; 26 L. T. 923; 30 J. P. 420; 20 W. R. 804; 17 E. R. 470, P. C.; *affg.* (1870), L. R. 3 A. & E. 167.

*Annotations*:—*Generally*, *Mentd.* R. v. London, Bp. (1888), 23 Q. B. D. 414; R. v. Canterbury, Archbp., [1902] 2 K. B. 503.

**2988. Number of communicants.—At least three.]**—CLIFTON v. RIDSDALE, No. 2900, *ante*.

**2989. Bread & wine—Pure wheaten bread—Whether wafers or wafer bread permissible.]**—HEBBERT v. PURCHAS, No. 36, *ante*.

**2990.** ————.]—RIDSDALE v. CLIFTON, No. 1145, *ante*.

**2991.** ————.]—MARTIN v. MACKONOCHE (SECOND SUIT), No. 2815, *ante*.

**2992.** ———— Wine mixed with water—Whether permissible.]—MARTIN v. MACKONOCHE, No. 2048, *ante*.

**2993.** ————.]—HEBBERT v. PURCHAS, No. 36, *ante*.

**2994.** ————.]—READ v. LINCOLN (BP.), No. 1146, *ante*.

*See, also*, No. 2941, *ante*.

**2995.** ———— Substitution of water for wine—Whether permissible.]—BEDDOE v. HAWKES (1888), 4 T. L. R. 315.

——— Provision by parish.]—*See* Nos. 1038, 1039, *ante*.

**Ornaments of the Communion Table.]**—*See* Sect. 1, sub-sect. 4, B. (b) ii., *ante*.

**Vestments.]**—*See* Sect. 1, sub-sect. 4, C., *ante*.

**2996. Offertory—Disposal of.]**—MARSON v. UNMACK, No. 441, *ante*.

**SUB-SECT. 2.—RITES AND CEREMONIES.**

**2997. Position of minister—At north side or end of table—During service generally.]**—HEBBERT v. PURCHAS, No. 36, *ante*.

**2998.** ————.]—READ v. LINCOLN (BP.), No. 1146, *ante*.

**2999.** ———— During consecration.]—HEBBERT v. PURCHAS, No. 36, *ante*.

*See, also*, Nos. 2786, 2788, 2872, *ante*.

**3000.** ———— Whether facing south or east.]—HEBBERT v. PURCHAS, No. 36, *ante*.

**3001.** ———— Communicants able to see bread broken.]—HEBBERT v. PURCHAS, No. 36, *ante*.

**3002.** ————.]—RIDSDALE v. CLIFTON, No. 1145, *ante*.

**3003.** ————.]—SERJEANT v. DALE, No. 2905, *ante*.

**3004.** ———— & cup taken.]—HEBBERT v. PURCHAS, No. 36, *ante*.

**3005.** ————.]—RIDSDALE v. CLIFTON, No. 1145, *ante*.

**3006.** ————.]—(1) It is unlawful for the minister to stand during the prayer of consecration in the Communion Service so that the manual acts of breaking the bread & taking the cup into his hand are not visible to the people.

(2) The making of the sign of the cross in giving the absolution & in giving the benediction in the Communion Service is unlawful.—*READ v. LINCOLN (BP.)*, [1891] P. 9; 64 L. T. 149; 7 T. L. R. 81; *affd.*, [1892] A. C. 644, P. C.

*Annotations*:—*As to* (1) *Reid*, Hendon Parish Church (1912), 28 T. L. R. 438. *Generally*, *Mentd.* St. Paul, Camden Square (1897), 14 T. L. R. 156; Assheton-Smith v. Owen (1905), 94 L. T. 42; Wimbledon (Vicar & Churchwardens) v. Eden, Re St. Mark's, Wimbledon, [1908] P. 167; Fowke v. Berlington, [1914] 2 Ch. 308; Gore-Booth v. Manchester, Bp., [1920] 2 K. B. 412; Commonwealth Shipping Representative v. Peninsular & Oriental Branch Service, [1923] A. C. 191.

**3007. Reading the gospel—Lights held each side of gospeller—Whether permissible.]**—SUMNER v. WIX, No. 2812, *ante*.

**3008. Attitude of minister—"Standing before the table."]**—MARTIN v. MACKONOCHE, No. 2948, *ante*.

**3009.** ———— Kneeling during prayer of consecration—Whether permissible.]—MARTIN v. MACKONOCHE, No. 2948, *ante*.

**3010.** ———— What constitutes kneeling.]—MARTIN v. MACKONOCHE, No. 2814, *ante*.

**3011.** ———— After consecration—"All meekly kneeling."]—MARTIN v. MACKONOCHE, No. 2948, *ante*.

**3012.** ———— Obsequies during consecration—Whether permissible.]—MARTIN v. MACKONOCHE, No. 3017, *post*.

**3013. Singing the Agnus Dei—Whether per-**

Prayer Book; & the term "ornaments" is confined to those articles; (9) though there may be articles not expressly mentioned in the rubric the use of which would not be restrained, they must be articles which are consistent with, & subsidiary to, the services; as an organ for singing, a credence table from which to take the sacramental bread & wine, cushions, hassocks, etc.

According to this rubric, the following practices are unlawful: (10) the elevation during or after the prayer of consecration of the paten & cup; (11) the using of incense in the celebration of the Holy Communion; (12) the mixing of water with the wine used in the administration of the Holy Communion.

(13) *Semble*: the words "all meekly kneeling" in the rubric following the prayer of consecration, refer to the celebrant, as well as to the people.

(14) The terms "rite" & "ceremony," as used in the Prayer Book are terms of ecclesiastical & ritual art, & are to be construed with reference to their use in the works of writers on ritual, unless they receive a different meaning from a comparison of other passages or parts in the Prayer Book or statute in which they are found. There is a legal distinction between a rite & a ceremony; a rite consists in services expressed in words; a ceremony in gestures or acts preceding, accompanying or following the utterance of those words.—*MARTIN v. MACKONCHIE* (1868), L. R. 2 P. C. 365; 5 Moo. P. C. C. N. S. 500; Bro. Ecc. Rep. 103; 38 L. J. Eccl. 1; 19 L. T. 503; 33 J. P. 35; 17 W. R. 187; 16 E. R. 603, P. C.; *varying*, S. C. *sub nom.* *MARTIN v. MACKONCHIE*, *FLAMANK v. SIMPSON*, L. R. 2 A. & E. 116; *subsequent proceedings*, *sub nom.* *MARTIN v. MACKONCHIE* (1869), L. R. 3 P. C. 52, 409, P. C.

*Annotations*:—*As to* (1) *Consd.* *Hebbert v. PURCHAS* (1871), L. R. 3 P. C. 605; *Ridsdale v. CLIFTON* (1877), 2 P. D. 276. *Reid.* *Martin v. Mackonochie* (1869), L. R. 3 P. C. 52; *Heywood v. Manchester*, Bp. (1884), 12 Q. B. D. 401. *As to* (2) *Reid.* *Martin v. Mackonochie* (1869), L. R. 3 P. C. 52. *As to* (3) *Apld.* *Elphinstone v. PURCHAS* (1870), L. R. 3 A. & E. 66. *Reid.* *Sheppard v. Bennett* (Second Appeal) (1872), L. R. 4 P. C. 371. *As to* (4) *Consd.* *Sumner v. Wix* (1870), L. R. 3 A. & E. 58; *St. Paul, Camden Square* (1897), 11 T. L. R. 85, 156. *Reid.* *Martin v. Mackonochie* (1869), L. R. 3 P. C. 52; *Elphinstone v. PURCHAS* (1870), L. R. 3 A. & E. 66; *Heywood v. Manchester*, Bp. (1884), 12 Q. B. D. 401; *Read v. Lincoln*, Bp., [1892] A. C. 644; *Gore-Booth v. Manchester*, Bp., [1920] 2 K. B. 412. *As to* (5) *Consd.* *Sumner v. Wix* (1870), L. R. 3 A. & E. 58; *St. Paul, Camden Square* (1897), 11 T. L. R. 85, 156. *Reid.* *Elphinstone v. PURCHAS* (1870), L. R. 3 A. & E. 66; *Clifton v. Ridsdale* (1874), 1 P. D. 316; *Read v. Lincoln*, Bp., [1892] A. C. 644. *As to* (6) *Reid.* *Boyd v. Phillips* (1871), L. R. 4 A. & E. 297. *As to* (7) *Reid.* *Elphinstone v. PURCHAS* (1870), L. R. 3 A. & E. 66; *White v. Bowron* (1873), L. R. 4 A. & E. 207; *Kensit v. St. Ethelburga, Bishopsgate Within* (Rector), [1900] P. 80. *As to* (8) *Reid.* *Elphinstone v. PURCHAS* (1870), L. R. 3 A. & E. 66; *White v. Bowron* (1873), L. R. 4 A. & E. 207; *Clifton v. Ridsdale* (1874), 1 P. D. 316; *Kensit v. St. Ethelburga, Bishopsgate Within* (Rector), [1900] P. 80; *Davey v. Hinde*, [1903] P. 221; *St. Paul, Bow Common* (Vicar & Churchwardens) v. *Same* (Inhabitants), [1909] P. 245; *Gore-Booth v. Manchester*, Bp., [1920] 2 K. B. 412. *As to* (9) *Reid.* *Elphinstone v. PURCHAS* (1870), L. R. 3 A. & E. 66; *St. Paul, Bow Common* (Vicar & Churchwardens) v. *Same* (Inhabitants), [1909] P. 245. *As to* (10) *Reid.* *Martin v. Mackonochie* (1869), L. R. 3 P. C. 52; *Elphinstone v. PURCHAS* (1870), L. R. 3 A. & E. 66; *Sheppard v. Bennett* (Second Appeal) (1872), L. R. 4 P. C. 371; *Heywood v. Manchester*, Bp. (1884), 12 Q. B. D. 401. *As to* (11) *Foll.* *Gore-Booth v. Manchester*, Bp., [1920] 2 K. B. 412. *Reid.* *Elphinstone v. PURCHAS* (1870), L. R. 3 A. & E. 66. *As to* (12) *Consd.* *Elphinstone v. PURCHAS* (1870), L. R. 3 A. & E. 66. *Reid.* *Hebbert v. PURCHAS* (1871), L. R. 3 P. C. 605; *Heywood v. Manchester*, Bp. (1884), 12 Q. B. D. 404. *Generally, Mentd.* *Ex p. Edwards* (1873), 29 L. T. 529; *Martin v. Mackonochie* (Second Smt) (1874), L. R. 4 A. & E. 279; *Parnell v. Roughton* (1874), L. R. 6 P. C. 46; *Hudson v. Tooth* (1877), 2 P. D. 125; *Martin v. Mackonochie* (1879), 49 L. J. Q. B. 9; *R. v. Oxford*, Bp. (1879), 4 Q. B. D. 525; *Martin v. Mackonochie* (1882), 31 W. R. 1; *Marshall v. Graham*, *Bell v. Graham*, [1907] 2 K. B. 112.

2949. —.]—*HEBBERT v. PURCHAS*, No. 36, *ante*.

2950. *Tippets*.]—*ELPHINSTONE v. PURCHAS*, No. 2751, *ante*.

2951. *Stole*.]—*ELPHINSTONE v. PURCHAS*, No. 2751, *ante*.

2952. —.]—*COMBE v. EDWARDS*, No. 2957, *post*.

2953. *Dalmatic*.]—*ELPHINSTONE v. PURCHAS*, No. 2751, *ante*.

2954. *Maniple*.]—*ELPHINSTONE v. PURCHAS*, No. 2751, *ante*.

2955. —.]—*COMBE v. EDWARDS*, No. 2957, *post*.

2956. *Chasuble & alb*.]—*HEBBERT v. PURCHAS*, No. 36, *ante*.

2957. —.]—The incumbent of a parish church was charged with wearing, when officiating in the Communion Service, certain vestments called respectively a chasuble, alb, amice, maniple & stole. At the hearing of the suit the charge was proved, but it was submitted on behalf of deft. that as the promoter had not proved the "Advertisements of Queen Elizabeth," he had failed to establish that the vestments were illegal:—*Held*: the ct. was bound to follow the ruling in *Ridsdale v. Clifton*, No. 2000, *ante*, & it was unnecessary for the promoter to prove the Advertisements.—*COMBE v. EDWARDS* (1877), 2 P. D. 351; 42 J. P. 100.

*Annotations*:—*Reid.* R. v. London, Bp. (1889), 23 Q. B. D. 411.

2958. —.]—*RIDSDALE v. CLIFTON*, No. 1145, *ante*.

2959. *Tunicle*.]—*HEBBERT v. PURCHAS*, No. 36, *ante*.

2960. *Amice, maniple & stole*.]—*COMBE v. EDWARDS*, No. 2957, *ante*.

2961. *Cope*—In cathedral & collegiate churches.]—*HEBBERT v. PURCHAS*, No. 36, *ante*.

2962. *Surplice*—Service other than Holy Communion.]—*HEBBERT v. PURCHAS*, No. 36, *ante*.

2963. *Black gown when preaching*.]—A testatrix bequeathed £1,500 towards the endowment of a church, provided certain conditions were carried out in every particular, & under this stipulation alone was her exor. empowered to pay it. One of the conditions called by the testatrix an "abiding condition," was "that the black gown shall be worn in the pulpit, unless there shall be any alteration in the law rendering it illegal." The fund being in ct. in an action to administer the estate of the testatrix:—*Held*: the condition was a continuing condition, so as to entitle the incumbent of the church to the income of the fund from time to time so long as he performed the condition. It was not illegal for a clergyman of the Church of England to wear a black gown in the pulpit when preaching, the legality of the black gown in preaching being sanctioned by the continuous usage of centuries, uncontrolled by positive law or judicial decision.—*Re ROBINSON, WRIGHT v. TUGWELL*, [1897] 1 Ch. 85; 66 L. J. Ch. 97; 76 L. T. 95; 61 J. P. 132; 45 W. R. 181; 13 T. L. R. 72; 41 Sol. Jo. 96, C. A.

*Annotations*:—*Reid.* *Re Church Patronage Trust, Laurie v. A.-G.* (1901), 73 L. J. Ch. 712; *Re Robinson, Wright v. Tugwell*, [1923] 2 Ch. 332.

2964. *Biretta*.]—*HEBBERT v. PURCHAS*, No. 36, *ante*.

2965. —.]—It is unlawful for the clergyman to wear a biretta while officiating in church, in entering to perform the communion service, & on leaving the church at its conclusion. It is unlawful for the clergyman to stand while breaking the bread & taking the cup in his hand in such a

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(6) the doctrine that adoration is due to the consecrated elements is contrary to law, & has been condemned (*Martin v. Machonochie*, No. 2948, *ante*); the Church of England has forbidden all acts of adoration to the sacrament, understanding by that the consecrated elements: she has been careful to exclude any act of adoration on the part of the minister, at or after the consecration of the elements, & to explain the posture of kneeling prescribed by the Rubric: Article 28 lays down that "the Sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped." In Article 25 it is affirmed that "the Sacraments were not ordained by Christ to be gazed upon, or to be carried about, but that we should duly use them."

(7) In the absence of a charge of any outward act of adoration, a general charge:—*Held*: in the circumstances, not sufficient to support a penal proceeding.

(8) The successive alterations & omissions in the Book of Common Prayer, by which words or passages, inculcating particular doctrines, or assuming a belief in them, have been struck out, are evidence that the Church has ceased to affirm those doctrines; but the effect of such changes, when they stand alone, is that it ceases to be unlawful to contradict such doctrines, & not that it becomes unlawful to maintain them.

(9) Though it has been the practice of the Archbishops, on the remission of arts. directed on appeal to be reformed as to a particular charge, for the judge himself to reform the arts. by striking out such parts of the arts. as he conceives to be within the original decree appealed from & confirmed, notwithstanding objections made by the promoter of the cause, such practices, as tending to create delay, if not a miscarriage of justice, if the judge should erroneously strike out parts not affected by the Order in Council, ought to be discontinued, & before an appeal from any decree directing the reformation of arts. is perfected, the actual reformation which appears to the judge to be required should be made by him & appear on the face of the decree that the very passages directed to be omitted may be brought under the judgment of the Ct. of Appeal.

(10) It is not the part of the Ct. of Arches nor of the Judicial Committee to usurp the functions of a synod or council. Their duty is to ascertain whether statements are so far repugnant to or contradictory of the language of the arts. & formularies, construed in their plain meaning, that they should require judicial condemnation.—*SHEPPARD v. BENNETT (SECOND APPEAL)* (1871), L. R. 4 P. C. 371; 9 Moo. P. C. C. N. S. 149; Bro. Ecc. Rep. 209; 41 L. J. Eccl. 1; 26 L. T. 923; 30 J. P. 420; 20 W. R. 804; 17 E. R. 470, P. C.; *affd.* (1870), L. R. 3 A. & E. 107.

*Annotations:—Generally, Mentd.* R. v. London, Bp. (1888), 23 Q. B. D. 414; R. v. Canterbury, Archbp., [1902] 2 K. B. 503.

**2988. Number of communicants.—At least three.]**—CLIFTON v. RIDSDALE, No. 2900, *ante*.

**2989. Bread & wine—Pure wheaten bread—Whether wafers or wafer bread permissible.]**—HEBBERT v. PURCHAS, No. 36, *ante*.

**2990. ———.]**—RIDSDALE v. CLIFTON, No. 1145, *ante*.

**2991. ———.]**—MARTIN v. MACKONCHIE (SECOND SUIT), No. 2815, *ante*.

**2992. ——— Wine mixed with water—Whether permissible.]**—MARTIN v. MACKONCHIE, No. 2948, *ante*.

**2993. ———.]**—HEBBERT v. PURCHAS, No. 36, *ante*.

**2994. ———.]**—READ v. LINCOLN (Bp.), No. 1146, *ante*.

*See, also*, No. 2941, *ante*.

**2995. ——— Substitution of water for wine—Whether permissible.]**—BEDDOE v. HAWKES (1888), 4 T. L. R. 315.

**—— Provision by parish.]**—*See* Nos. 1038, 1039, *ante*.

**Ornaments of the Communion Table.]**—*See* Sect. 1, sub-sect. 4, B. (b) ii., *ante*.

**Vestments.]**—*See* Sect. 1, sub-sect. 4, C., *ante*.

**2996. Offertory—Disposal of.]**—MARSON v. UNMACK, No. 441, *ante*.

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**2997. Position of minister—At north side or end of table—During service generally.]**—HEBBERT v. PURCHAS, No. 36, *ante*.

**2998. ———.]**—READ v. LINCOLN (Bp.), No. 1146, *ante*.

**2999. ——— During consecration.]**—HEBBERT v. PURCHAS, No. 36, *ante*.

*See, also*, Nos. 2786, 2788, 2872, *ante*.

**3000. ——— Whether facing south or east.]**—HEBBERT v. PURCHAS, No. 36, *ante*.

**3001. ——— Communicants able to see bread broken.]**—HEBBERT v. PURCHAS, No. 36, *ante*.

**3002. ———.]**—RIDSDALE v. CLIFTON, No. 1145, *ante*.

**3003. ———.]**—SERJEANT v. DALE, No. 2965, *ante*.

**3004. ——— & cup taken.]**—HEBBERT v. PURCHAS, No. 36, *ante*.

**3005. ———.]**—RIDSDALE v. CLIFTON, No. 1145, *ante*.

**3006. ———.]**—(1) It is unlawful for the minister to stand during the prayer of consecration in the Communion Service so that the manual acts of breaking the bread & taking the cup into his hand are not visible to the people.

(2) The making of the sign of the cross in giving the absolution & in giving the benediction in the Communion Service is unlawful.—*READ v. LINCOLN (Bp.)*, [1801] P. 9; 64 L. T. 149; 7 T. L. R. 81; *affd.*, [1892] A. C. 644, P. C.

*Annotations:—As to* (1) *Reid*, Hendon Parish Church (1912), 28 T. L. R. 438. *Generally, Mentd.* St. Paul, Camden Square (1897), 14 T. L. R. 156; Assheton-Smith & Owen (1905), 94 L. T. 42; Wimbledon (Vicar & Churchwardens) v. Eden, Re St. Mark's, Wimbledon, [1908] P. 167; Fowke v. Berington, [1914] 2 Ch. 308; Gore-Booth v. Manchester, Bp., [1920] 2 K. B. 412; Commonwealth Shipping Representative v. Peninsular & Oriental Branch Service, [1923] A. C. 191.

**3007. Reading the gospel—Lights held each side of gospeller—Whether permissible.]**—SUMNER v. WIX, No. 2812, *ante*.

**3008. Attitude of minister—"Standing before the table."]**—MARTIN v. MACKONCHIE, No. 2948, *ante*.

**3009. ——— Kneeling during prayer of consecration—Whether permissible.]**—MARTIN v. MACKONCHIE, No. 2948, *ante*.

**3010. ——— What constitutes kneeling.]**—MARTIN v. MACKONCHIE, No. 2814, *ante*.

**3011. ——— After consecration—"All meekly kneeling."]**—MARTIN v. MACKONCHIE, No. 2948, *ante*.

**3012. ——— Obsequies during consecration—Whether permissible.]**—MARTIN v. MACKONCHIE, No. 3017, *post*.

**3013. Singing the Agnus Dei—Whether per-**

missible.]—**MARTIN v. MACKONCHIE** (SECOND SUIT), No. 2815, *ante*.

3014. ————]—**READ v. LINCOLN** (BP.), No. 1146, *ante*.

3015. **Ringings Sanctus bell—Whether permissible.**]—**ST. JOHN THE EVANGELIST, CLEVEDON** (VICAR & CHURCHWARDENS) v. **ALL HAVING INTEREST**, No. 2883, *ante*.

*See, also*, No. 1115, *ante*.

**Ceremonial mixing of wine with water.**]—*See* Nos. 6, 2948, *ante*.

3016. **Elevation of the elements—Whether permissible.**]—**MARTIN v. MACKONCHIE**, No. 2918, *ante*.

3017. ———— **Elevation of wafer without paten.**]—Motion against resp., the perpetual curate of the parish of A., Ilolborn, for disobedience to a monition founded upon an Ord. in Council, which ordered him, amongst other things, to abstain for the future "from the elevation of the cup & paten, during the administration of the Holy Communion, & from kneeling & prostrating himself before the consecrated elements during the prayer of consecration:" in that he knowingly & habitually sanctioned the elevation of the cup & paten above the head of the officiating clergyman in the prayer of consecration, & knowingly & habitually sanctioned kneeling & prostration during the prayer of consecration. It appeared that the ordinary course pursued in the administration of the Holy Communion in resp.'s church was for the officiating clergyman, on reaching the words of institution in the prayer of consecration, to drop his voice so as to be nearly inaudible; that he then elevated, not the paten, but a large wafer bread, & replacing it upon the Communion Table, bowed his head down towards the table, & remained some seconds in that position; that he then elevated the cup so that the rim was some inches above his head, & replacing it on the table bowed as before, after which the administration of the elements commenced:—*Held*: (1) such elevation of the wafer was equivalent to an elevation of the paten, the elevation which is unlawful being that of the consecrated bread itself, & not the paten in which it is placed; (2) the bowing of the head in the manner described as the prayer of consecration, though without bending the knee, was a prostration before the consecrated elements, whereof the sanctioning was a disobedience of the monition, & the Ord. in Council for such disobedience to the monition.

Resp. was ordered to be suspended from the discharge of all clerical duties & offices & the execution thereof, for the space of three calendar months.

*Semble*: as art. 28 of the Articles of Religion prohibits all elevation of the elements, by declaring, that "The Sacrament of the Lord's Supper was not by Christ's Ordinance reserved, carried about, lifted up, or worshipped;" it is not necessary to article & describe a particular elevation during the prayer of consecration, but sufficient to state & prove that such elevation occurred during the administration of the Holy Communion.—**MARTIN v. MACKONCHIE** (1870), L. R. 3 P. C. 409; 7 Moo. P. C. C. N. S. 239; 40 L. J. Eccl. 1; 24 L. T. 204; 35 J. P. 421; 19 W. R. 545; 17 E. R. 91, P. C.; *previous proceedings* (1868), L. R. 2 P. C. 365, P. C.; (1869), L. R. 3 P. C. 52, P. C.

*Annotations*:—*Generally*, *Mentl.* **Mackonchie v. Penzance** (1881), 6 App. Cas. 424; **Heywood v. Manchester**, Bp. (1884), 53 L. J. Q. B. 186.

3018. ———— **At any time during administration.**]—**MARTIN v. MACKONCHIE**, No. 3017, *ante*.

3019. **Washing sacred vessels at end of service—& drinking water—Whether permissible.**]—**READ v. LINCOLN** (BP.), No. 1146, *ante*.

**Reservation of the Sacrament.**]—*See* Nos. 1147, 2883, 2974, 2975, *ante*.

3020. **Making sign of cross—At absolution.**]—**READ v. LINCOLN** (BP.), No. 3006, *ante*.

3021. ———— **At benediction.**]—**READ v. LINCOLN** (BP.), No. 3006, *ante*.

#### SUB-SECT. 3.—REFUSAL TO ADMINISTER.

3022. **Cause of action.**]—**HENLEY v. BURSTOW** (1886), 1 Keb. 947; 83 E. R. 1335.

3023. **Right of minister to refuse—To "notorious evil liver"—What constitutes.**]—**JENKINS v. COOK**, No. 1047, *ante*.

3024. ———— **Marriage with deceased wife's sister—After Deceased Wife's Sister's Marriage Act, 1907 (c. 47.).**]—Lay members of the Church of England who have been baptised & confirmed & between whom a marriage legalised by the above Act has been solemnised are not either by reason of such marriage or by their afterwards living together as husband & wife, open & notorious evil livers within the rubric in the Communion Service, & neither the solemnisation of their marriage nor their subsequent cohabitation justifies the incumbent of the parish in which the parties reside in repelling them from the sacrament of the Lord's Supper.

A domiciled Englishman who had gone through the form of marriage with his deceased wife's sister, a domiciled Englishwoman, in a Presbyterian church in Canada, after the passing of the Colonial Marriages (Deceased Wife's Sister) Act, 1906, but before the above Act had come into force, & after the marriage had returned to reside in England applied, after the coming into force of the last-mentioned Act, to the incumbent of the parish in which he was residing together with his wife, that, they being both members of the Church of England, & having been baptised & confirmed, should be admitted to the sacrament of the Holy Communion. The incumbent repelled the applicant & his wife from the Holy Communion, & on their promotion a criminal suit by letters of request was thereupon instituted against the incumbent:—*Held*: the promoters had been illegally repelled from the Holy Communion, & the incumbent must be admonished for having so repelled them & must refrain from similar acts in the future.—**BANISTER v. THOMPSON**, [1908] P. 362; 24 T. L. R. 811.

3025. ————]—Sect. 1 of the above Act validates a marriage between a man & his deceased wife's sister for all purposes, whether the marriage is contracted within or without the realm, & whether before or after the date of the passing of the Act. The immunity granted by the first proviso to the sect. to any clergyman of the Church of England from any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office, to which suit, penalty, or censure he would not have been liable if the Act had not been passed, is limited to the subject-matter of the enacting clause & relates to matters connected with the solemnisation of the marriage. Since the passing of the Act marriage with a deceased wife's sister is not a lawful cause within 1 Edw. 6, c. 1, s. 8, for repelling the parties to the marriage from Holy Communion. Where, therefore, the

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(7) In the absence of a charge of any outward act of adoration, a general charge:—*Held*: in the circumstances, not sufficient to support a penal proceeding.

(8) The successive alterations & omissions in the Book of Common Prayer, by which words or passages, inculcating particular doctrines, or assuming a belief in them, have been struck out, are evidence that the Church has ceased to affirm those doctrines; but the effect of such changes, when they stand alone, is that it ceases to be unlawful to contradict such doctrines, & not that it becomes unlawful to maintain them.

(9) Though it has been the practice of the Archb. Ct., on the remission of arts. directed on appeal to be reformed as to a particular charge, for the judge himself to reform the arts. by striking out such parts of the arts. as he conceives to be within the original decree appealed from & confirmed, notwithstanding objections made by the promoter of the cause, such practices, as tending to create delay, if not a miscarriage of justice, if the judge should erroneously strike out parts not affected by the Order in Council, ought to be discontinued, & before an appeal from any decree directing the reformation of arts. is perfected, the actual reformation which appears to the judge to be required should be made by him & appear on the face of the decree that the very passages directed to be omitted may be brought under the judgment of the Ct. of Appeal.

(10) It is not the part of the Ct. of Arches nor of the Judicial Committee to usurp the functions of a synod or council. Their duty is to ascertain whether statements are so far repugnant to or contradictory of the language of the arts. & formularies, construed in their plain meaning, that they should require judicial condemnation.—*SHEPPARD v. BENNETT* (SECOND APPEAL) (1871), 1 L. R. 4 P. C. 371; 9 Moo. P. C. C. N. S. 149; Bro. Ecc. Rep. 209; 41 L. J. Eccl. 1; 26 L. T. 923; 30 J. P. 420; 20 W. R. 804; 17 E. R. 470, P. C.; *affg.* (1870), L. R. 3 A. & E. 167.

*Annotations*.—*Generally*, *Mentd.* R. v. London, Bp. (1888), 23 Q. B. D. 414; R. v. Canterbury, Archbp., [1902] 2 K. B. 503.

**2988. Number of communicants.—At least three.]**—CLIFTON v. RIDSDALE, No. 2900, *ante*.

**2989. Bread & wine—Pure wheaten bread—Whether wafers or wafer bread permissible.]**—HEBBERT v. PURCHAS, No. 36, *ante*.

**2990. ————]**—RIDSDALE v. CLIFTON, No. 1145, *ante*.

**2991. ————]**—MARTIN v. MACKONOCHE (SECOND SUIT), No. 2815, *ante*.

**2992. ———— Wine mixed with water—Whether permissible.]**—MARTIN v. MACKONOCHE, No. 2948, *ante*.

**2993. ————]**—HEBBERT v. PURCHAS, No. 36, *ante*.

**2994. ————]**—READ v. LINCOLN (BP.), No. 1146, *ante*.

*See, also*, No. 2941, *ante*.

**2995. ———— Substitution of water for wine—Whether permissible.]**—BEDDOE v. HAWKES (1888), 4 T. L. R. 315.

**——— Provision by parish.]**—*See* Nos. 1038, 1039, *ante*.

**Ornaments of the Communion Table.]**—*See* Sect. 1, sub-sect. 4, B. (b) ii., *ante*.

**Vestments.]**—*See* Sect. 1, sub-sect. 4, C., *ante*.

**2996. Offertory—Disposal of.]**—MARSON v. UNMACK, No. 441, *ante*.

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**2997. Position of minister—At north side or end of table—During service generally.]**—HEBBERT v. PURCHAS, No. 36, *ante*.

**2998. ————]**—READ v. LINCOLN (BP.), No. 1146, *ante*.

**2999. ———— During consecration.]**—HEBBERT v. PURCHAS, No. 36, *ante*.

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**3000. ———— Whether facing south or east.]**—HEBBERT v. PURCHAS, No. 36, *ante*.

**3001. ———— Communicants able to see bread broken.**—HEBBERT v. PURCHAS, No. 36, *ante*.

**3002. ————]**—RIDSDALE v. CLIFTON, No. 1145, *ante*.

**3003. ————]**—SERJEANT v. DALE, No. 2965, *ante*.

**3004. ———— & cup taken.]**—HEBBERT v. PURCHAS, No. 36, *ante*.

**3005. ————]**—RIDSDALE v. CLIFTON, No. 1145, *ante*.

**3006. ————]**—(1) It is unlawful for the minister to stand during the prayer of consecration in the Communion Service so that the manual acts of breaking the bread & taking the cup into his hand are not visible to the people.

(2) The making of the sign of the cross in giving the absolution & in giving the benediction in the Communion Service is unlawful.—*READ v. LINCOLN* (BP.), [1891] P. 9; 64 L. T. 149; 7 T. L. R. 81; *affd.*, [1892] A. C. 644, P. C.

*Annotations*.—*As to* (1) *Reid*, Hendon Parish Church (1912), 28 T. L. R. 438. *Generally*, *Mentd.* St. Paul, Camden Square (1897), 14 T. L. R. 156; Assheton-Smith v. Owen (1905), 94 L. T. 42; Wimbledon (Vicar & Churchwardens) v. Eden, *Re* St. Mark's, Wimbledon, [1908] P. 167; Fowke v. Berington, [1914] 2 Ch. 308; Gore-Booth v. Manchester, Bp., [1920] 2 K. B. 412; Commonwealth Shipping Representative v. Peninsular & Oriental Branch Service, [1923] A. C. 191.

**3007. Reading the gospel—Lights held each side of gospeller—Whether permissible.]**—SUMNER v. WIX, No. 2812, *ante*.

**3008. Attitude of minister—"Standing before the table."]**—MARTIN v. MACKONOCHE, No. 2948, *ante*.

**3009. ———— Kneeling during prayer of consecration—Whether permissible.]**—MARTIN v. MACKONOCHE, No. 2948, *ante*.

**3010. ———— What constitutes kneeling.]**—MARTIN v. MACKONOCHE, No. 2814, *ante*.

**3011. ———— After consecration—"All meekly kneeling."]**—MARTIN v. MACKONOCHE, No. 2948, *ante*.

**3012. ———— Obsequies during consecration—Whether permissible.]**—MARTIN v. MACKONOCHE, No. 3017, *post*.

**3013. Singing the Agnus Dei—Whether per-**

missible.]—**MARTIN v. MACKONCHIE** (SECOND SURT.), No. 2815, *ante*.

**3014.** ———.]—**READ v. LINCOLN** (BP.), No. 1146, *ante*.

**3015. Ringing Sanctus bell—Whether permissible.]—ST. JOHN THE EVANGELIST, CLEVEDON (VICAR & CHURCHWARDENS) v. ALL HAVING INTEREST**, No. 2883, *ante*.

*See, also*, No. 1115, *ante*.

**Ceremonial mixing of wine with water.]—See Nos. 6, 2948, *ante*.**

**3016. Elevation of the elements—Whether permissible.]—MARTIN v. MACKONCHIE**, No. 2048, *ante*.

**3017.** ——— **Elevation of wafer without paten.]—**Motion against resp., the perpetual curate of the parish of A., Holborn, for disobedience to a monition founded upon an Ord. in Council, which ordered him, amongst other things, to abstain for the future "from the elevation of the cup & paten, during the administration of the Holy Communion, & from kneeling & prostrating himself before the consecrated elements during the prayer of consecration:" in that he knowingly & habitually sanctioned the elevation of the cup & paten above the head of the officiating clergyman in the prayer of consecration, & knowingly & habitually sanctioned kneeling & prostration during the prayer of consecration. It appeared that the ordinary course pursued in the administration of the Holy Communion in resp.'s church was for the officiating clergyman, on reaching the words of institution in the prayer of consecration, to drop his voice so as to be nearly inaudible; that he then elevated, not the paten, but a large wafer bread, & replacing it upon the Communion Table, bowed his head down towards the table, & remained some seconds in that position; that he then elevated the cup so that the rim was some inches above his head, & replacing it on the table bowed as before, after which the administration of the elements commenced:—*Held*: (1) such elevation of the wafer was equivalent to an elevation of the paten, the elevation which is unlawful being that of the consecrated bread itself, & not the paten in which it is placed; (2) the bowing of the head in the manner described as the prayer of consecration, though without bending the knee, was a prostration before the consecrated elements, whereof the sanctioning was a disobedience of the monition, & the Ord. in Council for such disobedience to the monition.

Resp. was ordered to be suspended from the discharge of all clerical duties & offices & the execution thereof, for the space of three calendar months.

**Semble**: as art. 28 of the Articles of Religion prohibits all elevation of the elements, by declaring, that "The Sacrament of the Lord's Supper was not by Christ's Ordinance reserved, carried about, lifted up, or worshipped;" it is not necessary to article & describe a particular elevation during the prayer of consecration, but sufficient to state & prove that such elevation occurred during the administration of the Holy Communion.—**MARTIN v. MACKONCHIE** (1870), L. R. 3 P. C. 409; 7 Moo. P. C. C. N. S. 239; 40 L. J. Eccl. 1; 24 L. T. 204; 35 J. P. 421; 19 W. R. 545; 17 E. R. 91, P. C.; *previous proceedings* (1868), L. R. 2 P. C. 365, P. C.; (1869), L. R. 3 P. C. 52, P. C.

**Annotations**:—*Generally*, *Mentl.* **Mackonochie v. Penzance** (1881), 6 App. Cas. 424; **Heywood v. Manchester, Bp.** (1884), 53 L. J. Q. B. 196.

**3018.** ——— **At any time during administration.]—MARTIN v. MACKONCHIE**, No. 3017, *ante*.

**3019. Washing sacred vessels at end of service—& drinking water—Whether permissible.]—READ v. LINCOLN** (BP.), No. 1146, *ante*.

**Reservation of the Sacrament.]—See Nos. 1147, 2883, 2974, 2975, *ante*.**

**3020. Making sign of cross—At absolution.]—READ v. LINCOLN** (BP.), No. 3006, *ante*.

**3021.** ——— **At benediction.]—READ v. LINCOLN** (BP.), No. 3006, *ante*.

#### SUB-SECT. 3.—REFUSAL TO ADMINISTER.

**3022. Cause of action.]—HENLEY v. BURSTOW** (1866), 1 Keb. 947; 83 E. R. 1335.

**3023. Right of minister to refuse—To "notorious evil liver"—What constitutes.]—JENKINS v. COOK**, No. 1047, *ante*.

**3024.** ——— **Marriage with deceased wife's sister—After Deceased Wife's Sister's Marriage Act, 1907 (c. 47).]**—Lay members of the Church of England who have been baptised & confirmed & between whom a marriage legalised by the above Act has been solemnised are not either by reason of such marriage or by their afterwards living together as husband & wife, open & notorious evil liver within the rubric in the Communion Service, & neither the solemnisation of their marriage nor their subsequent cohabitation justifies the incumbent of the parish in which the parties reside in repelling them from the sacrament of the Lord's Supper.

A domiciled Englishman who had gone through the form of marriage with his deceased wife's sister, a domiciled Englishwoman, in a Presbyterian church in Canada, after the passing of the Colonial Marriages (Deceased Wife's Sister) Act, 1906, but before the above Act had come into force, & after the marriage had returned to reside in England applied, after the coming into force of the last-mentioned Act, to the incumbent of the parish in which he was residing together with his wife, that, they being both members of the Church of England, & having been baptised & confirmed, should be admitted to the sacrament of the Holy Communion. The incumbent repelled the applicant & his wife from the Holy Communion, & on their promotion a criminal suit by letters of request was thereupon instituted against the incumbent:—*Held*: the promoters had been illegally repelled from the Holy Communion, & the incumbent must be admonished for having so repelled them & must refrain from similar acts in the future. —**BANISTER v. THOMPSON**, [1908] P. 302; 24 T. L. R. 811.

**3025.** ———.]—**Sect. 1 of the above Act validates a marriage between a man & his deceased wife's sister for all purposes, whether the marriage is contracted within or without the realm, & whether before or after the date of the passing of the Act. The immunity granted by the first proviso to the sect. to any clergyman of the Church of England from any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office, to which suit, penalty, or censure he would not have been liable if the Act had not been passed, is limited to the subject-matter of the enacting clause & relates to matters connected with the solemnisation of the marriage. Since the passing of the Act marriage with a deceased wife's sister is not a lawful cause within 1 Edw. 6, c. 1, s. 8, for repelling the parties to the marriage from Holy Communion. Where, therefore, the**



*Sect. 3.—Holy Communion: Sub-sect. 3. Sects. 4, 5 & 6. Part VII. Sect. 1.]*

Archdeacon of Canterbury admonished a clergyman, who, since the passing of the Act, had repelled the parties to such a marriage from Holy Communion by reason of their marriage & cohabitation, to refrain from so repelling them in future:—*Held*: a writ of prohibition ought not to be granted to restrain the Archdeacon from proceeding further in the matter of the monition.—*THOMPSON v. DIBDIN*, [1912] A. C. 533; 81 L. J. K. B. 918; 107 L. T. 66; 28 T. L. R. 490; 56 Sol. Jo. 647, II. 1.; *affg.* S. C. *sub nom.* *R. v. DIBDIN*, [1910] P. 57, C. A.

**3026.** — *Depraver of Book of Common Prayer—What constitutes.*—*JENKINS v. COOK*, No. 1047, *ante*.

**3027.** — *For occasional attendance at non-conformist chapel.*—*NWAYNE v. BENSON* (1889), 6 T. L. R. 7.

#### SECT. 4.—HOLY MATRIMONY.

*Formalities of legal marriage.*—*See* HUSBAND & WIFE.

*Unlawful solemnisation of marriage.*—*See* Part V., Sect. 13, sub-sect. 3, B., *ante*.

**3028.** *Refusal to marry—Where licence issued—Pending inquiry—Suspicion of fraud.*—*ARGAR v. HOLDSWORTH*, No. 2716, *ante*.

**3029.** — *Knowledge of misstatement in licence.*—*EWING v. WHITELY* (1814), 2 Hag. Con. 175; 161 E. R. 706.

*Annotations:—Mentd.* *Clowes v. Clowes* (1842), 2 Notes of Cases, 1; *R. v. Chapman* (1849), T. & M. 90; *Moss v. Moss*, [1897] P. 263.

**3030.** — *Whether action lies.*—In an action against the rector of a parish for refusing to solemnise a marriage between *pltf.* & *M.*, by licence, the declaration set forth the licence duly obtained for that purpose, & alleged, that it became & was the duty of *deft.*, upon notice of the licence, to solemnise the marriage when thereunto requested, & then averred notice of the licence, & a request by *pltf.* to solemnise the marriage, without stating any request by *M.* or that the request of *pltf.* was made with her consent or on her behalf:—*Held*: (1) declaration was insufficient.

(2) *Qu.*: whether an action will lie against the rector or vicar of a parish for refusing to solemnise a marriage between two persons in pursuance of a licence directed to him for that purpose.—

*DAVIS v. BLACK* (1841), 1 Q. B. 900; 1 Gal. & Dav. 432; 10 L. J. Q. B. 338; 6 Jur. 55; 113 E. R. 1376.

*Annotations:—As to (1) Consd.* *Titchmarsh v. Chapman* (1844), 1 Rob. Eccl. 175. *Generally, Mentd.* *Holford v. Hankinson* (1844), 5 Q. B. 584.

**3031.** — *Whether justified—Where parties have not received sacrament.*—(1) Where a man & woman, notice of whose intended marriage had been published at the Board of Guardians, called at the private house of the clergyman of a chapel in the district, at nine o'clock in the evening, & showing him the superintendent registrar's cer-

tificate, requested him to appoint a time for their marriage, when the clergyman declared he would marry them when they had expressed a desire to be confirmed, & not till then:—*Held*: this was no proper tender of the parties for marriage, nor a legal demand of marriage, & the clergyman was not liable to an indictment for his refusal at such time & place.

(2) *Qu.*: is a clergyman justified in refusing to marry parties who have not received the sacrament, nor have expressed a desire to be confirmed?—*R. v. JAMES* (1850), 3 Car. & Kir. 167; 2 Den. 1; T. & M. 300; 19 L. J. M. C. 179; 15 L. T. O. S. 262; 14 J. P. 339; 14 Jur. 940; 4 Cox, C. C. 217, C. C. R.

**3032.** — *Where parties have expressed no desire for confirmation.*—*R. v. JAMES*, No. 3031, *ante*.

**3033.** — *Demand at improper time & place.*—*R. v. JAMES*, No. 3031, *ante*.

— *As ground for indictment.*—*See* CRIMINAL LAW, Vol. XV., p. 745, No. 8039.

*Fees for marriage.*—*See* Part VII., Sect. 10, C., *post*.

*Registration of marriage.*—*See* REGISTRATION OF BIRTHS, MARRIAGES & DEATHS.

#### SECT. 5.—CHURCHING OF WOMEN.

**3034.** *Custom to come veiled.*—*SHIPDEN v. REDMAN* (NORWICH, CHANCELLOR) (1622), Palm. 296; 81 E. R. 1090.

**3035.** *Customary fee where woman not churchd—Whether custom good.*—A custom that a person shall pay the churching fee who is never churchd is void.—*NAYLOR v. SCOT* (1729), 1 Barn. K. B. 159; 2 Id. Raym. 1559; 94 E. R. 110.

*Annotation:—Apld.* *Patten v. Castleman* (1753), 1 Lee, 387.

#### SECT. 6.—BURIAL.

*Right to burial in church or churchyard.*—*See* BURIAL, Vol. VII., pp. 527 *et seq.*

*Burial service.*—*See, generally*, BURIAL, Vol. VII., pp. 530 *et seq.*

**3036.** — *Read on unconsecrated ground—Whether lawful.*—(1) Where a church has been consecrated, whether such consecration be presumed from the fact that Divine Services have been performed therein for a long period, or has actually taken place, the consecration will extend to everything which is under the building.

(2) It is not illegal for a clergyman standing on unconsecrated ground to read the burial service.—*RUGG v. KINGSMILL* (1867), L. R. 1 A. & E. 343; 36 L. J. Eccl. 17; 31 J. P. 644; *on appeal* (1868), L. R. 2 P. C. 59, P. C.

*Annotations:—Generally, Reqd.* *Winchester, Bp. v. Rugg* (1868), L. R. 2 A. & E. 247; *Kellett v. St. John's, Burscough Bridge* (1910), 32 T. L. R. 571.

*Burial in consecrated ground without service.*—*See* BURIAL, Vol. VII., p. 535.

*Registration of burial.*—*See* BURIAL, Vol. VII., p. 562.

**SECT. 1.—IN GENERAL.**

appointed under the Church of England Act never had the trust estate conveyed to them:—*Held*: even apart from sect. 6 of the Act, such conveyance was necessary to complete their

*Sect. 1.—In general. Sects. 2 & 3: Sub-sects. 1, 2 & 3.]*

forming station, the machinery of which, as plffs. alleged, caused a humming or buzzing sound in the church & certain buildings used in connection therewith, such as seriously to annoy & disturb persons using the same. In an action for an injunction:—*Held*: plffs. were not, because their premises were used as a place of worship, entitled to anything more than the ordinary amount of quiet in a town; the character of the neighbourhood & the surrounding circumstances must be considered; the law did not regard trifling inconveniences, & everything of the sort must be looked at from a reasonable point of view; though the sound might cause irritation & annoyance to sensitive persons it did not amount to a legal nuisance, & no injunction ought to be granted.—*HEATH v. BRIGHTON CORPN.* (1908), 98 L. T. 718; 72 J. P. 225; 24 T. L. R. 414.

**Gifts to churches, etc.—Whether gift for charitable purpose.]—***See CHARITIES, Vol. VIII., pp. 248 et seq.*

**Exemptions from restrictions on assurances.]—***See CHARITIES, Vol. VIII., pp. 284 et seq.*

**Compulsory acquisition.]—***See BURIAL, Vol. VII., pp. 550, 551, Nos. 280-284; COMPULSORY PURCHASE OF LAND, Vol. XI., p. 125, Nos. 158, 159.*

**Liability to rates.]—***See RATES & RATING.*

**Liability to conform to building line.]—***See HIGHWAYS; METROPOLIS.*

**Liability to conform to building regulations.]—***See METROPOLIS; PUBLIC HEALTH.*

**Liability to contribute to expense of making up & repair of streets & highways.]—***See HIGHWAYS; METROPOLIS.*

## SECT. 2.—DEDICATION AND CONSECRATION.

**3044. Dedication—What constitutes.]—***BATTISCOMBE v. EVE, No. 1198, ante.*

**3045. Consecration—How effected.]—***WOOD v. HEADINGLEY-CUM-BURLEY BURIAL BOARD, No. 390, ante.*

**Of church.]—***See Sect. 3, sub-sect. 2, post.*

**Of churchyard.]—***See BURIAL, Vol. VII., p. 527, No. 70.*

**3046. Effect—Subsequent user of site for secular purposes—Jurisdiction of secular & ecclesiastical courts.]—***SUTTON v. BOWDEN, No. 1737, ante.*

**Of church.]—***See Nos. 406, 1115, 2768, 3030, ante.*

## SECT. 3.—THE CHURCH.

### SUB-SECT. 1.—ACQUISITION.

**3047. Under Church Building Acts—Application of Acts—Parish subject to local Act.]—***FITZGERALD v. CHAMPNEYS, No. 381, ante.*

**3048. Conveyance in breach of trust—Whether reconveyance ordered—After chapel consecrated.]—**The trustee of a charity is not authorised by Church Building Acts, 1818 (c. 45), 1819 (c. 134) & 1822 (c. 72), to convey to the comrs. the private chapel of a charitable foundation held by him as a trustee for the benefit of the charity. Such a conveyance was declared to be a breach of trust, & a reconveyance ordered, although the comrs.

had caused the chapel to be consecrated as a parish church, & had caused the parson who was chaplain of the charity to be appointed the incumbent, as of a parish church, & caused a district to be assigned to it as a parish church under an Ord. in Council.—*A.-G. v. MANCHESTER (BP.)* (1867), L. R. 3 Eq. 436; 15 L. T. 646; 31 J. P. 516; 15 W. R. 673.

*Annotations:—Reid. Sutton v. Bowden, [1913] 1 Ch. 518. Mentd. The Parlement Belge (1879), 4 P. D. 129.*

**3049. Under Places of Worship Sites Act, 1873 (c. 50)—Settled property—Concurrence of infant tenant in tail.]—**A father, tenant for life, is the guardian of his infant son, tenant in tail in remainder, for the purpose of concurring under the above Act, in a grant by himself of a site for a church. *Semble*: the ct. has no power to appoint a guardian for the purpose of concurring under the Act.—*Re SALISBURY (MARQUIS) & ECCLESIASTICAL COMRS.* (1876), 2 Ch. D. 29; 45 L. J. Ch. 250; 34 L. T. 5; 40 J. P. 404; 24 W. R. 380, C. A.

**3050. Building contract for church—Liability of incumbent—Construction of contract.]—**By two contemporaneous building contracts made in 1808 between plff. a builder, of the one part, & C., vicar of the parish of St. P. & A. incumbent of an ecclesiastical district within the parish of the other part; after reciting that, under an Act creating the district, C. or the vicar for the time being of St. P. in conjunction with A. or the incumbent for the time being of the district, were to apply a fund, payable to them by a railway co., in building a church & parsonage for the district; it was witnessed that in consideration of sums amounting together to the whole of the available building fund, to be paid to plff. by C. & A. "their exors. or administrators or the person or persons for the time being entitled to apply the fund under the Act," plff. agreed with C. & A. " & with such person or persons as aforesaid " & C. & A. "to the intent (so far as they lawfully could or might) to bind such person or persons as aforesaid, but not so as to bind either of themselves or his heirs exors. or administrators, after he or they should have ceased to be entitled to apply the same fund did & each of them did agree with plff.; " then followed provisions under which plff. was to build the church & parsonage in accordance with plans & specifications & a clause stipulating that the consideration moneys should be paid in manner provided by the specifications. The specifications provided for monthly payments on account of the contracts; also that the architect might order additional works; & that payments for additional works were to be made on the completion of the entire works. In June, 1869, C., having obtained preferment, ceased to be vicar of St. P. by which time the whole of the building fund had been exhausted. The buildings were completed in June, 1870. In Feb. 1875, C. died, whereupon plff. brought an action against his exors. to recover a sum alleged to be due for "extras" under the contracts:—*Held*: (1) the liability of C. & A. respectively under the contracts was restricted to the period during which they were respectively vicar & incumbent & therefore C.'s liability terminated on his ceasing to be vicar; (2) in any case the liability of C. & A. extended only to the amount of the building fund & no further.—*WILLIAMS v. HATHAWAY* (1877), 6 Ch. D. 544.

*Annotations:—Generally, Mentd. Watling v. Lewis, [1911] 1 Ch. 414; Forbes v. Gil, [1922] 1 A. C. 256.*

appointment as trustees within the meaning of the Church of England

Trust Property Incorporation Act.—CHURCH OF ENGLAND PROPERTY

TRUST DIOCESE OF GOULDSWIN v. ROSSI (1893), 14 N. S. W. Eq. 185.—*AUG.*

**Bequest of pure personality for—Whether valid.]**—See CHARITIES, Vol. VIII., pp. 275, 277, 278, Nos. 429–431, 466, 467, 473, 492, 495, 497.

**Assurance inter vivos for charitable purposes.]**—See, generally, CHARITIES, Vol. VIII., pp. 279 et seq.

#### SUB-SECT. 2.—CONSECRATION.

See, generally, Sect. 2, ante.

**3051. Necessity for—Whether erection on consecrated site sufficient.]**—BATTISCOMBE v. EVE, No. 1198, ante.

**3052. — Old church pulled down & rebuilt.]**—BATTISCOMBE v. EVE, No. 1198, ante.

**3053. — On old lines of foundation.]**—L., the tenant & occupier of the Manor House in the parish of W., instituted a suit in the Chancery Ct. of York against P., the incumbent & perpetual curate, for perturbation of a pew, held by L. as appurtenant to the Manor House, & occupied by him therewith for nearly forty years. P., the incumbent, admitted the destruction of the pew by his orders & direction, but pleaded to the jurisdiction of the ct., on the grounds that the church was not in law a church, never having been reconsecrated since its general repair in 1825, & that the permissive occupation of the pew was not sufficient to entitle L. to sue:—*Held*: (1) it appearing from the evidence that the church of W. having been repaired & rebuilt under a faculty, upon its old foundation, the tower & eastern wall & windows never having been removed, & some of the offices of the church performed during the repairs, it had never ceased to be a parish church so as to require reconsecration, but remained subject to the authority of the diocesan, & the judgment of the ct. below, overruling the protest to the jurisdiction, was right; (2) as a pew being in the chancel may legally belong to a party in respect of the ownership of a house, the title by occupation of such a pew was rightly pleaded, & if proved, would entitle L. to maintain his suit.

(3) *Semble*: If a church be rebuilt on the old lines of foundation, including within it the same originally consecrated ground & no more, the ecclesiastical law does not require that such church should be reconsecrated.

(4) There is no authority for the doctrine that where the communion table of a parish church has been taken down & replaced by a new one, it requires reconsecration, for the communion table of a Protestant church is not analogous to the altar in a Roman Catholic church:—PARKER v. LEACH (1866), L. R. 1 P. C. 312; 4 Moo. P. C. C. N. S. 180; 36 L. J. P. C. 26; 15 L. T. 370; 31 J. P. 71; 12 Jur. N. S. 911; 15 W. R. 204; 16 E. R. 284, P. C.

*Annotations*:—As to (3) *Refd.* Rugg v. Winchester, Bp. (1868), 19 L. T. 578. As to (4) *Refd.* Martin v. Mackenochie (1868), L. R. 2 P. C. 365.

**3054. — Altar taken down.]**—TURNER v. HANWELL (RECTOR), No. 1748, ante.

**3055. — Old church partly pulled down & rebuilt.]**—PARKER v. LEACH, No. 3053, ante.

**3056. Whether valid—Without consent of incumbent.]**—RUGG v. WINCHESTER (BP.), No. 162, ante.

**3057. — New church built in substitution for former parish church—Transfer of endowments after consecration.]**—In 1891 a church was built in a parish to take the place of the existing parish church which had become inadequate for the performance of Divine worship. By a sentence & decree of the bishop of the diocese, dated Nov. 12,

1891, the new church was declared to be duly consecrated; & by an instrument dated Dec. 10, 1891, & made under Church Building Act, 1845 (c. 70), s. 1, the ecclesiastical comrs. declared that the new church should thenceforth be the parish church in the place of the old parish church & transferred the endowments of the old parish church to the new parish church. In 1905 *plff.* became the rector of the parish & was "read in" in the new church. *Plff.* applied in the county ct. under Tithe Act, 1891 (c. 8), for an order for the payment of tithe rentcharge by *deft.*, the owner & occupier of land in the parish. *Deft.* contended that the new church had not been validly consecrated in that the requirements of Council of London 1102, Canon 10, as to the provision of endowment before consecration had not been complied with, & that *plff.* was, therefore, not the lawful incumbent of the parish & was not entitled to the tithe rentcharge:—*Held*: (1) assuming the requirements of Canon 10 had not been complied with, the decree of consecration had been issued by the bishop acting within his jurisdiction & its validity could not be questioned in these proceedings, & *plff.* was entitled to the order for payment of tithe rentcharge by *deft.*; (2) the church had been validly consecrated.—SEDGWICK v. BOURNE, [1920] 2 K. B. 267; 80 L. J. K. B. 1031; 123 L. T. 259; 36 T. L. R. 449, D. C.

**3058. — In what proceedings issue can be raised.]**—SEDGWICK v. BOURNE, No. 3057, ante.

**3059. Presumption as to.]**—MOYSEY v. HILLCOAT, No. 438, ante.

**3060. Effect of—What is included.]**—RUGG v. KINGSMILL, No. 3036, ante.

**3061. — Of part of site—Vesting in incumbent.]**—PLUMSTEAD DISTRICT BOARD OF WORKS v. ECCLESIASTICAL COMRS. FOR ENGLAND, No. 406, ante.

— Houses built on site—Whether charity property within City of London Parochial Charities Act, 1883 (c. 36).]—See CHARITIES, Vol. VIII., p. 255, No. 169.

— On existing ornaments.]—See Nos. 1115, 2768, ante.

#### SUB-SECT. 3.—NEW CHURCH SUBSTITUTED FOR OLD.

**3062. When old church still exists—Whether new church is parish church.]**—ORMEROD v. CHADWICK, No. 362, ante.

**3063. Endowment of old church—Whether attached to new church.]**—(1) The gift of a piece of land to apply the rents for the repair, etc., of a parish church, is in its purpose indivisible, & a new ecclesiastical district carved out of that parish & another can claim no portion of the rents or any subdivision of the charity estate.

(2) The exclusive advantages to be derived from the rents will attach themselves to a new church substituted for the original parish church.—A-G. v. LOVE (1857), 23 Beav. 409; 26 L. J. Ch. 539; 29 L. T. O. S. 36; 21 J. P. 390; 3 Jur. N. S. 948; 53 E. R. 196.

*Annotations*:—As to (1) *Apprvd.* Re Church Estate Charity, Wandsworth (1871), 6 Ch. App. 296. As to (2) *Consd.* Re Palace Estate Charity (1888), 39 Ch. D. 54.

**3064. — Charity for necessary occasions of old—Whether spire for new church included.]**—An ancient charity was founded to provide for the reparations, ornaments & other necessary occasions of the parish church. A new parish church had been erected, & a scheme was sanctioned

*Sect. 3.—The church: Sub-sect. 6, B. (b) & (c); sub-sects. 7, 8 & 9, A.]*

**3086. Alteration to pews or fittings.]—**PARHAM *v.* TEMPLAR (1821), 3 Phillim. 515.

*Annotation:—Mentd.* RITCHINGS *v.* CORDINGLEY (1868), L. R. 3 A. & E. 113.

**3087. —.]—**HAWKES *v.* JONES, No. 3084, *ante*.

**3088. Interference with human remains.]—**HAWKES *v.* JONES, No. 3084, *ante*.

**Construction of vault.]—**See BURIAL, Vol. VIII., pp. 529, 530, Nos. 93–96.

*See, generally, Part IV., Sect. 2, sub-sect. 1, ante.*

*(c) Grounds for Granting or Refusing.*

*See, generally, Part IV., Sect. 2, sub-sect. 4, ante.*

**3089. What court will consider—Wishes of incumbent.]—**A faculty for the erection of a gallery in a church granted, notwithstanding the opposition of the vicar.—TATTERSALL *v.* KNIGHT (1811), 1 Phillim. 232.

*Annotations:—Mentd.* Walter *v.* Montague & Lamprell (1830), 1 Curt. 253; Bathurst *v.* Cirencester Parishi, [1921] P. 381.

**3090. — Wishes of parishioners.]—**In considering an application for a faculty to enlarge or improve a church the ct. is not bound by the opinion of the parishioners, though their opinion is entitled to much weight. But where it considered the alterations intended would be a public benefit & without injury to any legal private rights, & the rector proposed to carry them out at his own cost, the ct. granted the faculty against the opposition of churchwardens & parishioners.—STEEPLE LANGFORD (RECTOR) *v.* STEEPLE LANGFORD (CHURCHWARDENS) (1856), 28 L. T. O. S. 178.

**3091. —.]—**Where the incumbent & churchwardens with the approval of the vestry apply for a faculty for alterations in their parish church, & the grant or refusal of the faculty is merely a matter for the discretion of the ordinary, the faculty ought not to be granted unless it is proved to the satisfaction of the ordinary that if the proposed alterations are carried out the church will be thereby rendered more convenient, more fit for the accommodation of the parishioners who worship there, more suitable, more appropriate or more adequate to its purposes, or that there exists either on the part of the parishioners generally, or of the parishioners actually attending the church, a general desire in favour of the faculty being granted.—PEEK *v.* TROWER (1881), 7 P. D. 21; 45 J. P. 707.

*Annotations:—Refd.* Lightfoot *v.* Eastwood & Cross-stone (1889), Trist. 218; St. Andrew's, Haverstock-Hill (1909), 25 T. L. R. 408. *Mentd.* Nickalls *v.* Briscoe, [1892] P. 269.

*See, also, No. 1051, post.*

**3092. — Wishes of majority of vestry.]—**TOTTENHAM (VICAR) *v.* VENN, No. 3096, *post*.

**3093. — Comfort & convenience of parishioners attending church.]—**TOTTENHAM (VICAR) *v.* VENN, No. 3096, *post*.

**3094. —.]—**PEEK *v.* TROWER, No. 3091, *ante*.

**3095. — Circumstances of parish.]—**JAY *v.* WEBBER, No. 2940, *ante*.

**3096. — Interests of future parishioners.]—**An application for a faculty was made for the following purposes: (a) to raise the walls & the roof of an ancient church with a picturesque ivy-clad tower, & to add claristery windows; (b) to extend the east end of the church by constructing a chancel & two vestries; (c) to remove two galleries; (d) to re-arrange the sittings; & to repair the church. The application was opposed

by defts. with the support of a considerable majority of the vestry:—*Held*: (1) for the determination of the questions raised, the ct. should consider not only the wishes of the majority of the vestry, but also the comfort & convenience of the parishioners attending the church, as well as the interests of future parishioners; (2) as the raising of the walls & roof of the church & the claristery windows was opposed by the majority of the vestry & parishioners, & according to the architectural evidence, would be detrimental to the picturesque appearance & architectural beauty of the church tower, this part of the application should be rejected; (3) as to so much of the plan as related to taking down the galleries, to making a chancel & vestries, re-arranging & re-pewing the church, as it was supported by the majority of churchmen in the parish, & as its adoption would conduce to the convenience of the congregation, a faculty should be granted; subject to a proviso that it should not issue until an order had been obtained from the Ecclesiastical Comrs. & two justices of the peace under Church Building Act, 1819 (c. 134), s. 39, sanctioning the diversion of the ancient footpaths necessary for the extension of the chancel.

(4) On the Ecclesiastical Comrs. declining to make an order under sect. 9 of the above Act, the ct., by a subsequent order, directed the diversion of the ancient footpaths, substituting for them other convenient paths.—TOTTENHAM (VICAR) *v.* VENN (1874), L. R. 4 A. & E. 221; Trist. 20.

*Annotation:—Mentd.* Nickalls *v.* Briscoe, [1892] P. 269.

**3097. — Whether alterations a public benefit.]—**STEEPLE LANGFORD (RECTOR) *v.* STEEPLE LANGFORD (CHURCHWARDENS), No. 3090, *ante*.

**3098. — Wishes of donors of window affected by alterations.]—**A faculty for the enlargement of the parish church of St. M. by taking down & rebuilding the east wall of the chancel of the church six or seven feet further to the east & for other alterations in the church, including the re-erection & re-reading of the historical painted window at the east end of the chancel erected by the House of Commons, was granted, on the application of the rector & churchwardens with the consent of the parish vestry, on it appearing in evidence that official notice of the application for the faculty had been given to the then Speaker of the House of Commons, & that the assent of the members of the House of Commons to the works proposed by the faculty had been sufficiently shown.—*Re* ST. MARGARET'S, WESTMINSTER, [1905] P. 286.

**3099. Purpose for which faculty sought—Alterations detrimental to architectural beauty or picturesque appearance of church.]—**TOTTENHAM (VICAR) *v.* VENN, No. 3096, *ante*.

**3100. — Extension of east end—By construction of chancel.]—**TOTTENHAM (VICAR) *v.* VENN, No. 3096, *ante*.

**3101. —.]—***Re* ST. MARGARET'S, WESTMINSTER, No. 3098, *ante*.

**3102. — Erection of gallery.]—**GROVES & WRIGHT *v.* HORNSEY (RECTOR, ETC.), No. 1051, *ante*.

**3103. — Removal of galleries.]—**TOTTENHAM (VICAR) *v.* VENN, No. 3096, *ante*.

**3104. — Rearrangement of sittings.]—**TOTTENHAM (VICAR) *v.* VENN, No. 3096, *ante*.

**3105. — Extension on to unconsecrated ground—Subject to consecration.]—**Faculty granted authorising *inter alia* the extension of the chancel on unconsecrated ground, such extension to be consecrated.—ST. BARNABAS, KENSINGTON (1909), 25 T. L. R. 571.

## SUB-SECT. 7.—FITTINGS AND DECORATIONS.

**Liability of parishioners to provide.]—***See, generally, Part III., Sect. 7, sub-sect. 9, B. (c), & No. 420, ante.*

**Effect of on liability of incumbent to repair chancel.]—***See No. 422, ante.*

**The bells—Control over.]—***See Part II., Sect. 7, sub-sect. 2, B. (a) iii., ante.*

**The organ.]—***See Part II., Sect. 7, sub-sect. 2, B. (a) iv., ante.*

**Legality of.]—***See Part V., Sect. 1, sub-sect. 4, B., ante.*

**3106. Necessity for faculty—Setting up ornaments.]—**No ornaments can be set up in the church without consent of the ordinary.—*PALMET v. EXETER (Br.) (1723), 1 Stra. 576; 93 E. R. 710.*

*Annotations:—***Mentd.** Vincent v. Epton, [1897] P. 1. **Mentd.** Wilson v. M'Math (1819), 3 B. & Ald. 244, n.; *Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113; *Novill v. Bridger* (1874), L. R. 9 Exch. 214.

*See, also, No. 1756, ante.*

**3107. Setting up organ.]—**In a parish church an organ cannot legally be erected without a faculty. It is not a sufficient objection to such a faculty that there is no provision for repairs or for the salary of an organist.—*PEARCE & HUGHES v. LAPHAM (RECTOR, ETC.) (1795), 3 Hag. Ecc. 10.*

*Annotations:—***Mentd.** St. Margaret, Rochester Burial Board v. Thompson (1871), L. R. 6 C. P. 445; *Keet v. Smith* (1875), L. R. 4 A. & E. 398.

**3108. Introduction of heating apparatus.]—***HAWKES v. JONES, No. 3081, ante.*

**3109. Moving Communion Table.]—***ENSHAM (CHURCHWARDENS) v. ENSHAM (VICAR) (1857), 20 L. T. O. S. 402.*

*Annotation:—***Mentd.** *Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113.

**3110. Defacing superstitious window.]—***FRANCES v. LEY, No. 3282, post.*

**3111. When faculty granted—Erection of organ—Seating capacity already insufficient diminished.]—**An application for the grant of a faculty to erect an organ in a parish church refused.

In this it would be inconvenient, for it clearly appeared that the church was too small for the number of inhabitants & would be made less by taking away several seats to make way for an organ (*SIR G. LEE*).—*RANDALL v. COLLINS (1755), 2 Lee, 217; 161 E. R. 319.*

**3112. As of course—Removal of illegal ornaments.]—***WESTERTON v. LIDDELL, HORNE, ETC., BEAL v. LIDDELL, PARKE & EVANS (1855), 1 Jur. N. S. 1178; 4 W. R. 167; Moore's Special Report, 1; on appeal, sub nom. LIDDELL v. WESTERTON, LIDDELL v. BEAL (1856), 21 J. P. 100; on appeal, sub nom. LIDDELL v. WESTERTON (1857), Brod. & F. 117.*

*Annotations:—***Mentd.** *Evans v. Kingsford* (1866), 31 J. P. 179; *Sleeking & Evans v. Kingsford* (1866), 36 L. J. Eccl. 1; *Martin v. Mackonochie* (1868), 5 Moo. P. C. C. N. S. 500; *Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113; *Martin v. Mackonochie* (1869), L. R. 3 P. C. 52; *Sumner, Bp. v. Wix* (1870), L. R. 3 A. & E. 58; *Hebbert v. Purchas* (1871), L. R. 3 P. C. 605; *Sheppard v. Bennett* (2nd Appeal) (1872), 9 Moo. P. C. C. N. S. 149; *Lee v. Ridsdale* (1873), 37 J. P. 804; *St. Barnabas, Plimlico (Vicar & Churchwardens) v. Bowron* (1873), Trist. 1; *Lee v. Fagg* (1874), L. R. 6 P. C. 38; *Martin v. Mackonochie* (1874), L. R. 4 A. & E. 279; *Phillipotts v. Boyd* (1875), L. R. 6 P. C. 435; *Durst v. Masters* (1876), 1 P. D. 37; *Ridsdale v. Clifton* (1877), 2 P. D. 276; *Bradford v. Fry* (1878), 4 P. D. 93; *Re St. Augustine, Haggerstone* (1878), 4 P. D. 112; *St. Ethelburga Faculty Case* (1878), Trist. 69; *R. v. Oxford, Bp.* (1879), 4 Q. B. D. 525; *Re Holy Trinity Church, Stroud Green* (1887), 12 P. D. 199; *Re Palatine Estate Charity* (1888), 39 Ch. D. 54; *R. v. London, Bp.* (1888), 23 Q. B. D. 414; *St. John's, Isle of Dogs* (1888), 4 T. L. R. 661; *St. Andrew, Romford (Rector & Churchwardens) v. All Persons having Interest, etc.*, [1894] P. 220; *St. James Norland (Vicar, etc.) v. St. James Norland (Parishioners)*, [1894] P. 236; *St. John the Baptist, Timberhill (Vicar, etc.) v. St. John the Baptist, Timberhill (Rectors, etc.)*, [1895] P. 71; *Barsham*

*Suffolk (Rector, etc.), Barsham Suffolk (Parishioners)*, [1896] P. 256; *Great Bardfield (Vicar) v. All having Interest*, [1897] P. 185; *Richmond (Vicar) & St. Matthias, Richmond (Churchwardens) v. All Persons having Interest, etc.*, [1897] P. 70; *Re St. Paul, Camden-Square* (1897), 14 T. L. R. 156; *Re St. Mark's, Marylebone Road, St. Mark's (Vicar) v. St. Mark's (Parishioners)*, [1898] P. 114; *Kensit v. St. Ethelburga, Bishopgate Within (Rector)*, [1900] P. 80; *Re St. Anselm, Pinner*, [1901] P. 202; *Davey v. Hinde*, [1901] P. 95; *Davey v. Hinde*, [1903] P. 221; *St. Luke's, Chelsea (Rector) v. Wheeler*, [1904] P. 257; *Palngton (Vicar) v. All having Interest*, [1905] P. 111; *Markham v. Shirebrook Overseers*, [1906] P. 239; *Re St. Mark's, Wimbledon, Wimbledon (Vicar & Churchwardens) v. Eden*, [1908] P. 167; *Hayes Parish Church* (1909), 26 T. L. R. 89; *St. Paul, Bow Common (Vicar & Churchwardens) v. St. Paul, Bow Common (Inhabitants)*, [1909] P. 245; *Re Tenbury Parish Church* (1919), 36 T. L. R. 188; *Goro-Booth v. Manchester, Bp.*, [1920] 2 K. B. 412; *Re St. Luke's, Southport* (1920), 36 T. L. R. 733.

**3113. Ornament contrary to wishes of parishioners—Set up without faculty.]—***HUDSON v. FULFORD, No. 1756, ante.*

*See, further, Part IV., Sect. 11, sub-sect. 4, B., ante.*

**Removal by churchwardens.]—***See Nos. 789, 2709 ante.*

## SUB-SECT. 8.—MONUMENTS, COATS OF ARMS, ARMOUR, ETC.

**3114. Removal—Right of parson.]—***CORVEN'S CASE, No. 3159, post.*

**3115. Right of action for.]—***ANON. (1616), 1 Brownl. 45; 123 E. R. 655.*  
*Annotation:—***Mentd.** *Griffin v. Dighton & Davies* (1863), 33 L. J. Q. B. 29.

**3116. Damage to—Right of action for.]—***FRANCES v. LEY, No. 3282, post.*

*See, further, BURIAL, Vol. VII., pp. 531–531.*

## SUB-SECT. 9.—PEWS AND SEATS.

## A. In General.

**3117. Erection of pew—Necessity for faculty.]—***LEWIS v. OWEN & WILLIAMS (1751), 1 Lee, 538; 161 E. R. 198.*

**3118. Damage to pews—Chapel of augmented parochial chapelry—Right of action for.]—***JONES v. ELLIS, No. 1884, ante.*

**3119. Removal—Parochial chapelry—Right of chapelwarden.]—***JONES v. ELLIS, No. 1884, ante.*

**3120. Door of pew—Whether chattel.]—***MANT v. COLLINS (1812), cited in 8 Q. B. at p. 916; 115 E. R. 1119.*

*Annotations:—***Consd.** *Wood v. Hewett* (1816), 8 Q. B. 913; *Lancaster v. Eve* (1859), 5 C. B. N. S. 717. **Mentd.** *Philpot v. Bath* (1905), 21 T. L. R. 631.

**3121. Corporation pew—Funds applicable for repair.]—**A corp'n. had, during all the time of living memory, repaired from the corp'n. funds a pew in a parish church to which the members of the corp'n. had been used, in their character of corporators, to resort for worship. It did not appear that the corp'n. possessed any hall or other building within the parish:—*Held: such repairs might be defrayed from time to time under 5 & 6 Will. 1, c. 76, s. 92.—R. v. WARWICK CORPN. (1846), 8 Q. B. 926; 15 L. J. Q. B. 306; 7 L. T. O. S. 137; 10 J. P. 789; 10 Jur. 902; 115 E. R. 1123.*  
*Annotations:—***Mentd.** *R. v. Tamworth Corp'n.*, *Re p. Tamworth Corp'n.* (1868), 19 L. T. 133; *R. v. Sheffield Corp'n.* (1871), L. R. 6 Q. B. 652.

**Repewing church.]—***See No. 3081, ante.*

**3122. Repairs—By churchwardens—Jurisdiction of ecclesiastical courts to control.]—***COLEBACH v. BALDWIN (1692), 2 Lut. 1032; 125 E. R. 574.*

**As evidence of prescriptive right to seat.]—***See Sub-sect. 9, E. (e) iii., post.*

**Corporation pew—Funds applicable for.]—***See No. 3121, ante.*

## Sect. 3.—The church: Sub-sect. 9, B. (a) &amp; (b).]

## B. Rights in.

## (a) In General.

**3123. In parishioners.**—(1) Faculties appropriating pews in parish churches, to particular families, in different forms, & under different limitations, too lavishly granted by ordinaries in former times—the numerous exclusive rights to particular pews, vested, or supposed to be vested, in particular families, to which this has given rise, nuisances to parishes at large—it is the duty of ordinaries to prevent, so far as may be, their continuance or increase, by treating all applications for such faculties with great reserve; & by suffering none to issue, but under very peculiar circumstances.

(2) By the general law, & of common right, all the pews in a parish church are the common property of the parish; they are for the use, in common, of the parishioners, who are all entitled to be seated, orderly, & conveniently, so as best to provide for the accommodation of all. The distribution of seats rests with the churchwardens as the officers, & subject to the control of the ordinary (*per Cur.*).

(3) Some instances there are of faculties at large: that is, appropriating pews to persons & their families without any condition annexed of residence in the parish. But such faculties are, so far at least, merely void, that no faculty is deemed, either here, or at common law, good to the extent of entitling any person who is a non-parishioner to a seat even in the body of the church (*per Cur.*).

(4) Whenever the occupant of a pew in the body of the church ceases to be a parishioner, his right to the pew, howsoever founded, & how valid soever during his continuance in the parish, at once ceases & determines (*per Cur.*).

(5) So, again, of pews annexed by prescription to certain messuages, it is often erroneously conceived that the right to the pew may be severed from the occupancy of the messuage; it is no such thing; it cannot be severed: it passes with the messuage; the tenant of which, for the time being, has also *de jure*, for the time being, the prescriptive right to the pew (*per Cur.*).

(6) The faculty prayed is, if once issued, good & valid, even against the ordinary himself (*per Cur.*).—**FULLER v. LANE** (1825), 2 Add. 419; 102 E. R. 348.

**Annotations.**—As to (1) **Consd.** Butt v. Jones (1829), 2 Hag. Ecc. 417; Taylor v. Timson (1888), 20 Q. B. D. 671; Bathurst v. Cirencester Parish, [1921] P. 381. **Reid.** Woollocombe v. Ouldrige (1825), 3 Add. 1; Phillips v. Halliday, [1891] A. C. 228; L. C. C. v. Dundas, [1904] P. 1. As to (2) **Consd.** Byerley v. Windus (1826), 5 B. & C. 1; Taylor v. Timson (1888), 20 Q. B. D. 671. **Reid.** Re St. Columb, Londonderry, Cathedral Church Pews (1863), 8 L. T. 861; Serjeant v. Bala (1875), Trist. 33; Asher v. Calcraft (1887), 3 T. L. R. 485; Claverley (Vicar, etc.) v. Claverley (Parishioners, etc.), Claverley (Churchwardens) v. Claverley (Vicar, etc.), Gatacro & Leigh v. Claverley (Vicar, etc.), [1909] P. 195; B. v. Sarum, Bp., [1916] 1 K. B. 466; As to (3) **Reid.** Byerley v. Windus (1826), 5 B. & C. 1; Butt v. Jones (1829), 2 Hag. Ecc. 417; Proud v. Price (1893), 62 L. J. Q. B. 490; Claverley (Vicar, etc.) v. Claverley (Parishioners, etc.), Claverley (Churchwardens) v. Claverley (Vicar, etc.), Gatacro & Leigh v. Claverley (Vicar, etc.), [1909] P. 195; Kellett v. St. John's, Burrough Bridge (1916), 32 T. L. R. 571; Bathurst v. Cirencester Parish, [1921] P. 381. As to (4) **Reid.** Byerley v. Windus (1826), 5 B. & C. 1. As to (5) **Consd.** Byerley v. Windus (1826), 5 B. & C. 1; Stilleman-Gibbard v. Wilkinson, [1897] 1 Q. B. 749. **Generally, Reid.** Chapman v. Jones (1869), L. R. 4 Exch. 273.

**3124. In non-parishioners—By prescription only.]**

—A non-parishioner can have no right to a pew in the body of a parish church, except by prescription; & prohibition will lie to restrain proceedings in the ecclesiastical ct., if they seek to enforce a claim by any title except that of prescription; or if it be sought by that title, & the prescription be denied by deft. Where prohibition is applied for, it is not necessary that the proceedings in the ecclesiastical ct. should be actually at issue: it is sufficient, if they are clearly in progress towards the trial of a question which can be properly tried only in a ct. of law.—**BYERLEY v. WINDUS** (1826), 5 B. & C. 1; 7 Dow. & Ry. K. B. 504; 4 L. J. O. S. K. B. 102; 108 E. R. 1.

**Annotations.**—**Consd.** Re St. Columb, Londonderry, Cathedral Church Pews (1863), 8 L. T. 861. **Reid.** Taylor v. Timson (1888), 20 Q. B. D. 671. **Menid.** Bodenham v. Hicketts (1836), 5 Dow. 120; Ray v. Sherwood (1836), 1 Curt. 173; Chesterton v. Farlar (1838), 7 Ad. & El. 713; Hall v. Maule (1838), 3 Nov. & P. K. B. 459; Hallack v. Cambridge University (1841), 1 Q. B. 593; London Corp. v. Cox (1867), L. R. 2 H. L. 239; R. v. Electricity Comrs., Ex p. London Electricity Joint Committee (1923), 39 T. L. R. 715.

**3125.** —.]—A possessory right in a pew is sufficient to maintain a suit against a mere disturber.

By the general law, & of common right, all pews belong to the parishioners at large for their use & accommodation; but the distribution of seats among them rests with the ordinary; the churchwardens are the officers of the ordinary; they are to place the parishioners according to their rank & station; but they are subject to the control of the ordinary if any complaint should be made against them (*per Cur.*).

The vestry, as such, has no authority whatever on the subject (*per Cur.*).

A prescriptive right must be clearly proved—the facts must not be left equivocal—and they must be such as are not inconsistent with the general right. In the first place, it is necessary to show that use & occupation of the seat has been from time immemorial appurtenant to a certain messuage—not to lands—the ordinary itself cannot grant a seat appurtenant to lands. Secondly, it must be shown, that if any acts have been done by the inhabitants of such messuage, they maintained & upheld the right. At all events, if any repairs have been required within memory, it must be proved that they have been made at the expense of the party setting up the prescriptive right. The *onus & beneficium* are supposed to go together; mere occupancy does not prove the right (*per Cur.*).—**PETTMAN v. BRIDGER** (1811), 1 Phillim. 316; 161 E. R. 996.

**Annotations.**—**Consd.** Crisp v. Martin (1876), 2 P. D. 15; Taylor v. Timson (1888), 20 Q. B. D. 671; Claverley (Vicar, etc.) v. Claverley (Parishioners, etc.), Claverley (Churchwardens) v. Claverley (Vicar, etc.), Gatacro & Leigh v. Claverley (Vicar, etc.), [1909] P. 195. **Reid.** Byerley v. Windus (1826), 5 B. & C. 1; Jones v. Ellis (1828), 2 Y. & J. 265; Stilleman-Gibbard v. Wilkinson, [1897] 1 Q. B. 749.

**3126.** —.]—**WYLLIE v. MOTT & FRENCH**, No. 1040, ante.

**3127.** —.]—(1) A person who has permission from the churchwardens to sit in a pew temporarily, & in order, by keeping possession for the future tenant, to carry into effect the conditions of sale of a house with which the pew had for above a century been held under an expired faculty, has no possession on which he can bring a suit for perturbation against a mere intruder,

**PART VII. SECT. 3, SUB-SECT. 9.—****B. (a).****a. General rule.**—Every parishioner

has a right to a sitting, but not to a pew. Non-parishioners have not a right to a pew or a sitting.—*Re*

**DERRY CATHEDRAL (Pews of)** (1863), 13 Ir. Jur. 115.—*IR.*



such permission by the churchwardens being illegal, as confirming the sale of the pew.

(2) By the general law the use of all pews belongs to the parishioners, who are to be in the first instance seated by the churchwardens, subject to the control of the ordinary.

(3) On the expiration of a faculty limited to a certain period, the right of the parishioners to the pews the subject of such faculty revives.—*BLAKE v. USBORNE* (1832), 3 Hag. Ecc. 726; 162 E. R. 1323.

*Annotation:—As to (2) Expld. Re St. Columb, Londonderry Cathedral Church Pews* (1863), 8 L. T. 861.

**3128.** ——— *Effect of ceasing to be parishioner.* — *FULLER v. LANE*, No. 3123, *ante*.

**3129. Whether subject of permanent ownership.** — By the general law, there can be no permanent property in pews.—*HAWKINS & COLEMAN v. COMPEIGNE* (1818), 3 Phillim. 11; 161 E. R. 1243.

**3130.** ——— *RAWLSON v. MEDWIN & HURST* (1852), 10 L. T. O. S. 375.

**3131. Under Church Building Acts—Free seats—Provision for children.** — *WILLIAMS v. BROWN*, No. 1937, *ante*.

#### (b) Private Rights.

**3132. How acquired—By faculty or prescription.** — *MORGAN v. CURTIS*, No. 3280, *post*.

**3133.** ——— *BATHURST (EARL) v. CIRENCESTER PARISH*, No. 3201, *post*.

Acquisition by faculty, *see* Sub-sect. 9, D. (a), *post*.

Acquisition by prescription, *see* Sub-sect. 9, E., *post*.

**3134.** ——— *By reservation—On conveyance of site for church Whether presumed.* — In 1845, a meeting of the inhabitants of B. A. appointed a committee to raise funds by subscription to build a chapel, in pursuance of an arrangement with the governors of a school, by which, in consideration of a new site & school being provided for them, they gave up the site of an old school for the purposes of a chapel. The deed of conveyance of the new school was delivered to the governors on Sept. 5, 1846, but there was no record of any conveyance of the site of the chapel. On Feb. 12, 1848, on completion of the chapel, a pew therein was assigned by the committee to H., there being nothing to attach the pew to any particular house. On Feb. 22, 1848, the chapel was consecrated. H. devised the house & also the pew by will. In 1867 a faculty was obtained for the re-pewing of the chapel, with the consent of the persons who then held the pews. The faculty empowered the incumbent & churchwardens to re-allot the pews, & H.'s pew was so re-allotted to her representatives. In 1873 H.'s house & the pew, described as usually held by H. with her mansion house, were sold to pttf., who thereafter continuously remained in exclusive enjoyment of the pew. No repairs were done to the pew by H. or her successors in title:—*Held*: (1) a reservation of a pew

in the body of a church upon the conveyance of the land on which the church is built is unknown in law, & therefore could not be presumed; (2) the assent of H.'s successors in title in 1867 to the allotment of a pew by the ordinary was inconsistent with an existing right by virtue of a faculty; (3) where the question relates, not to the presumption of an ancient grant or faculty relied upon as the foundation of prescription, but to the existence of a modern grant or faculty actually made but lost, it is always one of fact; (4) the absence of evidence of repair was fatal to the presumption of a faculty since 1867; (5) Prescription Act, 1832 (c. 71), s. 1, does not apply to a claim to a pew; (6) even if it does, the evidence proved occupancy only, which in the case of a pew is not sufficient evidence of prescription.—*PROUD v. PRICE* (1893), 63 L. J. Q. B. 61; 60 L. T. 604; 57 J. P. 533; 42 W. R. 102; 10 T. L. R. 21; 37 Sol. Jo. 441; 9 R. 40, C. A.

*Annotation:—As to (3) Rejd. Silliman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

**3135. Possessory right—Existence of right—Jurisdiction of church to try.** — A. brought a suit against the churchwardens of the parish of C. for disturbing him in the occupation of a certain pew. In the letters of request from the Diocesan Ct. & in the citation this pew was stated to be occupied & enjoyed as appurtenant to a house in which A. resided. In the libel & responsive allegation the sole & exclusive title set up & disputed was that by prescription, which, by the evidence, was not proved:—*Held*: in such a state of the pleadings the ct. could not inquire whether A. had any title against the churchwardens on the ground of mere possession. The churchwardens are not justified in dispossessing any one of a sitting, which he has enjoyed for a time, without giving notice of their intention, & offering an opportunity for objection & explanation.—*HORSFALL v. HOLLAND & WOOLLEY* (1859), 6 Jur. N. S. 278.

*Annotation:—Rejd. Asher v. Culerait* (1887), 56 L. T. 490.

**3136.** ——— *Extent of right—As against intruder.* — *PETTMAN v. BRIDGEHILL*, No. 3125, *ante*.

**3137.** ——— *SPRY v. FLOOD*, No. 423, *ante*.

**3138.** ——— *RAWLSON v. MEDWIN & HURST* (1852), 10 L. T. O. S. 375; *subsequent proceedings, sub nom. L. v. MEDWIN* (1853), 1 E. & B. 609.

**3139.** ——— *On confirmation by court.* — *WILKINSON v. MOSS* (1756), 2 Lee, 259; 161 E. R. 331.

**3140.** ——— *Right of action at common law.* — An action at common law will not lie for disturbing another in the possession of a pew, unless the pew be annexed to a house in the parish.—*MAINWARING v. GILES* (1822), 5 B. & Ald. 356; 106 E. R. 1221.

*Annotations:—Consd. Chapman v. Jones* (1869), L. R. 4 Exch. 273. *Mentd. Vickers v. Selwyn* (1903), 89 L. T. 747.

#### PART VII. SECT. 3, SUB-SECT. 9. — B. (b).

**t. Rights of Crown.** — The Crown is as fully entitled to those parts of the church which have been successively occupied by H. M.'s servants as any individual is to the pew he occupies. If, therefore, any public officer to whom the king has given the use of one of the pews belonging to the Crown be deprived of this easement or obstructed in the enjoyment of it, by the churchwardens, such officer may bring an action on the case against them; but the Governor, as the King's representative, may dispose of the

government pews as he thinks proper. — *FITZGERBERG v. WILLIAMS & GILL* (1818), 1 Nid. L. R. 133, 115. — *NFLD.*

**a. Conveyance of pews To trustee for corporation.** — Conveyance of pews in a church belonging to the Church of England to pttf., a member of that church, even if clothed with an unexpressed trust in favour of a corp., incapacitated under Church Temporalities Act from being pew-holders by reason of their not belonging to the church, was nevertheless in a ct. of law binding between the parties to it. — *RIPPOUT v. HARRIS* (1866), 17 C. P. 88; *consd. TULLY v. FARRELL*, 23 Gr. 19. — *CAN.*

**b. Destruction of church—Agreement to subscribe towards restoration—Refusal of pew-holder.** — The church of St. J. having been destroyed by fire, it was agreed that the pew-holders who had purchased the right to their pews, subject to a ground rent, should pay a certain sum & be reinstated as nearly as circumstances would permit in their pews in a new church, to be built on the site of that destroyed. After the new church was built, one of such pew-holders refused to pay the sum of £25, agreed to be authorised by him towards rebuilding the church, & for which he had given his note; whereupon the churchwardens, in

*Sect. 3.—The church: Sub-sect. 9, B. (b), C. & D. (a) i.]*

**3141.** ——— *On rearrangement of seats.]—FULLER v. BEXLEY (PARISHIONERS), No. 3201, post.*

**3142.** ——— *Duration of right.]—WOOLLOCOMBE v. OULDRIDGE, No. 1167, ante.*

**3143.** ——— *Termination—Right to notice.]—HORSFALL v. HOLLAND & WOOLLEY, No. 3135, ante.*

— *As ground for grant of faculty.]—See Nos. 3183, 3201, 3203, 3204, post.*

**3144.** *Surrender of right—Whether valuable consideration.]—CHICHESTER (COUNTESS) & ENBROOK ESTATE TRUSTEES v. WOODWARD, No. 3182, post.*

#### C. Control of.

**3145.** *By ordinary.]—MAY v. GILBERT (1613), 2 Bulst. 150; 80 E. R. 1025.*

*Annotations:—Refd. Chester's, 13p. Case (1698), 5 Mod. Rep. 433; Jacob v. Dallow (1698), 12 Mod. Rep. 233; Stocks v. Booth (1786), 1 Term Rep. 428; Byerley v. Windus (1820), 7 Dow. & Ry. K. B. 564.*

**3146.** ——— *Boothly v. BAILY, No. 1012, ante.*

**3147.** ——— *Seats in a church are as a rule in the power of the ordinary.]—EATON v. AYLIFFE (1628), 11 Ct. 94; 124 E. R. 370.*

**3148.** ——— *Langley v. CHUTE (1678), T. Raym. 246; 83 E. R. 126.*

**3149.** ——— *Of common right the ordinary has the disposal of seats in the church & of common right the parishioners ought to repair them & the fact that the parishioners have built & repaired all the seats in the church is not sufficient to entitle the churchwardens to dispose of the sittings.]—GREATERCHY v. BEARDSLY (1679), 2 Lev. 241; 83 E. R. 537.*

**3150.** ——— *St. SWITHIN'S PARISH (IN LONDON) CASE (1695), as reported in Holt, K. B. 139; 90 E. R. 975.*

*Annotations:—Mentd. Hartley v. Cook (1833), 9 Bing. 728; Robinson v. Bristol (1851), 19 L. T. O. S. 230.*

**3151.** ——— *Disposal of seats in the church belongs to the ordinary.]—LEE v. DANIEL (1698), 12 Mod. Rep. 228; 88 E. R. 1281.*

**3152.** ——— *All controversies concerning seats in a church are determinable before the ordinary, except where one claims a seat by prescription (per CUR.).—ANON. (1700), 12 Mod. Rep. 401; 88 E. R. 1408.*

**3153.** ——— *(1) The disposition of pews belongs to the ordinary.*

*(2) If one purchase a pew, his interest therein ceases by ceasing to be a parishioner.]—ANON. (1701), 12 Mod. Rep. 554; 88 E. R. 1514.*

**3154.** ——— *JACOB v. DALLO, No. 1249, ante.*

**3155.** ——— *If a faculty is only granted for the sake of quiet & order in the church, that is an assignment of a seat for the person to sit in where the ordinary has the right; but where any particular person has a right, the ordinary cannot assign (PARKER, C.J.).—AINGE v. MORGAN (1713), Gilb. 124; 93 E. R. 281.*

**3156.** ——— *PETTMAN v. BRIDGER, No. 3125, ante.*

**3157.** ——— *Seat in body of church.]—CORVEN'S CASE, No. 3159, post.*

*pursuance of a resolution of the vestry removed the door from the pew claimed by him, & the holder thereof instituted an action on the case against the churchwardens for the disturbance of his easement:—Held: he was not*

*entitled to recover.—BRUNSKILL v. HARRIS (1854), 1 E. & A. 322.—CAN.*

#### PART VII. SECT. 3, SUB-SECT. 9.—C.

**3165** 1. *By churchwardens—Subject to ordinary.]—Churchwardens alone have,*

**3158.** ——— *—.]—ANON. (1616), 1 Brownl. 45; 123 E. R. 655.*

*Annotation:—Refd. Griffin v. Dighton & Davies (1863), 33 L. J. Q. B. 29.*

**3159.** ——— *Seat claimed by prescription.]—(1) Any person who has house or land in a parish time out of mind, & has had a seat in an aisle of the same church, & has maintained it at his own charges, may have a prohibition against the bishop, if he will dispossess him. But if a question arises concerning a seat in the body of the church, the ordinary shall decide it.*

*(2) A parson cannot take a gravestone, coat of armour, tomb, etc., though they are annexed to his freehold; nor can he take things which are hung up in the church for the honour of the deceased.*

*(3) The ornaments of the chapel of a preceding bishop belong to his successor, although other chattels in the case of a sole corporation belong to the executors of the deceased.*

*(4) It was resolved in the Star-Chamber, that if a man have a house in any parish, & time out of mind he & all those whose estate he has, have used to have a certain pew in the church, if the ordinary will displace him, he shall have a prohibition: but he must claim it as belonging to his house.]—CORVEN'S CASE (1612), 12 Co. Rep. 105; 77 E. R. 1380; sub nom. GARVEN & PYM'S CASE, Godb. 199; sub nom. PYM v. GORWYN, Moore, K. B. 878.*

*Annotations:—As to (1) Consd. Claverley (Vicar, etc.) v. Claverley (Parishioners, etc.), Claverley (Churchwardens) v. Claverley (Vicar, etc.), Gatacre & Legh v. Claverley (Vicar, etc.), [1909] P. 195. Refd. Buxton v. Bateman (1662), 1 Sid. 88; Churton v. Frewen (1806), L. R. 2 Eq. 634. As to (2) Refd. Frances v. Ley (1615), Cro. Jac. 366; Spooner v. Brewster (1825), 3 Bing. 136; Ashby v. Harris (1868), L. R. 3 C. P. 523; MacGough v. Lancaster Burial Board (1888), 52 J. P. 740. As to (4) Refd. Phillips v. Halliday, [1891] A. C. 228.*

**3160.** ——— *—.]—AINGE v. MORGAN, No. 3155, ante.*

*Sec, further, Sub-sect. 9, E. (f), post.*

**3161.** ——— *Where seats built & repaired by parishioners.]—GREATERCHY v. BEARDSLY, No. 3149, ante.*

**3162.** ——— *Control by Court of Arches.]—ELD v. PERRY, No. 1788, ante.*

*Sec, also, Nos. 1040, 3123, 3127, ante, No. 3169, post.*

**3163.** *By churchwardens.]—REYNOLDS v. MONKTON, No. 3174, post.*

**3164.** ——— *By custom.]—BRABIN v. TREDIMAN (1618), 2 Roll. Rep. 24; Popl. 140; 81 E. R. 634.*

*Annotations:—Refd. Langley v. Chute (1678), T. Raym. 246; Proud v. Price (1803), 62 L. J. Q. B. 490; Kellett v. St. John's, Burscough Bridge (1916), 32 T. L. R. 571.*

**3165.** ——— *Subject to ordinary.]—PETTMAN v. BRIDGER, No. 3125, ante.*

**3166.** ——— *—.]—FULLER v. LANE, No. 3123, ante.*

**3167.** ——— *—.]—WYLLIE v. MOTT & FRENCH, No. 1040, ante.*

**3168.** ——— *—.]—BLAKE v. USBORNE, No. 3127, ante.*

**3169.** ——— *—.]—The churchwardens of a parish church have vested in them the allotment of seats in the body of the church amongst the parishioners subject to the control of the ordinary & to the exemption existing in respect of faculty pews or seats. The allotment, however, in each*

*subject to the ordinary's control, the regulation of the pews in a parish church, even though it be a cathedral.—Re DERRY CATHEDRAL (PEWS OF) (1863), 15 Ir. Jur. 115; 8 L. T. 861.—IR.*

case must be made in general terms so as to entitle the allottees to occupy the seats allotted to them at all the ordinary services held in the church; the churchwardens not being entitled to attach to the allotment a condition excluding any allottee from the right to attend in the seats allotted any of the ordinary services of the Church prescribed by the rubrics. Thus persons to whom the churchwardens have allotted seats in the body of the church are entitled by law to occupy the seats so allotted to them not only during the Sunday morning service, but also during the Sunday evening service & at the early Sunday morning service held for the administration of Holy Communion, as well as at the ordinary services held on Christmas Day, Ash Wednesday, & Good Friday, & at any other ordinary service held in the church whether on Sundays or on weekdays.

Moreover, up to the commencement of service the seats allotted by the churchwardens to parishioners cannot legally be occupied by other persons against the will of the persons to whom they have been allotted.

Should a stranger be put into a seat prior to the commencement of the service & decline to leave it to enable the allottees from the churchwardens to occupy it, he would be liable to an action at common law for disturbance of seat & to a suit in the Ecclesiastical Ct. for perturbation of seat (*DR. TRISTRAM*).—*CLAVERLEY (VICAR, ETC.) v. CLAVERLEY (PARISHIONERS, ETC.), CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, ETC.), GATACRE & LEIGH v. CLAVERLEY (VICAR, ETC.)*, [1008] P. 195.

See, also, No. 3122, *ante*.

**3170.** — By custom of London.]—(*CLERK v. BIRCH* (1719), 11 Mod. Rep. 290; 88 E. R. 1046.

**3171.** — [—*DRURY v. HARRISON* (1794), 3 Phillim. 515, n.

*Annotation*:—*Reid*. *Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113.

**3172.** — Free seats.]—(1) Churchwardens of a church with free seats have authority to direct, for the maintenance of order & decorum, in which of those seats certain classes of the congregation may & others may not sit.

(2) A person may be convicted by justices, under Ecclesiastical Cts. Jurisdiction Act, 1860 (c. 32), s. 2, of violent behaviour in a church, although such behaviour was in assertion of a *bonâ fide* claim of right.—*ASHER v. CALCRAFT* (1887), 18 Q. B. D. 607; 56 L. J. M. C. 57; 56 L. T. 490; 51 J. P. 598; 35 W. R. 651; 3 T. L. R. 485, D. C.

*Annotations*:—As to (2) *Reid*. *Kensit v. St. Paul's (Dean & Chapter)*, [1905] 2 K. B. 249. *Generally*, *Mentd.* *Taylor v. Timson* (1888), 20 Q. B. D. 671.

See, also, No. 3149, *ante*.

**3173.** — Extent of control—Whether right to destroy pew included.]—*GIBSON v. WRIGHT* (1605), Noy, 108; 74 E. R. 1074.

**3174.** — Removal of intruder.]—The churchwardens have a discretionary power to appropriate the pews in the church amongst the parishioners, & may remove persons intruding on seats already appropriated.

I think that the churchwardens have a right to exercise a reasonable discretion in directing where the congregation shall sit; & if deft. used no unnecessary force, he had a right to remove pltf. from the pew in question to another seat. If, in the exercise of a fair discretion, the churchwardens thought it more convenient that the pew should be occupied by G.'s family, & not by pltf., & if the removal could be effected without public scandal, or the disturbance of Divine service,

deft. was justified. The jury are to say whether any unnecessary violence was used (*ROLFE, B.*).—*REYNOLDS v. MONKTON* (1841), 2 Mood. & R. 384. *Annotations*:—*Apprvd.* *Asher v. Calcrafft* (1887), 18 Q. B. D. 607. *Reid*. *Taylor v. Timson* (1888), 20 Q. B. D. 671.

**3175.** — Right of exclusion—For insufficiency of accommodation.]—*TAYLOR v. TIMSON*, No. 1031, *ante*.

See, further, Nos. 700, 789, *ante*.

**3176.** — Exercise of powers.]—*PETTMAN v. BRIDGER*, No. 3125, *ante*.

**3177.** — [—*DRURY v. HARRISON* (1794), 3 Phillim. 515, n.

*Annotation*:—*Reid*. *Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113.

See, generally, Nos. 751, 752, *ante*.

**3178.** By parson & churchwardens—Seats in body of church.]—*PYM v. GORWYN* (1612), as reported in Moore, K. B. 878; 72 E. R. 969.

*Annotations*:—*Mentd.* *Frances v. Ley* (1615), Cro. Jac. 366; *Buxton v. Bateman* (1662), 1 Sid. 88; *Spooner v. Brewster* (1825), 3 Bing. 136; *Churton v. Frowen* (1866), L. R. 2 Eq. 634; *Ashby v. Harris* (1868), L. R. 3 C. P. 523; *Macdough v. Lancaster Burial Board* (1888), 52 J. P. 740; *Phillips v. Halliday*, [1891] A. C. 228; *Claverley (Vicar, etc.) v. Claverley (Parishioners, etc.)*, *Claverley (Churchwardens) v. Claverley (Vicar, etc.)*, *Gatacre & Leigh v. Claverley (Vicar, etc.)*, [1909] P. 195.

**3179.** By parishioners.]—Parishioners cannot prescribe to dispose of pews, exclusive of the ordinary.—*PRESGRAVE v. SHREWSBURY (CHURCHWARDENS)* (1705), 1 Salk. 167; 91 E. R. 154.

**3180.** By vestry.]—*PETTMAN v. BRIDGER*, No. 3125, *ante*.

**3181.** When common law courts will interfere -- Where proprietary right in issue.]—*MAY v. GILBERT* (1613), 2 Bulst. 150; 80 E. R. 1025.

*Annotations*:—*Reid*. *Chester's, Bp. Case* (1698), 5 Mod. Rep. 433; *Jacob v. Dallow* (1698), 12 Mod. Rep. 233; *Stocks v. Booth* (1780), 1 Term Rep. 428; *Hyorley v. Windus* (1826), 7 Dow. & Ry. K. B. 561.

See, further, Sub-sect. 9, E. (f), *post*.

#### D. Appropriation.

##### (a) By Faculty.

##### i. Necessity for.

**3182.** On exchange of galleries.]—In 1822 D. conveyed a piece of freehold land with a chapel thereon adjoining E., his park & mansion, excepting from the conveyance a gallery extending along the west side of the chapel, reserved for the use of himself & his heirs for ever, to trustees in fee, upon trust to allow the chapel to be used for services according to the rites of the Church of England, etc. The chapel was, shortly after the date of the conveyance, consecrated, & a chaplain was appointed to officiate in it. In 1840 the chapel was pulled down, & the present church was erected partly on its site & partly on land belonging to B., who had succeeded to the E. estate, in fee, without any conveyance of the land having been made by B. for the use of the church. Upon the completion of the church, a portion of the north gallery, sufficient to seat 72 persons, was by the trustees appropriated to E. in lieu of the west gallery, which had been demolished in carrying out the plans for the extension of the church. In 1851 resp. was appointed incumbent of F., & in 1854, by an Order in Council, the district of S., including the church, was formed into a consolidated chapelry. In 1866 B. as the surviving trustee under the deed of 1822, conveyed the site of the old chapel, & in his own right the remainder of the site of the church, to the incumbent of S. & his successors in fee; subject to a proviso that the E. north gallery, with the private entrance thereto, should belong to him & his heirs for ever. The exchange of galleries had not been

*Sect. 3.—The church: Sub-sect. 9, D. (a) i., ii., iii., iv. & v.]*

sanctioned by faculty. The Countess of C., as tenant for life of E. & the trustees of the E. estate petitioned for a faculty confirmatory of the above exchange of galleries:—*Held*: (1) B. in 1849, in giving up to the parish his west gallery, gave full & valuable consideration for the present E. gallery; (2) the chapel & its site having been made, by the deed of 1822, as well as by the sentence of consecration, subject to the jurisdiction of the ct., to perfect the title to the exchange of galleries a faculty was necessary, & the exchange by deed was not sufficient to give the Countess of C. a good title to the present gallery; (3) petitioners were entitled to the confirmatory faculty prayed.—*CHICHESTER (COUNTESS) & ENBROOK ESTATE TRUSTEES v. WOODWARD* (1888), Trist. 180.

**3183. Seats appropriated on consecration of church.**—The parish church of Cross-stone was erected in 1835 by parochial subscriptions & a grant from the Ecclesiastical Comrs. in substitution for a chapel erected in 1717, which had taken the place of an earlier chapel erected in 1530. The present church consisted of a middle aisle, two side aisles, with north & south & west galleries. The incumbent & churchwardens petitioned for a faculty to authorise the removal of the north & south galleries, the substitution in the aisles of low pews with slanting backs for the present high ones, the doing away with square pews & other alterations. The granting of the faculty was opposed by E., who, with his ancestors had been resident landed proprietors of the same property in the parish for upwards of four centuries, & in the enjoyment of pews & seats annexed to houses on the E. property since 1530. E.'s opposition was based on the grounds: that (a) the proposed alterations were unnecessary, & would be no improvement, that they would seriously diminish the number of sittings; (b) that the opening of a third entrance to the church would increase the draughts in the church; that they would interfere with the E. faculty pew, & with other faculty sittings annexed to houses on the E. property now owned by himself & his nephew. The pew & other sittings in question had been appropriated to resp.'s & his nephew's predecessors in title by an appropriation deed of even date with the consecration of the church in 1835, executed by four comrs. appointed for the purpose by the Archbishop of York as Diocesan, but the appropriation had not been confirmed by faculty. There were 400 sittings appropriated by this deed as faculty sittings:—*Held*: (1) the ostensible number of sittings in the church would not be diminished by the proposed alterations & resp.'s other general objections to the alterations might be met by slight modifications in the plan, which the ct. would order to be made; (2) resp. had by the evidence established that the predecessors in title of himself & his nephew were entitled to faculty sittings in respect of houses on the E. property in the later as well as in the earlier chapel, & in lieu of such sittings those now occupied by them had been appropriated in favour of their predecessors in title by the deed of appropriation of 1835, but this appropriation, not having been confirmed by faculty, did not confer on them a complete legal title to the sittings; (3) it was competent to the ct. in the exercise of its equitable jurisdiction, to cure the defect in the title of resp. & his nephew to the seat & sittings in the aisles by decreeing a faculty confirmatory of their appropriation under the deed of 1835,

& under the circumstances, they were entitled to such faculty; (4) like faculties ought to issue to any claimants to sittings under the appropriation deed, upon the judge being satisfied in Chambers that they were entitled to corresponding faculty sittings in the later chapel; (5) as claimants to sittings appropriated by the deed of 1835, in the north & south galleries, had failed to establish a title to corresponding faculty sittings in the later chapel, they were not entitled to a similar confirmatory faculty; (6) resp. having reasonable ground for opposing the issue of the faculty in the form originally prayed, there ought to be no order as to costs, excepting on resp. to recoup to petitioners such costs as they had incurred in producing evidence in support of his own title.—*LIGHTFOOT v. EASTWOOD & CROSS-STONE (INHABITANTS)* (1889), Trist. 248.

*See, also*, No. 3134, *ante*, Nos. 3204, 3280, *post*.

*ii. Jurisdiction to Grant.*

Control of seats generally, *see* Sub-sect. 9, C., *ante*.

**3184. What estate may be granted.**—*BRABIN & TRADUM'S CASE* (1618), Poph. 140; 79 E. R. 1241; *sub nom.* *BRABIN v. TREDIMAN*, 2 Roll. Rep. 24.

*Annotations*:—*Consd.* Kellett v. St. John's, Burscough Bridge (1916), 32 T. L. R. 571. *Refd.* Langley v. Chute (1879), T. Ryms. 246; Proud v. Price (1893), 62 L. J. Q. B. 490.

**3185.** —. —. —. *STOCKS v. BOOTH*, No. 3275, *post*.

**3186.** —. —. —. *WALTER v. GUNNER & DRURY*, No. 1052, *ante*.

**3187. Seat subject to claim by prescription.**—*AINGE v. MORGAN*, No. 3155, *ante*.

**3188.** —. —. —. *STOCKS v. BOOTH*, No. 3275, *post*.

**3189. Faculty conferring power to sell.**—*STEVENS v. WOODHOUSE & BULLER* (1792), 1 Hag. Con. 318, n.; 161 E. R. 506.

**3190. Faculty granting seat appurtenant to lands.**—*PETTMAN v. BRIDGER*, No. 3125, *ante*.

**3191. Faculty without condition of residence.**—*FULLER v. LANE*, No. 3123, *ante*.

**3192.** —. —. —. *MEIGH v. TWIGG* (1886), 2 T. L. R. 552.

**3193. Faculty for seat in body of church—For non-parishioner.**—*FULLER v. LANE*, No. 3123, *ante*.

**3194. Erection of pew in chancel by parishioner.**—*WEST PECKHAM (VICAR & CHURCHWARDENS) v. GEARY, DALISON INTERVENING* (1889), Trist. 180.

**3195. Faculty confirming appropriation deed—Exchange of galleries.**—*CHICHESTER (COUNTESS) & ENBROOK ESTATE TRUSTEES v. WOODWARD*, No. 3182, *ante*.

**3196.** —. —. —. *LIGHTFOOT v. EASTWOOD & CROSS-STONE (INHABITANTS)*, No. 3183, *ante*.

*iii. Principles governing Grant.*

**3197. What court will consider.**—When the ct. grants a faculty to appropriate a seat in a church to an inhabitant, it should be matter of preliminary consideration (1) whether such a grant would be prejudicial to the parish (2) whether it would be prejudicial to the persons opposing the grant, & (3) whether the party applying for it is, from station & property in the parish, qualified to have such a grant.—*PARTINGTON v. BARNES, SURRY (RECTOR)* (1757), 2 Lee, 345; 161 E. R. 304.

**3198.** —. —. —. *Grant for faculty diminishing accommodation for parishioners.*—*BUTT v. JONES* (1829), 2 Hag. Ecc. 417; 162 E. R. 909.

*Annotations*:—*Consd.* *Re Plumstead Burial Ground*, [1895] P. 225; *St. Andrew's, Hove* (Vicar, etc.) & *Hove Comrs.*

**See, also, No. 3194, ante.**

**3200.** —.—]—WOOLLOCOMBE r. OULDRIDGE, No. 1167, *ante*.

**3202.** —.] —LIGHTFOOT r. EASTWOOD &  
(CROSS-STONE (INHABITANTS), No. 3183, *uncl.*

**3204. — Two hundred years.]**—(1) Grants of faculty for appropriating church seats are now very seldom granted, but in a case where there had been continuous possession by the same family for upwards of 200 years of seats in the gallery of the side chapel of a parish church & of substituted seats on the floor of the chapel erected at the expense of the family, & where also at the commencement of the continuous possession of the seats the ordinary had recognised that the predecessors of petitioner had special rights in the seats distinguished from the seats over which he ordinary had jurisdiction, the C. of Arches leered a faculty to issue appropriating the seats to the use of petitioner & his successors & his & their families subject to the usual provision of residence in a named house in the parish.

(2) There are only three ways in which a claim can be asserted to seats in a church which prevents the churchwardens & the ordinary, whom for this purpose the churchwardens represent, from interfering with them. The first is by claiming prescription. . . . The second is by production of a faculty. . . . The third is by application for the grant of a faculty where none is proved to have existed hitherto (*per CUR.*).

**3205. Claim by purchase.]—HARFORD v. JONES**  
(1724), 1 Hag. Con. 318, n.; 101 E. R. 566.

3206. —.]—GIBBON v. CHRISTCHURCH, HIGH HARROGATE (ALL OF), SHEEPSHANKS INTERVENING, No. 3223, *post*.

*See, generally, Sub-sect. 9, D. (b), post.*

**3207. Avoidance of expense.] — SANDGATE FACULTY CASE (1888), 4 T. L. R. 615.**

#### iv. *Effect of Grant.*

**3208. Whether ordinary bound.] — FULLER v. LANE, No. 3123, ante.**

**8209.** —.]—WOOLLOCOMBE v. OULDRIDGE,  
No. 1167, *ante*.

**3210.** ———.]—KNAPP v. ST. MARY'S, WILLESDEN (PARISHIONERS), No. 3207, *post*.

**3211. Right of grantee—Whether apportionable—Faculty granted in respect of dwelling-house—House subsequently divided.]**—The right to sit in a pew may be apportioned. Therefore, where by a faculty, reciting, “that A. had applied to have a pew appropriated to him in the parish church in respect of his dwelling-house” a pew was granted to him & his family for ever, & the owners & occupiers of the dwelling-house, & the dwelling-house was afterwards divided into two: - *Held*: the occupier of one of the two, constituting a very small part of the original messuage, had some right to the pew, & in virtue thereof might maintain an action against a wrongdoer.---*HANCOCK v. DREW* (1831), 2 B. & Ad. 161; 9 L. J. O. S. K. B. 200; 100 E. R. 1104.

*Annotation* :- **Mentd.** Newcomen v. Coulson (1877), 5 Ch. D.  
133.

**3212. --- On alteration of seating in church.**—If the owner of a faculty pew is asked to allow his pew to be removed as part, for example, of a general reseating of the church, he is entitled to similar faculty rights in a pew either on the site of his old pew or elsewhere as may be agreed (*per* CUR.).—BATHURST (EARL) v. CHIRENCESTER PARISH, No. 3204, *ante*.

**3218. Faculty granted for limited period only.** --  
BLAKE v. USBORNE, No. 3127, *ante*.

#### v. *Presumption of Lost Faculty.*

**3214. When presumed - After what period.** -  
WALTER v. GUNNER & DEURY, No. 1052, *ante*.

**3215. - Exclusive possession & repair for long period - Original possession acquired without legal title.]** The owner of a freehold dwelling-house brought an action in respect of the disturbance of his possession of a pew in the parish church. There was evidence that for more than seventy years he & his predecessors in title had occupied the pew, kept it locked, & repaired it : -- *Held* : upon the principle that a legal origin ought to be presumed if a legal origin be possible, the grant of a faculty ought to be presumed, & the action was maintainable ; & this was so though it appeared that 200 years ago the then lessee of the house, before he became the freeholder, first acquired possession of the pew in a manner which gave no legal title, the subsequent enjoyment not being more consistent with the illegal origin than with the presumption of a latter faculty. — **PHILLIPS v. HALLIDAY**, [1891] A. C. 228 ; 61 L. J. Q. B. 210 ; 64 L. T. 745 ; 55 J. P. 741. H. L. ; *affy.* 8 C. *sub nom.* **HALLIDAY v. PHILLIPS** (1889), 23 Q. B. D. 48. C. A.

**Annotations:** — **Apld.** Lightfoot v. Eastwood & Cross-Stone (1886), Trist. 248; Simpson v. Godmanchester, Corp., (1866), 1 L. Ch. 248; Roberts & Lovell v. Jern., (1903), 89 T. 282. **Apld.** Hulbert v. Dale, (1909) 2 Ch. 570. **Consd.** A.-G. v. Horner (No. 2), [1913] 2 Ch. 140. **Apld.** General Estates Co. v. Beaver, [1914] 3 K. B. 918. **Estd.** Proud v. Price (1893), 62 L. J. Q. B. 490; Stillman-Gibbard v. Wilkinson, [1897] 1 Q. B. 749; L. C. C.

*Sect. 3.—The church: Sub-sect. 9, E. (b), (c), (d) & (e) i., ii. & iii.]*

**3240. Non-parishioner—Claim to seat in body of church.]—**BYERLEY v. WINDUS, No. 3124, *ante*.

**As appurtenant to property in another parish.]—**See, also, Nos. 3252, 3255, 3315, *post*.

**Claim to seat in aisle—As appurtenant to property in another parish.]—**See Nos. 3251, 3252, 3315, *post*.

(c) *What may be claimed.*

**3241. Seat in body of church.]—**CORVEN'S CASE, No. 3159, *ante*.

**3242. —.]—**BOOTHLY v. BAILY, No. 1012, *ante*.

**3243. — Upper end of seat.]—**BUXTON v. BATEMAN (1604), 1 Sid. 88, 201; 1 Keb. 457; T. Raym. 52; 82 E. R. 987, 1050; *sub nom.* BUNTON v. BATEMAN, 1 Lev. 71.

*Annotations:—***Reid.** Barrow v. Kew (1668), 2 Keb. 342; Ashly v. Freckleton (1682), 3 Lev. 73; Jacob v. Dallow (1698), 12 Mod. Rep. 233; Kenrick v. Taylor (1752), Say. 31; Stocks v. Booth (1786), 1 Term Rep. 428; Churton v. Frewen (1866), L. R. 2 Eq. 634; Chapman v. Jones (1869), 38 L. J. Ex. 169; Stileman-Gibbard v. Wilkinson, [1897] 1 Q. B. 749; Claverley (Vicar, etc.) v. Claverley (Parishioners, etc.), Claverley (Churchwardens) v. Claverley (Vicar, etc.), Gatacre & Leigh v. Claverley (Vicar, etc.), [1909] P. 195.

**Claim by non-parishioners.]—**See No. 3124, *ante*, Nos. 3252, 3255, 3315, *post*.

See, also, No. 3285, *post*.

**3244. Seat in aisle.]—**CORVEN'S CASE, No. 3159, *ante*.

**Claim by non-parishioners.]—**See Nos. 3251, 3252, 3315, *post*.

**3245. Seat in chancel—Chief seat.]—**HALL v. ELLIS, No. 466, *ante*.

**3246. — Chancel claimed in right of honour.]—**To a declaration in an action on the case for disturbing *pltf.* in the use of his pew, stating a prescription to sit in a certain part called the parson's chancel, parcel of the church, & that *defts.* disturbed him from entering into the chancel & sitting in the seats there; a plea that they were seised in fee of the honour, & that the chancel was parcel of the honour, & therefore they sat in the seats of the chancel, is bad, for it does not answer the declaration.

In an action for disturbance in a pew, it is not necessary to allege, that the message to which the right is appurtenant is an ancient message.—DAWNEY v. DEE (1620), Cro. Jac. 605; 79 E. R. 517; *sub nom.* DAWTREE v. DEE, J. Bridg. 4; Palm. 46; 2 Roll. Rep. 139.

*Annotations:—***Reid.** Buxton v. Bateman (1662), 1 Sid. 88; Kenrick v. Taylor (1752), Say. 31; Spooner v. Brewster (1825), 3 Bing. 136. **Mentd.** Pitts v. Gaince (1700), 1 Salk. 10; Keble v. Hickerlingell (1707), Kel. W. 273; Bryan v. Whistler (1828), 2 Man. & Ry. K. B. 318.

**3247. —.]—**PARKER v. LEACH, No. 3053, *ante*.

**3248. Upper place in seat.]—**CARLETON v. HUTTON (1620), Noy, 78; Palm. 424; 74 E. R. 1045.

*Annotation:—***Reid.** Buxton v. Bateman (1662), 1 Keb. 370. See, also, No. 3243, *ante*.

(d) *In respect of What Property claimable.*

**3249. House.]—**ANON. (1616), 1 Brownl. 45; 128 E. R. 655.

*Annotation:—***Mentd.** Griffin v. Dighton & Davies (1863), 33 L. J. Q. B. 29.

**3250. —.]—**DAWNEY v. DEE (1620), Cro. Jac. 605; 79 E. R. 517; *sub nom.* DAWTREE v. DEE, J. Bridg. 4; Palm. 46; 2 Roll. Rep. 139.

*Annotations:—***Reid.** Buxton v. Bateman (1662), 1 Sid. 88; Kenrick v. Taylor (1752), Say. 31; Spooner v. Brewster (1825), 3 Bing. 136. **Mentd.** Pitts v. Gaince (1700), 1 Salk. 10; Keble v. Hickerlingell (1707), Kel. W. 273; Bryan v. Whistler (1828), 2 Man. & Ry. K. B. 318.

**3251. — In another parish—Claim to seat in**

**aisle.]—**BARROW v. KEW (1668), 2 Keb. 342; 84 E. R. 213; *sub nom.* BARROW v. KEEN, 1 Sid. 361.

**3252. —.]—**A pew in the aisle of a church may be prescribed for as appurtenant to a house out of the parish. *Qu.*: as to a pew in the body of the church.—DAVIS v. WITTS (1800), For. 14; 145 E. R. 1098.

**3253. —.]—**CHURTON v. FREWEN, No. 3315, *post*.

**3254. — Claim to seat in body of church.]—**DAVIS v. WITTS, No. 3252, *ante*.

**3255. —.]—**A pew in the body of a church may be prescribed for as appurtenant to a house out of the parish.—LOUSLEY v. HAYWARD (1827), 1 Y. & J. 583; 148 E. R. 304.

*Annotations:—***Reid.** *Ite* St. Columb, Londonderry Pews (1863), 8 L. T. 861; Churton v. Frewen (1866), L. R. 2 Eq. 634.

**3256. —.]—**CHURTON v. FREWEN, No. 3315, *post*.

**3257. Whether apart from house.]—**CORVEN'S CASE, No. 3159, *ante*.

**3258. —.]—**PETTMAN v. BRIDGER, No. 3125, *ante*.

**3259. —.]—**WOOLLOCOMBE v. OULDRIDGE, No. 1167, *ante*.

**3260. — In parish.]—**STOCKS v. BOOTH, No. 3275, *post*.

See, also, Nos. 3251, 3252, *ante*, No. 3315, *post*.

**3261. — Estate in another parish.]—**CHURTON v. FREWEN, No. 3315, *post*.

See, also, No. 3275, *post*.

(c) *Proof of Claim.*

i. *In General.*

**3262. Whether proof of repair necessary.]—**BUNTON v. BATEMAN (1604), 1 Lev. 71; *sub nom.* BUXTON v. BATEMAN, 1 Sid. 201; 1 Keb. 457; T. Raym. 52; 83 E. R. 302.

*Annotations:—***Reid.** Barrow v. Kew (1668), 2 Keb. 342; Ashly v. Freckleton (1682), 3 Lev. 73; Jacob v. Dallow (1698), 12 Mod. Rep. 233; Kenrick v. Taylor (1752), Say. 31; Churton v. Frewen (1866), L. R. 2 Eq. 634; Chapman v. Jones (1869), 38 L. J. Ex. 169; Stileman-Gibbard v. Wilkinson, [1897] 1 Q. B. 749; Claverley (Vicar, etc.) v. Claverley (Parishioners), Claverley (Churchwardens) v. Claverley (Vicar, etc.), Gatacre & Leigh v. Claverley (Vicar, etc.), [1909] P. 195. **Mentd.** Stocks v. Booth (1786), 1 Term Rep. 428.

**3263. —.]—**When a prescription for a seat in a church is found by the verdict, the repairing, which is only a circumstance requisite to support the prescription, is of necessity included.—STEDMAN v. HAY (1722), 1 Com. 366; 92 E. R. 1115.

**3264. —.]—**In an action for disturbing *pltf.* in his pew, *pltf.* need not lay or prove that he repaired it against a stranger; *aliter* in a dispute with the ordinary.—KENRICK v. TAYLOR (1752), 1 Wils. 326; Say. 31; 95 E. R. 643.

*Annotations:—***Consd.** Proud v. Price (1893), 42 W. R. 102. **Reid.** Waring v. Griffith (1757), 2 Keny. 183; Stocks v. Booth (1786), 1 Term Rep. 428; Cross v. Salter (1790), 3 Term Rep. 639; Crisp v. Martin (1876), 2 P. D. 15; Halliday v. Phillips (1889), 23 Q. B. D. 48; Claverley (Vicar, etc.) v. Claverley (Parishioners), Claverley (Churchwardens) v. Claverley (Vicar, etc.), Gatacre & Leigh v. Claverley (Vicar, etc.), [1909] P. 195.

**3265. —.]—**BRADBURY v. BURCH (1671), T. Jo. 3; 84 E. R. 1118.

*Annotation:—***Reid.** Stedman v. Hay (1722), 1 Com. 366.

**3266. —.]—**WOOLLOCOMBE v. OULDRIDGE, No. 1167, *ante*.

**3267. —.]—**(1) Evidence of repair to a pew claimed by prescription is not absolutely necessary, as no repair may have been made within the period of any one living.

(2) If a pew be held by a faculty or prescription, the *ct.* cannot disturb the possessor; it cannot

interfere so as to defeat that right (DR. LUSHINGTON).

(3) A claim by prescription can be set up in an act. Where there is a choice given to parties by the ordinary practice of the ct., it cannot interfere, except on application (DR. LUSHINGTON).

(4) An exclusive right to a pew must be maintained either by a faculty which may be seen, or by prescription which implies a faculty. Though it is not competent to the Ecclesiastical Cts. to try a prescription; still they may proceed until prohibited, for the defect is not in jurisdiction, but in *modo tritionis* (DR. LUSHINGTON).

(5) A man holds a pew by prescription when he & those before him, in the occupation of a house, have had constant use & possession, from time immemorial. Whenever a pew has been repaired, evidence should be adduced to show that the repair was made by the individual claiming a prescriptive right; for, if done at the expense of the parish, that circumstance would tend strongly against a claim by prescription (DR. LUSHINGTON). — KNAFF v. ST. MARY'S, WILLESDEN (PARISHIONERS) (1851), 2 Rob. Eccl. 358; 17 L. T. O. S. 191; 15 Jur. 473; 163 E. R. 1344.

*Annotations:—*As to (1) *Reid*, L. C. C. v. Dundas, [1904] P. 1. *Generally*, *Reid*, Stileman-Gibbard v. Wilkinson, [1897] 1 Q. B. 749.

**3268. — Where other acts of user proved.** — STILEMAN-GIBBARD v. WILKINSON, No. 3290, *post*.

— **Claim to seat in choir.** — *See* No. 3243, *ante*.

**3269. Whether proof of occupancy sufficient.** — PROUD v. PRICE, No. 3134, *ante*.

**3270. By evidence of acts of ownership—Acts maintaining & upholding right.** — PETTMAN v. BRIDGER, No. 3125, *ante*.

**3271. — Inconsistent with possession by permission of churchwardens—Coupled with evidence of exclusive possession.** — STILEMAN-GIBBARD v. WILKINSON, No. 3290, *post*.

**3272. Allegation of joint tenancy—Whether supported by evidence of tenancy in common.** — SNEELGRAVE v. BROGRAVE (1622), Palm. 161; 81 E. R. 1027.

**Admissibility of evidence—Of repair.** — *See* No. 3288, *post*.

**3273. Evidence of abandonment.** — STILEMAN-GIBBARD v. WILKINSON, No. 3290, *post*.

### ii. By Evidence of User.

**3274. Period of user—Thirty-six years.** — ROGERS v. BROOKS (1783), 1 Term Rep. 431, n.; 99 E. R. 1179, n.

*Annotations:—*Consid. Morgan v. Curtis (1828), 3 Man. & Ry. K. B. 389. *Reid*, Stocks v. Booth (1786), 1 Term Rep. 428; Griffith v. Matthews (1793), 5 Term Rep. 296; Morgan v. Curtis (1829), 7 L. J. O. S. K. B. 95; Phillips v. Halliday, [1891] A. C. 228; Proud v. Price (1893), 62 L. J. Q. B. 490; Kellett v. St. John's, Burscough Bridge (1916), 32 T. L. R. 571. *Mentd.* Bryan v. Whistler (1828), 8 B. & C. 288; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140; General Estates Co. v. Beaver, [1914] 3 K. B. 918; A.-G. for Southern Nigeria v. Holt (Liverpool), [1915] A. C. 599.

**3275. — Sixty years.** — Possession for above sixty years of a pew in a church is not a sufficient title to maintain an action upon the case of disturbance in the enjoyment of it; but ptf. must prove a prescriptive right, or a faculty, & should claim it in his declaration as appurtenant to a messuage in the parish.

A faculty of a pew to a man & his heirs is not good; so of an aisle of a church (BULLER, J.). — STOCKS v. BOOTH (1786), 1 Term Rep. 428; 99 E. R. 1177.

*Annotations:—**Reid*, Spooner v. Brewster (1825), 10 Moore, C. P. 494; Morgan v. Curtis (1828), 3 Man. & Ry. K. B. 389; Crisp v. Martin (1876), 2 P. D. 15; Phillips v. Halliday, [1891] A. C. 228; Proud v. Price (1893), 62 L. J. Q. B. 490. *Mentd.* Newcastle v. Clark (1818), 2 Moore, C. P. 666.

**3276. — Thirty years—Pew in chancel.** — Uninterrupted possession of a pew in the chancel of a church for thirty years is presumptive evidence of a prescriptive right to the pew in an action against a wrongdoer; but that presumption may be rebutted by proof that the pew had no existence thirty years ago. — GRIFFITH v. MATTHEWS (1793), 5 Term Rep. 296; 101 E. R. 166.

*Annotations:—**Reid*, Morgan v. Curtis (1828), 3 Man. & Ry. K. B. 389; Morgan v. Curtis (1829), 7 L. J. O. S. K. B. 95; Pepper v. Barnard (1843), 12 L. J. Q. B. 361; Halliday v. Phillips (1889), 5 T. L. R. 281; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140.

**3277. — Application of Prescription Act, 1832 (c. 71), s. 2.** — CRISP v. MARTIN, No. 3285, *post*.

**3278. — Application of Prescription Act, 1832 (c. 71), s. 1.** — PROUD v. PRICE, No. 3134, *ante*.

**3279. Effect of grant by rector & churchwardens—Where church rebuilt.** — ROGERS v. BROOKS (1783), 1 Term Rep. 431, n.; 99 E. R. 1179, n.

*Annotations:—*Consid. Morgan v. Curtis (1828), 3 Man. & Ry. K. B. 389. *Reid*, Stocks v. Booth (1786), 1 Term Rep. 428; Griffith v. Matthews (1793), 5 Term Rep. 296; Phillips v. Halliday, [1891] A. C. 228; Proud v. Price (1893), 62 L. J. Q. B. 490; Kellett v. St. John's, Burscough Bridge (1916), 32 T. L. R. 571. *Mentd.* Bryan v. Whistler (1828), 8 B. & C. 288; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140; General Estates Co. v. Beaver, [1914] 3 K. B. 918; A.-G. for Southern Nigeria v. Holt (Liverpool), [1915] A. C. 599.

**3280. Effect of Interruption.** — A right to a pew can only exist by faculty or by prescription. Where the prescription is interrupted the jury are not bound to presume a faculty from long undisturbed possession. — MORGAN v. CURTIS (1829), 3 Man. & Ry. K. B. 389; 7 L. J. O. S. K. B. 95.

*Annotation:—**Reid*, Griffin v. Dighton (1861), 5 B. & S. 93; Halliday v. Phillips (1889), 5 T. L. R. 281. *Mentd.* Stileman-Gibbard v. Wilkinson, [1897] 1 Q. B. 749.

**3281. Rebuttal of evidence—Pew not in existence.** — GRIFFITH v. MATTHEWS, No. 3276, *ante*.

### iii. By Evidence of Repair.

**3282. By family.** — (1) A man may prescribe for the sole enjoyment of a seat in the aisle of a church, if the family have used to repair it.

(2) The heir shall have an action for injuring the tomb of his ancestor.

(3) None can legally deface superstitious pictures in a church window.

If any one do so, without licence from the ordinary, he should be bound to his good behaviour (*per* C.B.). — FRANCES v. LEY (1615), Cro. Jac. 306; 79 E. R. 314; *sub nom.* DAY v. BEDDINGFIELD, Noy, 104.

*Annotations:—*As to (2) *Reid*, Spooner v. Brewster (1825), 10 Moore, C. P. 494. *Generally*, *Mentd.* R. v. London, Bp. (1743), 13 East, 426, n.; Fletcher v. Soudes (1826), 3 Bing. 501; Bryan v. Whistler (1828), 8 B. & C. 288; Winstanley v. North Manchester Overseers, [1910] A. C. 7.

**3283. By corporation—Enjoyment in mayor & alderman.** — JACOB v. DALLO, No. 1249, *ante*.

**3284. At expense of claimant for time being of prescriptive right.** — PETTMAN v. BRIDGER, No. 3125, *ante*.

**3285. —** (1) A parishioner who claims a legal right by prescription to a pew in the nave of his parish church must, in order to displace the general right of the ordinary, not only show that the pew has been occupied by him or his predecessors in title in respect of an ancient house in the parish for a period more or less extended, but must also prove, if any alteration or repair of the pew has been necessary, that such repairs or alterations were executed at the expense of those who at the time claimed the prescriptive right to it.

(2) *Seemle*: Prescription Act, 1832 (c. 71), s. 2, does not apply to a claim by prescription to a pew



*Sect. 3.—The church: Sub-sect. 9, E. (e) iii., iv. & v., (f) & F.; sub-sects. 10 & 11.]*

in the nave of a parish church.—*CRISP v. MARTIN* (1870), 2 P. D. 15.

*Annotations:—As to (1) Consd. Claverley (Vicar, etc.) v. Claverley (Parishioners, etc.), Claverley (Churchwardens) v. Claverley (Vicar, etc.), Gatacre & Leigh v. Claverley (Vicar, etc.), [1909] P. 195. Refd. Stileman-Gibbard v. Wilkinson, [1897] 1 Q. B. 749. As to (2) Apld. West Pockham (Vicar & Churchwardens) v. Geary, Dallison intervening (1889), Trist. 189. Follid. Proud v. Price (1893), 62 L. J. Q. B. 490.*

**3286. For what period.]—***WALTER v. GUNNER & DRURY*, No. 1052, *ante*.

**3287. What amounts to repair—Whether re-lining pew.]—***STILEMAN-GIBBARD v. WILKINSON*, No. 3290, *post*.

**Whether proof of repair essential.]—***See Nos. 3262-3268, ante*.

**3288. Evidence of repairs—Entry in vestry book—Whether admissible.]—**In an action for disturbing pltf.'s enjoyment of a pew claimed in right of a messuage, an old entry in the vestry book, signed by the churchwardens, stating that the pew had been repaired by the then owner of the messuage, under whom pltf. claims, in consideration of his using it, is admissible evidence to prove pltf.'s right to the pew.—*PRICE v. LITTLEWOOD* (1812), 3 Camp. 288, N. P.

*Annotation:—Refd. Sturla v. Freccia* (1880), 5 App. Cas. 623.

**3289. — Of one of three pews—Whether sufficient for claim for all.]—**In case against the churchwardens of the parish, for disturbance of pltf. in a pew claimed in respect of an ancient messuage, when it appeared that there were three adjoining pews, which had been used for many years by the family of pltf., & that repairs had been done at the expense of the family in one or more of these pews, although it did not appear whether in the one claimed in the action:—*Held: sufficient to support a verdict for pltf., although no evidence was given that the three pews had ever formed one.*—*PEPPER v. BARNARD* (1843), 12 L. J. Q. B. 361; 1 L. T. O. S. 169; 7 J. P. 687; 7 Jur. 1128.

#### iv. By Evidence of Other Acts of Ownership.

**3290. Removal of woodwork—Substitution of chairs for seats.]—**(1) Claimant of a right by prescription to a pew in the chancel of a parish church in respect of his ownership & occupancy of an ancient house in the parish must, as against the ordinary, prove, not merely exclusive possession of the pew by himself & his predecessors, but also some act of user or assertion of proprietary right inconsistent with mere possession by permission of the churchwardens. The right to such a pew is subject to the burden of repair, but it is unnecessary to prove actual repair where evidence is given of other such acts of user or assertion of proprietary right, repair being only one of many possible acts of user. Upon such proof being given, a lost faculty should be presumed.

(2) The removal of the woodwork of a pew in the chancel & the substitution of chairs for the former seats is an act of ownership or assertion of proprietary right inconsistent with any right in the ordinary, & together with exclusive possession, is sufficient to prove claimant's right; such removal will not amount to an abandonment of the right, unless it be coupled with circumstances indicating an intention to abandon.

(3) Re-lining a pew is not an act of repair.

*Semble: (4) the right of the lay rector to the chief seat in the chancel of the parish church is not confined to a single seat for his personal occupation.*—*STILEMAN-GIBBARD v. WILKINSON*,

[1897] 1 Q. B. 749; 66 L. J. Q. B. 215; 76 L. T. 90; 61 J. P. 214; *sub nom. WILKINSON, JARVIS & CLODE v. STILEMAN-GIBBARD, Re AN APPLICATION IN*, 13 T. L. R. 145.

#### v. Presumption of Lost Faculty.

*See Sub-sect. 9, D. (a) v., ante.*

#### (f) Jurisdiction of Courts to try.

**3291. Jurisdiction of Ecclesiastical Court.]—***ANON.* (1608), No. 1247, *ante*.

**3292. —.]—***HUSSEY v. LEYTON* (1612), cited 12 Co. Rep. 106; 77 E. R. 1383.

*Annotation:—Follid. Corven's Case* (1612), 12 Co. Rep. 105.

**3293. —.]—***GARVEN & PYM'S CASE* (1612), Godb. 199; 78 E. R. 121; *sub nom. PYM v. GORWYN*, Moore, K. B. 878; *sub nom. CORVEN'S CASE*, 12 Co. Rep. 105.

*Annotations:—Refd. May v. Gilbert* (1613), 2 Bulst. 150. *Mentd. Frances v. Ley* (1615), Cro. Jac. 366; *Buxton v. Bateman* (1662), 1 Sid. 88; *Spooner v. Brewster* (1825), 3 Bing. 136; *Churton v. Frewen* (1866), L. R. 2 Eq. 634; *Ashby v. Harris* (1868), L. R. 3 C. P. 523; *Hill v. Hill*, [1897] 1 Q. B. 483; *Claverley (Vicar, etc.) v. Claverley (Parishioners, etc.)*, *Claverley (Churchwardens) v. Claverley (Vicar, etc.)*, *Gatacre & Leigh v. Claverley (Vicar, etc.)*, [1909] P. 195.

**3294. —.]—***MAY v. GILBERT* (1613), 2 Bulst. 150; 80 E. R. 1025.

*Annotations:—Refd. Chester's, Bp. Case* (1699), 5 Mod. Rep. 433; *Iyerley v. Windus* (1826), 7 Dow. & Ry. K. B. 564. *Mentd. Jacob v. Dallow* (1698), 12 Mod. Rep. 233; *Stocks v. Booth* (1786), 1 Term Rep. 428.

**3295. —.]—***HARRIS v. WISEMAN*, No. 1194, *ante*.

**3296. —.]—***CARLETON v. HUTTON*, No. 3248, *ante*.

**3297. —.]—***ANON.* (1700), No. 3152, *ante*.

**3298. —.]—***WITCHER v. CHESLAM* (1743), 1 Wils. 17; 95 E. R. 467.

**3299. — In proceedings for faculty.]—***SWETNAM v. ARCHER*, No. 1196, *ante*.

**3300. — For removal of pew.]—***R. v. TRISTRAM*, No. 1252, *ante*.

**3301. — Restraint by Court of Chancery—in vacation.]—***Re BATEMAN*, No. 1344, *ante*.

*See, also, Nos. 1249, 3294, ante.*

#### F. Disturbance.

**3302. Whether action lies.]—***DAWNEY v. DEE*, No. 3246, *ante*.

**3303. —.]—***MAINWARING v. GILES*, No. 3140, *ante*.

**3304. Remedies—Nature of remedy—Bill in Chancery—After decree before ordinary.]—**Bill will not lie to quiet one in the possession of a pew in a church, though pltf. before had a decree before the ordinary for this pew.—*BAKER v. CHILD* (1691), 2 Vern. 226; 23 E. R. 746.

**3305. — Action in ecclesiastical court—Seat claimed by prescription—Prescriptive right not in dispute.]—***JACOB v. DALLO*, No. 1249, *ante*.

**3306. — Proof of title—Whether prescriptive title must be shown.]—***DAWNEY v. DEE* (1620), Cro. Jac. 605; 79 E. R. 517; *sub nom. DAWTREE v. DEE*, J. Bridg. 4; Palm. 40; 2 Roll. Rep. 139. *Annotations:—Refd. Buxton v. Bateman* (1662), 1 Sid. 88; *Kenrick v. Taylor* (1752), Say. 31; *Spooner v. Brewster* (1825), 3 Bing. 136; *Bryan v. Whistler* (1828), 2 Man. & Ry. K. B. 318. *Mentd. Pitts v. Gaiance* (1700), 1 Salk. 10; *Keble v. Hickerlingell* (1707), Kel. W. 273.

**3307. —.]—***BUXTON v. BATEMAN* (1664), 1 Sid. 88, 201; 1 Keb. 457; T. Raym. 52; 82 E. R. 987, 1056; *sub nom. BUNTON v. BATEMAN*, 1 Lev. 71.

*Annotations:—Follid. Barrow v. Kew* (1668), 3 Keb. 343; *Ashby v. Freckleton* (1683), 3 Lev. 73. *Consd. Kenrick v. Taylor* (1752), Say. 31; *Churton v. Frewen* (1866), L. R. 2 Eq. 634; *Claverley (Vicar, etc.) v. Claverley (Parishioners, etc.)*, *Claverley (Churchwardens) v. Claverley*

(Vicar, etc.), *Gatacre & Leigh v. Claverley* (Vicar, etc.), [1909] P. 195. *Reid*, *Jacob v. Dallow* (1698), 12 Mod. Rep. 233; *Stocks v. Booth* (1786), 1 Term Rep. 428; *Chapman v. Jones* (1809), 38 L. J. Ex. 169; *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

**3308.** ————]—*MERCHANT v. WHITE-PANE* (1077), 2 Lev. 193; 83 E. R. 514; *sub nom. MERCHANT v. WHITPAIN*, 3 Keb. 754.

**3309.** ————]—*JACOB v. DALLO*, No. 1249, *ante*.

**3310.** ————]—*Disturbance by bishop.*—In case for disturbing his seat in the church; if against the bishop he must show title, *aliter* if against a stranger.—*ASHLY v. FRECKLETON* (1682), 3 Lev. 73; 83 E. R. 583.

*Annotations.*—*Consd.* *Kenrick v. Taylor* (1752), Say. 31. *Reid*, *Stedman v. Hay* (1722), 1 Com. 366.

**3311.** ————]—*Disturbance by stranger.*

—*ASHLY v. FRECKLETON*, No. 3310, *ante*.

**3312.** ————]—*Whether finding in previous proceedings in ecclesiastical court sufficient.*—Upon a libel in the Consistorial Ct. for disturbance in p'tf.'s right to a pew, the Ct. adjudged the right to be in p'tf., & admonished def't. not to sit in the pew; & the Ct. of Arches reversed the sentence, but admonished def't. not to use the pew again:—*Held*: these sentences were not conclusive evidence of p'tf.'s right in an action for a disturbance between the same parties.—*CROSS v. SALTER* (1790), 3 Term Rep. 639; 100 E. R. 777.

*Annotation.*—*Reid*, *Barrs v. Jackson* (1842), 1 Y. & C. Ch. Cas. 585.

**3313.** *Pleading*—*Manner of disturbance.*—*DAWNEY v. DEE*, No. 3246, *ante*.

#### SUB-SECT. 10.—PRIVATE AISLES AND CHAPELS.

**3314.** *When claimable*—*General rule.*—*FRANCIS v. LEY*, No. 3282, *ante*.

**3315.** ————]—A person may prescribe for a chancel, or for an aisle, or for a pew in an aisle or in the nave of a parish church if he prescribe that he & all, etc. . . . had always repaired, even though the estate or house in respect of which the prescription is claimed be out of the parish.

Upon bill filed to establish a right to a chancel as part of the parish church, against the lord of the manor, who claimed it as appendant to the manor or manor-house, it appearing that the chancel was an ancient chapel, coeval with the church; that it was a private chapel erected by the lord of the manor:—*Held*: immemorial use & occupation, coupled with reparation, entitled the lord of the manor by prescription to the perpetual & exclusive use of the chancel; & this right might exist, notwithstanding that the freehold might not be in the person prescribing, & although the estate or house to which the chancel was appendant might not be situate in the parish.—*CHURTON v. FREWEN* (1800), L. R. 2 Eq. 634; 35 L. J. Ch. 692; 14 L. T. 846; 30 J. P. 803; 12 Jur. N. S. 870.

*Annotations.*—*Consd.* *Norfolk v. Arbutnot* (1879), 4 C. P. D. 290; *Proud v. Price* (1893), 62 L. J. Q. B. 490. *Reid*, *Fowke v. Berlington*, [1914] 2 Ch. 308.

**3316.** ————]—The parish church of A., regarded as one building, is a cruciform church with a central tower; the portion east of this tower is called the F. chapel, & occupies the place commonly filled by the chancel. P'tf. claimed this portion of the building as his private property, & built a wall across the west end of it, so as to separate it structurally from the rest of the church. Def't. pulled down part of this wall, alleging that the F. chapel was the chancel of the parish church, & even if it were not, still that the parishioners were entitled either by prescription at common law, or by virtue of a lost grant, or

under Prescription Act; 1832 (c. 71), to light from this chapel. Evidence was given of numerous acts of exclusive ownership by p'tf. & his ancestors for more than 300 years; documentary evidence of title to the same effect was produced, & at the trial, without a jury, judgment was given for p'tf. On appeal:—*Held*: (1) the evidence showed that the disputed building was not the chancel of the parish church, but had always been the property of p'tf. & his predecessors in title; (2) the claim to light could not be maintained on any of the grounds set up by def't.—*NORFOLK (DUKE) v. ARBUTHNOT* (1880), 5 C. P. D. 390; 49 L. J. Q. B. 782; 43 L. T. 302; 44 J. P. 790, C. A.

*Annotations.*—*As to* (1) *Reid*, *Fowke v. Berlington*, [1914] 2 Ch. 308. *Generally*, *Mentd.* *Halliday v. Phillips* (1889), 5 T. L. R. 281; *Proud v. Price* (1893), 62 L. J. Q. B. 490; *Wheaton v. Maple*, [1893] 3 Ch. 48.

**3317.** ————]—*Freehold not vested in claimant.*—*CHURTON v. FREWEN*, No. 3315, *ante*.

**3318.** *In respect of what property claimable*—*Whether land without house.*—*Qu.*: whether a prescription to an aisle in a church which p'tf. & all those, etc., used to repairs, as belonging to a manor, where he had no dwelling-house, but only land, is a good suggestion for a prohibition.—*SHAMBROK v. FETTERPLACE* (1678), 2 Mod. Rep. 283; 86 E. R. 1074.

**3319.** ————]—(1) The freehold of a chapel or lesser chancel may be vested in a private person, though such chapel or chancel forms an integral portion of, & is under the same roof with, a parish church. (2) The enjoyment of such chapel or chancel, & the right to its exclusive use, is not necessarily annexed to a dwelling-house. (3) Immemorial repair of a chapel or lesser chancel which is part of a parish church, coupled with other acts of ownership, is evidence of a freehold of inheritance in it being vested in those who have executed the repairs & exercised the acts of ownership.—*CHAPMAN v. JONES* (1809), L. R. 4 Exch. 273; 38 L. J. Ex. 169; 20 L. T. 811; 17 W. R. 020.

*Annotations.*—*As to* (1) & (2) *Reid*, *Norfolk v. Arbutnot* (1879), 4 C. P. D. 290; *Bennett v. Fawcett* (1887), 3 T. L. R. 736; *Proud v. Price* (1893), 62 L. J. Q. B. 490. *As to* (3) *Reid*, *Fowke v. Berlington*, [1914] 2 Ch. 308.

**3320.** ————]—*Whether house or estate in another parish.*—*CHURTON v. FREWEN*, No. 3315, *ante*.

**3321.** *Rights of owner*—*Proposal to build new church.*—*ÉVOIR v. NEW CHURCHES BUILDING COMRS.* (1843), 1 L. T. O. S. 55.

**3322.** ————]—*Estate of freehold*—*Though under same roof as parish church.*—*CHAPMAN v. JONES*, No. 3319, *ante*.

**3323.** ————]—*Evidence of.*—*CHAPMAN v. JONES*, No. 3319, *ante*.

**3324.** ————]—*Alleged substitution of other seats*—*Substitution not confirmed by faculty.*—*BENNETT v. FAWCETT* (1887), 3 T. L. R. 736.

*Annotations.*—*Foll.* *Chichester & Enbrook Estate Trustees v. Woodward* (1888), Trist. 180. *Reid*, *West Peckham (Vicar & Churchwardens) v. Geary* (1889), Trist. 189.

**3325.** *Rights of incumbent*—*Whether entitled to right of light*—*In respect of remainder of church.*—*NORFOLK (DUKE) v. ARBUTHNOT*, No. 3316, *ante*.

*Liability to repair.*—*See* No. 1012, *ante*.  
*Prescription to seat in aisle*—*In respect of house in another parish.*—*See* Nos. 3251, 3252, *ante*.

—*Whether proof of repair necessary.*—*See* No. 3243, *ante*.

#### SUB-SECT. 11.—BURIALS IN THE CHURCH.

*Right of burial in.*—*See* BURIAL, Vol. VII., pp. 528, 529.

*Sect. 3.—The church: Sub-sect. 11 & 12. Sects. 4 & 5: Sub-sect. 1, A., B. & C.]*

**Removal of human remains interred in.]—See BURIAL, Vol. VII., pp. 558, 559, Nos. 340–342.**

**SUB-SECT. 12.—SACRILEGE.**

*See CRIMINAL LAW, Vol. XV., pp. 959, 960.*

**SECT. 4.—THE CHURCHYARD.**

**Provision of land for.]—See BURIAL, Vol. VII., pp. 539 *et seq.***

**Boundaries of—Jurisdiction to try question of.]—See BOUNDARIES, Vol. VII., p. 272, No. 50.**

**Consecration of.]—See BURIAL, Vol. VII., p. 527, No. 70.**

**Extension of churchyard—"Land adjoining existing churchyard."—See BURIAL, Vol. VII., p. 527, No. 70.**

**Right of adjoining owner to object.]—See BURIAL, Vol. VII., p. 549, No. 276.**

**3326. Right of property in—Herbage & loppings of trees.]—The herbage of a parochial chapelyard & the loppings of trees in it, by law belong to the incumbent. If a parson is proceeded against for cutting down timber, under the Stat. 35, Edw. 1, Stat. 2, it must be by indictment at common law.—COX v. RICHAFT (1757), 2 Lee, 373.**

**Vesting of freehold.]—See BURIAL, Vol. VII., p. 526, Nos. 63–67.**

**3327. —Schoolhouse built on part of site.]—The vicar of the parish cannot recover the schoolhouse by ejectment, although it may have been built on what is evidently part of the churchyard, if it appear that the house was built on the site of a very old schoolhouse, the site of which might have been granted before the disabling statutes; but if a part of the house is built on ground taken from the churchyard recently, the vicar may remove that part.—DOE d. COYLE v. COLE (1831), 6 C. & P. 359.**

**3328. —Where in ejectment plff. gave evidence of some acts of ownership exercised upon the land in dispute, by the lessor's ancestor, & of a fine levied by him about the same time; & deft. proved some acts of ownership by the vicar, & gave evidence which tended to show that the land was formerly part of the churchyard, the judge refused to leave it as a question to the jury, whether the parties to the fine had any estate of freehold, but told them that the fine was a conclusive bar to the vicar. On error:—Held: this was wrong, & the judgment was reversed. An adverse possession for twenty years, is not a bar to a rector or vicar, except as against the same incumbent who submitted to such possession.—RUNCORN v. (DOE d.) COOPER (1826), 5 B. & C. 696; 8 Dow. & Ry. K. B. 450; 4 L. J. O. S. K. B. 281; 108 E. R. 259.**

**Application of Statutes of Limitation.]—See, generally, LIMITATION OF ACTIONS.**

**Right to fell timber.]—See Nos. 3709, 3710, *post*.**

**3329. —Under ancient grant—Application of 35 Edw. 1, Stat. 2.]—Where the usage of cutting down trees in a churchyard has been exercised by certain persons for upwards of two hundred years, the ct. will not upon the mere suggestion of an undue exercise of discretion, interfere by injunction. 35 Edw. 1, Stat. 2, does not apply.—A-G. v. WARREN (1844), 8 J. P. 774.**

**Right of burial in.]—See BURIAL, Vol. VII., pp. 529, 530.**

**3330. Repair & maintenance—Fences—Indictment of vicar for non-repair.]—R. v. REYNELL, No. 436, *ante*.**

**3331. —& footpaths—Duty of churchwardens to repair.]—WALTER v. MOUNTAGUE & LAMPRELL, No. 431, *ante*.**

**—See, further, BURIAL, Vol. VII., pp. 520, 527.**

**Closed burial grounds.]—See BURIAL, Vol. VII., p. 551, Nos. 289, 290.**

**Levelling of mounds in—Whether faculty necessary.]—See No. 1367, *ante*.**

**Monuments in.]—See BURIAL, Vol. VII., pp. 532, 533.**

**Disinterments.]—See BURIAL, Vol. VII., pp. 559 *et seq.***

**User for secular purposes.]—See BURIAL, Vol. VII., pp. 534, 535.**

**3332. New path in—Necessity for faculty.]—WALTER v. MOUNTAGUE & LAMPRELL, No. 431, *ante*.**

**3333. Right of way over churchyard—Claimed by prescription—Whether good.]—ANON. (1478), Jenk. 142; 145 E. R. 99.**

**3334. —WALTER v. MOUNTAGUE & LAMPRELL, No. 431, *ante*.**

**3335. —For public generally—Whether good.]—WALTER v. MOUNTAGUE & LAMPRELL, No. 431, *ante*.**

**3336. —Jurisdiction of ordinary to grant faculty for.]—The ct. having a discretionary jurisdiction to grant by faculty the user of a way across a churchyard for public convenience, or to an individual for private convenience, provided no detriment will thereby accrue to the parishioners, has also a discretionary jurisdiction to grant the exclusive user of a right of way underneath a part of a churchyard to an electric lighting co., to enable it to introduce electric lighting into the neighbourhood. The faculty should be granted, subject to the payment of an annual sum to the rector as the freeholder of the churchyard.—ST. BENET, SHEREHOG (RECTOR & CHURCHWARDENS) v. ST. BENET, SHEREHOG (PARISHIONERS), ST. NICHOLAS, ACONS (RECTOR & CHURCHWARDENS) v. ST. NICHOLAS, ACONS (PARISHIONERS) (1892), Trist. 274; *sub nom.* Re ST. BENET, SHEREHOG, Re ST. NICHOLAS, ACONS (1892), [1893] P. 66, n.**

**Annotation:—Reid. Re St. Nicholas Cole Abbey, Re St. Benet Fink, Churchyard, [1893] P. 58.**

**As means of access to church.]—See Part III., Sect. 7, sub-sect. 9, C. (b), *ante*.**

**3337. Right of way under churchyard—Jurisdiction of ordinary to grant faculty for.]—ST. BENET, SHEREHOG (RECTOR & CHURCHWARDENS) v. ST. BENET, SHEREHOG (PARISHIONERS), ST. NICHOLAS, ACONS (RECTOR & CHURCHWARDENS) v. ST. NICHOLAS, ACONS (PARISHIONERS), No. 3336, *ante*.**

**Closing of paths in churchyards—By ecclesiastical commissioners.]—See Sect. 16, *post*.**

**3338. Easement of light over—Faculty for.]—ST. MARTIN ORGARS, No. 1740, *ante*.**

**Ratability of.]—See BURIAL, Vol. VII., p. 564, No. 389.**

**Closed & disused burial grounds.]—See BURIAL, Vol. VII., pp. 549 *et seq.***

**SECT. 5.—TITHES AND TITHE RENTCHARGE.**

**SUB-SECT. 1.—TITHES GENERALLY.**

**A. The Right to Tithe.**

**3339. Right of the Crown—Extra parochial places.]—BANISTER v. WRIGHT, No. 3375, *post*.**

**3340.** ———. ———.]—*SHAW v. TOPPING* (1714), 1 Wood, 545.

See, further, CONSTITUTIONAL LAW, Vol. XI., p. 569, Nos. 690, 691.

**3341. Right of incumbent.]—ANON.** (1675), No. 2487, *ante*.

**3342.** ———. ———.]—*Vicarage under sequestration—Payment to sequestrator—Right to account.]—A vicarage being under sequestration for debt, the occupiers paid their tithes & certain alleged moduses to the sequestrator:—Held: the vicar might, notwithstanding, file his bill against the occupiers for an account & satisfaction of their tithes, without making the sequestrator a co-pltf., though no fraud or collusion between the occupiers & the sequestrator was alleged.—WARRINGTON v. SADLER* (1831), 1 You. 283; 159 E. R. 909.

**3343.** ———. ———.]—*Whether apportionable—On death of incumbent.]—Composition for tithes, received after the death of the incumbent by the successor, apportioned with reference to the respective periods of enjoyment.—LYNSLEY v. WORDSWORTH* (1813), 2 Ves. & B. 331; 35 E. R. 345.

*Annotation:—Apld.* *Oldham v. Hubbard* (1843), 2 Y. & C. Ch. Cas. 209.

**3344.** ———. ———.]—*A rector, who took a composition for his tithes every Michaelmas, died in Jan. 1811. The new rector was collated in the following Apr., & before harvest time he employed a surveyor to value the tithes. The surveyor furnished him with a report, stating what he considered ought yearly to be paid by each of the occupiers, as a composition in lieu of tithes. In Aug. the new rector required the respective occupiers to pay him as a compensation for their tithes the amount mentioned by the surveyor. The occupiers accordingly in Nov. 1811, made their payments according to the surveyor's report, for the whole year from Michaelmas, 1810, to Michaelmas, 1811:—Held: the representative of the late rector was entitled to be paid by the new rector a proportion, according to the time which elapsed from Michaelmas, 1810, to the late rector's death, of the composition which existed in the late rector's lifetime.*

*Scmble: a composition for tithes is within Distress for Rent Act, 1737 (c. 19), s. 15, & Apportionment Act, 1831 (c. 22).—OLDHAM v. HUBBARD* (1843), 2 Y. & C. Ch. Cas. 209; 63 E. R. 91.

**3345.** ———. ———.]—*As from what time—Predecessor both rector & patron.]—BETHAM v. GREGG*, No. 2421, *ante*.

**3346.** ———. ———.]—*Vicar—Of common right.]—FOX v. BARDWELL* (1736), 2 Com. 498; Bunb. 327; 2 Wood, 338; 92 E. R. 1178, H. L.

**3347.** ———. ———.]—*By gift, composition, or prescription only.]—ANON.* (1630), March, 11; 82 E. R. 389.

**3348.** ———. ———.]—*By the common law, the rector has a right to all such tithes to which the vicar is not entitled, & the title of the vicar must rest either on direct proof of an endowment, or on an endowment to be inferred by prescription or usage. Tithes of peas & beans have been held to be comprised in the description of tithes of corn.—A.-G. v. WARD* (1848), 11 Beav. 203; *Cripps' Church Cas.* 164; 12 Jur. 807; 59 E. R. 791.

**3349. Whether claimable by prescription—As**

**part of manor.]—Tithes cannot be prescribed for as parcel of a manor.—SHERWOOD v. WINCH-COMB (1693), Cro. Eliz. 293; 78 E. R. 547.**

*Annotation:—Consd.* *Winchester's Bp. Case*, *Wright v. Wright* (1596), 2 Co. Rep. 43 b.

### B. Meaning of Tithe.

**3350. In ancient documents—Whether payment in lieu of tithe included.]—The word tithes is continually found in ancient instruments used to denote tithes *qua* tithes, or a commutation for them, and may mean either one or the other, as the subsequent usage explains.—NORTON v. HAMMOND (1826), 1 Y. & J. 94; 148 E. R. 600.**

**3351.** ———. ———.]—*The word "tithes," in ancient documents, does not necessarily import, that tithes were then payable in kind, but may mean a money payment in lieu of tithes.—BECK v. BREE* (1830), 1 Cr. & J. 246; 1 Tyr. 132; 9 L. J. O. S. Ex. 26; 148 E. R. 1410; *sub nom.* *BREE v. BECK*, 1 You. 211.

*Annotation:—Mentd.* *Baine v. Cairns* (1841), 4 Haro. 327.

**3352. "White tithes"—Explained by usage of parish.]—The words "white tithes" have no general meaning, but are applicable to distinct things in distinct parishes. The meaning, therefore, of those words, as applicable to a particular parish, is to be ascertained only from the usage in that parish.—BECHER v. CLAYE (1835), 1 Y. & C. Ex. 448; 160 E. R. 183.**

**3353. "Privy tithes"—"Small tithes."]—"Privy tithes" synonymous with "small tithes," though the Ecclesiastical Survey makes a distinction between "privy tithes" & "lesser tithes," that distinction being explained by a subsequent terrier, distinguishing between tithes in general & privy tithes payable to the vicar; & there being evidence that in the district wherein the vicarage is situate privy tithes mean small tithes.—CLEE v. HALL (1840), 7 Cl. & Fin. 744; West, 148; 9 E. R. 453, H. L.; *affq.* *S. O. sub nom.* *HALL v. GODSON* (1836), 2 Y. & C. Ex. 153.**

**3354. Small tithes—Not dependent on quantity.]—Potatoes being sown in great quantities in a common field, the rector brought his bill for them as a great tithe:—Held: potatoes being in their nature a small tithe, the sowing them in greater quantities makes no alteration.—SMITH v. WYAT (1742), 2 Atk. 364; 9 Mod. Rep. 336; 26 E. R. 620, L. C.**

See, also, No. 3364, *post*.

### C. Nature of Tithe.

**3355. Whether tenement.]—Tithes are a tenement.—R. v. SKINGLE (1718), 1 Stra. 100; 93 E. R. 411.**

*Annotations:—Folld.* *R. v. Ellis* (1816), 3 Price, 323. *Consd.* *R. v. Nevill* (1846), 8 Q. B. 452. *Held.* *Underhill v. Ellecombe* (1825), 1 Myc. & Yo. 450.

**3356.** ———. ———.]—*Within 19 Geo. 3, c. 56, s. 14.]—Tithes are a tenement; & are, as such, within the exemption in 19 Geo. 3, c. 56, s. 14, from the duty on sales by auction imposed by the 43 Geo. 3, c. 69, sched. A. A letting by auction of tithes of corn, then standing & growing on the ground to be transferred by way of lease for one year, to commence from before the day of the auction, is a letting by auction of the tenement, & not a sale of the tithes; & that, although no*

### PART VII. SECT. 5, SUB-SECT. 1.—A.

**d. Right of incumbent—Vicar—Compensation for arrears.]—A vicar, having granted an annuity charged on his benefice, & being entitled to compensation for tithe arrears, under 3 & 4**

**W. 4, c. 100, may be restrained from receiving them until answer put in to a bill filed against him for raising the arrears of the annuity.—STANLEY v. ROBINSON (1831), *Hayes & Jo.* 622. — **IR.****

### PART VII. SECT. 5, SUB-SECT. 1.—C.

**e. Charge on "perpetual estate"—Not on fee-simple.]—Tithe rentcharge is a burden on the first estate of inheritance, or the first perpetual estate equivalent thereto, & not on the fee-**

**Sect. 5.—Tithes and tithe rentcharge: Sub-sect. 1, E. (b) & (c) & F. (a), (b) & (c).]**

tithes at 2s. 9d. in the pound, on the full value under 37 Hen. 8, c. 12.

(2) The maxim *ecclesiu decimas non solvit ecclesiæ*, applies only between rector & vicar of the same parish.—*ST. PAUL'S (WARDEN, ETC.) v. ST. PAUL'S (DEAN)* (1817), Wils. Ex. 1; 4 Price, 65; 146 E. R. 395, Ex. Ch.

*Annotation:—As to (1) Reff. Vivian v. Cochrane* (1855), 4 De G. M. & G. 818.

**3385.** —[It has been constantly held that if land has no discharge of itself, it is discharged only in the hands of the ecclesiastical owner, under the maxim *Ecclesia decimas non solvit ecclesiæ*; a maxim that is binding as long as the land is actually held by an ecclesiastic; but if it is transferred into the hands of laymen it becomes liable (*SIR WILLIAM SCOTT*).—*LAGDEN v. FLACK* (1819), 2 Hag. Con. 303; 161 E. R. 751.

*Annotation:—Mentd. Lewis v. Bridgman* (1834), 2 Cl. & Fin. 738.

**3386. Glebe.—General rule.]**—A vicar endowed of glebe & small tithes shall not pay tithes of his glebe to the parson.—*BLINCO v. MARSTON* (1590), Cro. Eliz. 479; Moore, K. B. 457, 910; 78 E. R. 730.

**3387.** — **Effect of lease or sale.]**—*STURTON (VICAR) v. GREENLEY* (1580), Sav. 3; 123 E. R. 979.

**3388.** — **Effect of release of all demands.]**—*STILE v. MILES* (1585), Owen, 39; 71 E. R. 884.

#### (c) Fish.

**3389. By custom.]**—Fish are tithable by custom.—*R. v. CARLYON* (1780), 3 Term Rep. 385; 100 E. R. 634.

*Annotation:—Reff. R. v. Christopherson* (1885), 16 Q. B. D. 7.

**3390.** — **River fish.]**—Tithes are not payable for fish taken in rivers, except by custom.—*DAWES v. HUDDLESTON* (1634), Cro. Car. 339; 70 E. R. 807.

**3391.** — **Sea fish—Expenses not deducted.]**—Tithes of fish are payable only by custom, & cannot be claimed as a mere personal tithe, *deductis expensis*; for where tithes in kind are due only by custom, it seems impracticable to deduct the expenses.—*KELYNACK v. GWAVAS* (1729), 2 Bro. Parl. Cas. 446; 1 E. R. 1054, II. L.; *sub nom. GWAVAS v. KELYNACK*, 2 Wood, 284; Bumb. 256, II. L.

**3392. Whether oysters included.]**—*MURRAY v. SKINNER* (1713), 1 Wood, 541.

**Proceedings in respect of—Necessary parties.]**—*See No. 3390, post.*

#### F. Actions in respect of Tithe.

##### (a) Jurisdiction of Courts.

**3393. On appeal to sessions—When title in issue.]**—On an appeal to sessions, if the right of tithes come in question the ct. cannot proceed in the cause.—*R. v. FURNESS* (1720), 11 Mod. Rep. 320; 1 Stra. 264; 88 E. R. 1064.

*Annotations:—Reff. R. v. Wakefield* (1758), 1 Burr. 485; *Backhouse v. Bishopwearmouth* (1860), 9 C. B. N. S. 315.

**3394.** —[Where a person who had been summoned by two justices under 7 & 8 Will. 3, c. 6, s. 1, appeared before them, & was ordered to

pay the tithes demanded, & did not raise any question of modus, but afterwards appealed to the sessions, & there, for the first time, set up a modus, & tendered evidence to prove it:—*Held*: the justices at sessions might, in the exercise of their discretion, reject the evidence. *Semble*: the power of justices to try questions of tithe under 7 & 8 Will. 3, c. 6, is taken away by sect. 8 of that Act, where a question of modus is raised.—*R. v. JEFFREYS* (1823), 1 B. & C. 604; 2 Dow. & Ry. K. B. 860; 1 Dow. & Ry. M. C. 455; 107 E. R. 222.

**3395. Court of summary jurisdiction—Where title in issue.]**—Deft., a householder, was summoned before justices under 7 & 8 Will. 3, c. 6, for non-payment to the rector of the parish of dominicals, a tax in lieu of tithes in respect of dwellings erected on land formerly subject to tithes. Evidence of custom in the parish to pay these dominicals was adduced before the justices, & the attorney who appeared for deft. objected in writing to the jurisdiction of the magistrates, on the ground that deft. had a *bonâ fide* objection to the validity of the payment, which being due by custom they could not try. The justices stated that they thought the custom was established, & made an order on deft. for payment of the claim with costs. Upon *certiorari* to quash this order:—*Held*: although a claim of right might oust the jurisdiction of justices under this statute, the mere assertion by the attorney did not sufficiently establish a *bonâ fide* objection on deft.'s part.—*R. v. SANDFORD* (1874), 30 L. T. 601; 39 J. P. 118.

*See, also, No. 3402, post.*

##### (b) Actions for Recovery.

**3396. Right of incumbent to bring—Before induction.]**—A parson cannot bring an action for tithes until he is inducted.—*ANON.* (1705), 11 Mod. Rep. 46; 88 E. R. 874.

— **Incumbent wrongfully presented & inducted.]**—*See No. 2388, ante.*

— **Incumbent guilty of simony.]**—*See Nos. 2279, 2280, ante.*

**3397. Right of lay-rector to bring—Rectory subject to mortgage.]**—(1) A lay-impropriator, who is in possession of a rectory & in perception of the tithes, subject to charges by way of mtge. & for raising portions, inasmuch as such mtgees., etc., having permitted the possession, cannot claim the bygone rents, has a title sufficient to sustain a suit against occupiers for an account of tithes.

(2) Upon a bill filed by such a lay-impropriator against an occupier, who had taken a lease from the rector, of the tithes of corn & grain, but expressly without prejudice to any question as to the tithe of hay, & who, by his answer, set up, but did not prove, a modus as to the small tithes:—*Held*: proof of the perception of some tithes by a lay-impropriator, without evidence of a grant from the Crown, gave a title to other tithes, of the perception of which there was no actual proof.—*CHERRY v. LEIGH* (1827), 1 Bli. N. S. 306; 4 E. R. 886, II. L.

*Annotations:—Generally, Mentd. Hughes v. Davies* (1832), 5 Sim. 331; *Bellwood v. Wetherell* (1835), 1 Y. & C. Ex. 211; *Waterford v. Knight* (1844), 11 Cl. & Fin. 653.

JJ. (1898) 2 I. R. 592, 624; 32 I. L. T. 97.—*IR.*

#### PART VII. SECT. 5, SUB-SECT. 1.—F. (b).

**1. Amount recoverable—Whether expenses of petition.]**—If the person liable to pay the tithe rentcharge fail to do so, within ten days after service of

#### PART VII. SECT. 5, SUB-SECT. 1.—F. (a).

**b. Quarter sessions—Not to vary rentcharge.]**—Where a composition of tithes has been effected in a parish situated partly within the boundaries of one county & partly within the boundaries of another county, there is no jurisdiction at the quarter sessions

of either of the counties within which such parish is so partly situated to vary the tithe rentcharge in lieu of composition of tithes.—*R. (SMYTH) v. KING'S COUNTY CHAIRMAN & JJ.* (1896), 31 I. L. T. 9.—*IR.*

**k. —.]**—Justices at quarter sessions are without jurisdiction to vary tithe rentcharge.—*R. v. MEATH*

**3398. Against whom brought—Land subject to tithe in mortgage.]—**CROSTHWAITE v. CONLAN (1843), 1 L. T. O. S. 263.

**3399. Necessary parties—Tithes on fish.]—**In a bill for tithes of fish all the persons interested in any one particular adventure must be made parties.—COPPARD v. PAGE (1800), For. 1; 145 E. R. 1094.

*Annotation:—*Distd. Perrott v. Bryant (1836), 2 Y. & C. Ex. 61.

**3400. — Tithes on oysters.]—**Where a bill was brought for the customary tithes of oysters, alleging the customary payment to be in the owners & occupiers of boats employed in the fishery, & usually moored within the parish:—*Held*: it was not necessary to make the dredgers for the oysters, who had no interest in the boats, but who shared in the profits of the oysters, parties to the bill.—PERROTT v. BRYANT (1836), 2 Y. & C. Ex. 61; 6 L. J. Ex. Eq. 26; 100 E. R. 312.

**3401. Amount recoverable—Whether interest allowed.]—**If there was an agreement for tithes, to be paid on a particular day, the sum to be paid would bear interest from that time; but where it is only a general agreement for so much a year, without specifying any time for the payment, no interest is payable (LORD ELLENBOROUGH).—SHIPLEY v. HAMMOND (1804), 5 Esp. 114, N. P.

**3402. —.]—**Since 5 & 6 Will. 4, c. 74, if any tithe, oblation, or composition not excepted in 7 & 8 Will. 3, c. 6, or exceeding £10 yearly value, due from any other person, is in arrear, it must be proceeded for before two justices. If the title of the claimant, or liability of the party sought to be charged is undisputed two years' arrears may be there recovered; whereas, if such title or liability is denied *rius vice* before the justices, or at any time in writing, the claimant may proceed in suit in equity, & recover six years' arrears.—ROBINSON v. PURDAY (1816), 16 M. & W. 11; 8 L. T. O. S. 123; 11 J. P. 712; 153 E. R. 1077.

#### (c) Proof of Right.

**3403. Presumption from long enjoyment Due performance of conditions.]—**In favour of a long-continued enjoyment of tithes, in conformity with successive recitals in old leases, the ct. will presume performance of conditions to endow, etc., & adopt every other presumption necessary to give effect to such a title, so supported. WOOLEY v. BIRKENSHAW (1823), 12 Price, 702; 147 E. R. 851, Ex. Ch.

**3404. By admission of defendant.]—**In a suit for tithes, an admission by deft. of plff.'s right to a specified modus, in lieu of tithes, which cannot be sustained, in consequence of its being defectively pleaded, is an admission of his title to the tithes.—WHARTON v. CHILD (1829), 7 L. J. O. S. Ch. 106.

**3405. Claim by lay impropriator—Whether different from claim by spiritual person—Evidence.]—**BURWELL v. COATES (1723), Bunb. 129; 145 E. R. 621.

**3406. — Whether long non-payment a defence.]—**(1) The mere non-payment of tithes is not a sufficient answer to a claim of tithes made by a lay impropriator.

(2) From evidence of right to tithes of all kinds in a lay impropriator up to a given time, & of perception of the corn tithe since that time by

another party, a jury may, if it think fit, infer a grant of all the tithes by the first-mentioned impropriator to such latter party, who is therefore at liberty, in support of his right to the hay tithe, to give in evidence leases of that & all other tithes from the presumed grantor.—ANDREWS v. DREVER (1835), 3 Cl. & Fin. 314; 2 Bing. N. C. 1; 9 Bl. N. S. 471; 2 Scott, 1; 6 E. R. 1454, H. L.; *affg*. S.C. *sub nom.* BAYLEY v. DREVER (1834), 1 Ad. & El. 449, Ex. Ch.

*Annotations:—*As to (1) *Fold*. Payne v. Esdalle (1888), 13 App. Cas. 613. As to (2) *Reid*. Dare v. Heathcote (1850), 25 L. J. Ex. 245.

**3407. — Evidence justifying presumption of grant.]—**ANDREWS v. DREVER, No. 3406, *ante*.

**3408. — Against rector—Evidence justifying presumption of grant.]—**Though mere non-payment of tithes, for however long a period, would not be evidence of a grant, yet a layman's adverse enjoyment of pernaney, for a long series of years, of the tithes of certain lands, or of a money-payment in lieu of tithes, coupled with a succession of deeds by which the tithes or money-payments in lieu of tithes have been conveyed from one person to another, corresponding with the enjoyment, affords evidence sufficient to justify a jury in presuming a legal grant of the tithes.—BACON v. WILLIAMS (1827), 3 Russ. 525; 38 E. R. 672, L. C.; *previous proceedings, sub nom.* WILLIAMS v. BACON (1823), 1 Sim. & St. 415.

*Annotation:—*Consd. Hughes v. Davies (1832), 5 Sim. 331.

**3409. Claim by vicar—Effect of rector's disclaimer.]—**(1) Title Act, 1832 (c. 100), brings down the period of legal memory from the time of Richard I. to the time of the commencement of two incumbencies, not being together less than sixty years, & three years of a third incumbency; but does not create a new ground of exemption, or destroy the right to tithes upon mere proof of non-payment or non-render during two such incumbencies, & three years of a third, in cases where proof of non-payment or non-render from the time of Richard I. would, before Tithe Act, 1802 (c. 100), have established no exemption.

(2) The proof of the title of the vicar to some small tithes, & that the other small tithes had never been paid to the rector, is not necessarily sufficient to establish the right of the vicar to such other small tithes, especially where some of the evidence is opposed to the vicar's claim.

(3) Where, in a suit for small tithes by the vicar against occupiers, the rector is a deft. & disclaims, the ct. may use the disclaimer for the purpose of founding upon it a decree for the particular tithes demanded by plff. in the suit, but not for the purpose of proving the right of the vicar to such tithes. SALKELD v. JOHNSTON (1842), 1 Hare, 190; 11 L. J. Ch. 201; 6 Jur. 210; 66 E. R. 1004; *on appeal* (1849), 1 Mac. & G. 242, L. C.

*Annotations:—*As to (1) *Consd.* Fellowes v. Clay (1843), 4 Q. B. 313; Esdalle v. Payne (1885), 52 L. T. 530. *Reid*. Toymbee v. Brown (1848), 3 Exch. 117; Ely (Dean) v. Bliss (1852), 2 De G. M. & G. 459; Esdalle v. Payne (No. 2) (1885), 53 L. T. 21. *Generally, Mend.* Gray v. Liverpool & Bury Ry. (1846), 4 Ry. & Can. Cas. 235; *Re Crosby Tithes* (1849), 13 Q. B. 761; Malcolm v. Scott (1856), 3 Mac. & G. 29; Shepherd v. Londonderry (1852), 21 L. J. Q. B. 204; Wilson v. Eden (1854), 23 L. J. Ch. 105; R. v. Yates (1883), 11 Q. B. D. 750; St. Catharine's College v. Rowe, [1916] 1 Ch. 73.

**3410. — Whether proof of non-payment to rector sufficient.]—**SALKELD v. JOHNSTON, No. 3409, *ante*.

notice, as prescribed by 1 & 2 Vict., c. 109, the rentcharger is then entitled to prepare his petition, & is justified in refusing to receive the arrears without the costs incurred in preparing his petition & incidental thereto.—

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MACARTNEY v. GRAYDON (1845), 8 L. Eq. R. 99.—IR.

PART VII. SECT. 5, SUB-SECT. 1.—F. (c).

m. Claim by vicar—Certificate of

commissioners.] Plff. sued as vicar for tithe composition; & in his bill set out the certificate in which he was named as vicar & the appointment, charging deft. as occupier. Deft. in his answer said that he believed the

*Sect. 5.—Tithes and tithe rentcharge: Sub-sect. 1, F. (c) & (d), G., H. & I.; sub-sect. 2, A.]*

**3411. — Against rector.]**—The right to compel an account for tithes being consequential to the legal title, & the rector having *primâ facie* the title to all the tithes in turn, it seems that in questions between the rector & the vicar, a ct. of equity ought not to make a decree in consequence of their opinion of the vicar's title, & in derogation of that of the rector, until the title of the vicar has been established by the decision of a jury; unless such title is made out in the most clear & satisfactory manner.—**BARNARD v. GARNONS** (1797), 7 Bro. Parl. Cas. 105; 3 E. R. 69; *sub nom.* **GARNONS v. BARNARD**, 4 Gwill. 1462, H. L.; *revog.* **S. C. sub nom.** **GARNONS v. BARNARD** (1798), 1 Anst. 296.

*Annotations:—Apld.* Foxcroft v. Parris (1800), 5 Ves. 221. *Distd.* Kennicott v. Watson (1814), 2 Price, 250, n. *Consd.* Willis v. Farrer (1828), 2 Y. & J. 217. *Held.* Byam v. Booth (1816), 2 Price, 231; Williams v. Price (1817), Dan. 13.

(d) *Limitation of Action.*

*See, generally, LIMITATION OF ACTIONS.*

**3412. Under Tithe Act, 1832 (c. 100)—Intention of Act.]**—(1) The object of the above Act, to be inferred from its preamble as explained by the enacting part, was, to prevent the expense & inconvenience of suits for tithes, by establishing certain limitations of time after which claims of modus & discharges should not be questioned.

(2) The effect of the Act as applicable to claims of exemption is not only to facilitate the proof of exemption *de facto* for the time past, but to dispense with the proof which was before required from laymen of any legal origin of such exemption.

(3) The Act applies also to the case of a claim of partial exemption on the ground of non-payment of tithes in respect only of some titheable matters; although the same lands have paid tithes of other matters.

(4) *Seemle:* under the same Act, a modus liable to the objection of rankness, but which has been acted upon for the period prescribed by the Act, will constitute a good exemption.

(5) If the party claiming title intends to rely on the matter of fact or of law not inconsistent with the simple fact of the enjoyment claimed by the other side, he must allege it specially, or he cannot avail himself of it.—**SALKELD v. JOHNSTON** (1849), 1 Mac. & G. 242; 1 H. & T. 329; 3 New Mag. Cas. 208; 18 L. J. Ch. 493; 13 L. T. O. S. 501; 13 J. P. 610; 14 Jur. 1; 41 E. R. 1257, L. C.; *varying* (1842), 1 Hare, 190.

*Annotations:—As to (1)* *Held.* Fellowes v. Clay (1843), 4 Q. B. 313. *As to (2)* *Held.* Esdalle v. Payne (1885), 52 L. T. 530. *As to (3)* *Held.* Ely (Dean) v. Bliss (1852), 2 De G. M. & G. 459. *As to (4)* *Held.* Toymbee v. Brown (1848), 3 Exch. 117. *Generally, Mentd.* Gray v. Liverpool & Bury Ry. (1846), 4 Ry. & Can. Cas. 235; *Re Crosby Tithes* (1849), 13 Q. B. 761; Malcolm v. Scott (1850), 3 Mac. & G. 29; Shephard v. Londonderry (1852), 21 L. J. Q. B. 204; Wilson v. Eden (1854), 23 L. J. Ch. 105; R. v. Yates (1883), 11 Q. B. D. 750; Esdalle v. Payne (No. 2) (1885), 53 L. T. 21; St. Catharine's College v. Roscoe, [1916] 1 Ch. 73.

comrs. did make & sign such certificate as in bill stated; but whether the same was duly prepared & signed, he referred to such proof as plff. should produce thereof. Upon hearing upon bill & answer:—*Held:* the certificate sufficiently proved the title of plff.—**CROWLEY v. FLOOD** (1837), 2 Jo. Ex. Ir. 555.—IR.

**PART VII. SECT. 5, SUB-SECT. 1.—F. (d).**

**34161. Under Real Property Limitation Act, 1833—Application of Act.]**—Sect. 2 of the above Act applies only between

**3413. — Effect of Act.]**—**SALKELD v. JOHNSTON**, No. 3412, *ante*.

**3414. — Property in City of London.]**—**PAYNE v. ESDALLE**, No. 3451, *post*.

**3415. Under Real Property Limitation Act, 1833 — As against ecclesiastical corporation.]**—The right to tithes as against an ecclesiastical corpn. aggregate is not barred under above Act by non-payment for twenty years.—**ELY (DEAN) v. BLISS** (1852), 2 De G. M. & G. 459; 20 L. T. O. S. 35; 42 E. R. 950, L. C.

*Annotations:—Consd.* Irish Land Commission v. Grant (1884), 10 App. Cas. 14. *Mentd.* Esdalle v. Payne (1885), 52 L. T. 530; Esdalle v. Payne (1889), 59 L. T. 910; Howitt v. Harrington, [1893] 2 Ch. 497.

**3416. — Application of Act.]**—At the trial of an action of debt for not setting out tithes accruing from lands forming part of M. fen, in the parish of M., the general title of plff. as impropriate rector was admitted; but it appeared that by a local inclosure act passed in the 47 Geo. 3, comrs. were directed to set out & allot in lieu of all tithes in the parish of M., such parts of the land intended to be inclosed as should be equal in value to certain proportions of lands in the parish of three different descriptions therein specified, amongst others, to one-seventh part of all the old inclosed lands, except such lands as were formerly part of M. common, & inclosed under an act of King Charles II. By a subsequent sect. provision was made for the case of (*inter alia*) old inclosures or inclosed lands subject to tithes, the respective owners whereof should be desirous of commuting for the tithes due thereout, & empowering the comrs. to direct such compensation to be made out of other lands or by money payments. The comrs. accordingly made their award, following the words of the Act, & professing to make an allotment to plff. in lieu of all the tithes accruing within M.; & the award was accompanied by a map of the inclosed lands & a schedule of lands not discharged from tithes was annexed to it; but the land in question was not included either in the map or the schedule; neither did it appear that any land was allotted in respect of the tithes of it, nor was any money payment directed to be made. It did not appear whether M. fen formed part of the land inclosed under the act of Charles II. The question of the liability of deft.'s lands having subsequently been brought under the attention of M., assistant tithe comr., he decided that they were not exempted by the inclosure act & award, & that plff. was entitled to the tithes:—*Held:* (1) reading both sects. of the inclosure Act together, it was not obligatory upon the comrs. to award compensation with respect to all the lands in the parish subject to tithes; (2) the assistant tithe comr. had, therefore, jurisdiction to inquire into the fact whether or not compensation had been awarded by the comrs.; (3) if his decision of that fact in the negative was erroneous, his decision that the tithes were payable was without

adverse claimants of estates in tithe rentcharge, & not as between the owner of the tithe rentcharge & the occupier & owner of the land.—**SHEIL v. INCORPORATED SOCIETY** (1847), 10 L. Eq. R. 411.—IR.

*n. —.*—Sect. 42 of the above Act does not apply to additional rent in lieu of tithe rentcharge, as between landlord & tenant.—*Er p.* **WARBURTON** (1847), 10 L. Eq. R. 206.—IR.

*o. —.*—Sect. 2 of the above Act does not apply to claims for tithe composition, as between the

tithe claimant & the owner of the land, but only as between adverse owners of estates in tithe.—**SHANNON v. HONDER** (1839), 3 L. L. R. 521.—IR.

*p. — Unsatisfied judgment within 12 years.]*—A civil-bill decree for arrears of tithe rentcharge, obtained within twelve years before action, though unsatisfied, saves the tithe rentcharge from being barred by Stat. Limitations.—**IRISH LAND COMMISSION v. JUDKIN** (1888), 24 L. R. Ir. 40.—IR.

*q. — Discontinuance of receipt—Subsequent receipt from person not*



**jurisdiction & did not preclude deft. from showing that they had been extinguished.**

(4) The neglect to appeal from the decision of the tithe comrs. finding that tithes are payable, under Tithe Act, 1836 (c. 71), s. 46, does not preclude the party against whom they decide afterwards setting up a previous commutation or extinguishment of the tithes under a prior Act of Parliament; the jurisdiction of the comrs. in such case being taken away by sect. 90.

(5) Sects. 2 & 34 of above Act do not apply to an action for not setting out tithes. The act applies to tithes only where the dispute is between adverse claimants, & not where the liability to pay tithes is questioned.—*BUNBURY v. FULLER* (1853), 9 Exch. 111; 1 C. L. R. 893; 23 L. J. Ex. 29; 23 L. T. O. S. 131; 17 J. P. 790; 156 E. R. 47. Ex. Ch.

*Annotations:—Generally, Mentd. R. v. Nunneley (1858).  
E. B. & E. 852; Pease v. Chaytor (1863), 3 B. & S. 620;  
Re The Charkieh (1873), 28 L. T. 190; Colonial Bank of  
Australasia v. Willan (1874), L. R. 5 P. C. 417; R. v.  
Sheffield Recorder (1883), 52 L. J. M. C. 78; Ex p. Wake  
(1883), 11 Q. B. D. 291; R. v. Woodhouse, [1906] 2 K. B.  
505; R. v. Bradford, [1908] 1 K. B. 365; May v. Mills  
(1914), 30 T. L. R. 287; H. v. Nat Bell Liquors, [1922]  
2 A. G. 128.*

**3417.** ———.] — **ST. BARTHOLOMEW'S HOSPITAL v. PHILLIPS** (1878), cited 52 L. T. at p. 531.

**Annotations :—**Consd. *Esdallo v. Payne* (1885), 52 L. T. 530. **Refd.** *Esdallo v. Payne* (No. 2) (1885), 53 L. T. 21.

**3418.** — **Property in City of London.**]—**PAYNE**  
**v. ESDAILE**, No. 3451, *post*.

**Presumption of grant from non-payment.]—**  
*See No. 3406, ante.*

### G. Exemption from Tithe.

**3419. Whether by unity of church & lands.]---**

(1) The perpetual unity of a church & lands is not of itself a discharge from tithes; for the tithes being collateral to the land are not extinguished, but only suspended, by the union, & when the union ceases they are payable. Lands, therefore, belonging to the lesser abbeyes, though annexed to a greater abbey, yet not being exempted by 31 Hen. 8, c. 13, become liable upon the dissolution made by that statute.

(2) Lands which came to the Crown by the 1 Edw. 6, c. 14, are not exempted from the payment of tithes by 31 Hen. 8, c. 13. — *GERRARD v. WRIGHT* (1621), Cro. Jac. 607; 79 E. R. 518; *sub nom.* *WRIGHT v. GERRARD & HILDERSHAM*, Hob. 306; W. Jo. 2.

*Annotations*.—As to (1) **Reid**. *Sydney v. Holme* (1635), Cro. Car. 422; Page v. *Wilson* (1821), 2 Jac. & W. 513. **Generally, Mentis**. *Bowles v. Atkins* (1667), 2 Keb. 28; *Thomas v. Sorrel* (1673), 3 Keb. 155; *Mills v. Watkins* (1703), 2 Salk. 609; *Bury St. Edmund Corp. v. Evans* (1739), 2 Com. 643.

**3420. Whether by liability to repair of chancel.]**—An obligation to repair the chancel of the church does not exempt the party from the payment of tithes.—**SWYER v. WELD** (1715), 2 Wood, 18.

**Annotation :—**Mentd. Jesus College v. Gibbs (1835), 1 Y. & C. Ex. 145.

**By lapse of time.**—See Sub-sect. 1, F. (d), *ante*.

**H. Voluntary Compositions or Allowances in Lieu of Tithe.**

**3421. Whether binding on landowner—Con-**

liable.)—A tithe rentcharge was not paid for a period of three & a half years from 1886. At the end of that time the owners of the tithe rentcharge, acting upon false information, innocently given, applied to the agent of a third party, who had not then, and never had, any estate or interest in

the lands liable thereto, & who was not in privity in any way with the owners thereof, & received from him the arrears & all subsequent gales as they accrued due:—*Held*: there had not been a discontinuance of receipt within sect. 3 of above Act.—*THE WINTER'S ESTATE*, [1908] 1 I. R. 529, 535; 42 I. L. T.

**firmation by court.]—EDGERLEY v. PRICE (1673),**  
*Chas. temp. Finch.* 18 ; 23 E. R. 10.

**Annotations:**—**Dbtd.** A.-(1. v. Cholmley (1765), 2 Eden, 304.  
**Mentd.** Thorne v. Mattingley (1837), 2 Y. & C. Ex. 421.

3422. — Incumbent simoniacally presented.]  
—BROOKSBY v. WATTS, No. 2282, *ante*.

3423. Whether binding on successor—Patron

**not a party.**—An agreement was made between the rector & inhabitants of a parish, allotting lands in lieu of the ancient glebe, with some addition on account of the rector's losing certain rights of common by an inclosure; & also providing an annual stipend or pecuniary compensation in lieu of tithes. The successor declining to abide by the agreement, unless on an increase of the stipend, an amicable suit was instituted in Chancery, to which the ordinary, but not the Patron, who was the King, was made a party, & the parishioners agreeing to increase the stipend, a decree was made by consent to ratify the articles of agreement. This agreement was acquiesced under for eighty years, forty of which the rector against whom the decree was made remained incumbent:—*Held*: this agreement as to the pecuniary composition was not binding, the patron not being ever a party thereto; & the composition being made only as respecting the value of the past tithes, without any regard to the future increasing value.—*CHOLMLEY v. A.-G.* (1708), 7 Bro. Parl. Cas. 34; 3 E. R. 23, II. L.; *affy.* 8 C. sub nom. A.-G. v. CHOLMLEY (1705), Amb. 510, L. C.

*Annotations.*—*Conrad. A.-G. v. Warren* (1818), 2 Swan. 291; *Thorpe v. Mattingley* (1838), 8 L. J. Ex. Eq. 9; *Plowden v. Thorpe* (1840), 7 Cl. & Fin. 137. *Reid, Salkeld v. Johnson* (1848), 2 Exch. 256; *Harper v. Hedges*, [1923] 2 K. B. 314.

**3424. — Agreement to accept benefit of trust.** — A., in consideration of £800 paid by B., granted a rent charge to trustees, in trust to pay it to the Vicar of C., in lieu of his small tithes; but if, at any time, the vicar should insist on taking the tithes, then in trust for the poor. The deed was duly enrolled. An objection, that the deed was invalid as a purchase from the vicar was overruled.

That [deed] does not bind the vicar who may take his small tithes, but he cannot take both, & of course the trustees must make a fresh contract with every succeeding vicar (ROMILLY, M.R.).—*MILBANK v. LAMBERT* (1860), 28 Beav. 200; 54 E. R. 344.

**3425. Whether valid.**—**MILBANK v. LAMBIERT**,  
No. 3424, *ante*.

### *1. Right of Tithe Way.*

*See EASEMENTS, p. 113, Nos. 733, 734, ante.*

**SUB-SECT. 2. - COMMUTATION.**

*A. Under Inclosure Acts.*

**3426. Appointment of fresh arbitrator.**--On neglect of previous arbitrator to make award.--What constitutes neglect.]--A private Act of Parliament, after appointing a comr. for dividing, allotting, & inclosing certain commonable lands, empowered an arbitrator, who was not the comr., to declare by an award under his hand & seal, within six months after the passing of the Act, the

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*v. bona fide perceptio et consumptio*.)—A demand of thirty years' arrears of tithes was met by the plea of *bona fide perceptio et consumptio*:—*Held*: the defence was sufficient.—*LORD ADVOCATE v. DRYSDALE* (1874), L. R. 2 SC. & DIV. 368.—SCOT.

**Sect. 5.—Tithes and tithe rentcharge: Sub-sect. 2, A.]**

annual amount of the rentcharge to be paid to the rector in lieu of tithes. A subsequent section enacted, that in case the arbitrator should neglect or refuse to act, the Bishop of Oxford should have power to nominate another arbitrator in his place with the like powers. The inclosure comrs. did not complete the inclosure within the six months, & the arbitrator did not make his award until after that time. The award made by him being bad on its face, the Bishop of Oxford appointed another arbitrator, who made an award on which pltf. declared, alleging that the arbitrator appointed by the Act had omitted to make his award within six months, & the other facts. Def't. pleaded that the arbitrator appointed under the Act made his award, which was submitted to & acted on by pltf. *absque hoc*, that the arbitrator "neglected" to make his award for the space of six calendar months, etc.:—*Held*: the arbitrator, by permitting six months to expire without making an award, had neglected to make one within the meaning of the Act.—**WILLOUGHBY v. WILLOUGHBY** (1847), 9 Q. B. 923; 16 L. J. Q. B. 251; 8 L. T. O. S. 470; 11 J. P. 581; 11 Jur. 902; 115 E. R. 1529.

**3427. Procedure on award—Time for appeal.]—**

—An Inclosure Act directed, that the comr. thereby appointed should by his award, or by some previous writing to be annexed thereto, ascertain the quantity of wheat equal to the annual value of the tithes in the parish of W., & should afterwards determine the value of such wheat in money, & charge & apportion the amount on the lands & tenements in W., which sum was to be paid to the rector quarterly, the first payment to be on Mar. 25 next after the execution of the award, or such earlier day as the comr. by his award or by such previous writing should appoint; & the tithes were to cease from the apportionment of such rent, or at such other time as the comr. by any writing should appoint. The Act also directed, that if any person should think himself aggrieved by any thing done in pursuance thereof, he might appeal to the sessions within four calendar months next after the cause of complaint should have arisen. The comr., by writing dated Oct. 3, 1832, fixed the corn rent in the proportions stated in a sched. annexed, & appointed the payments to begin from Dec. 25 next, & the tithes to cease from Sept. 29 then last. His award was not made till Jan. 1833. The rector appealed at the Easter Sessions, Apr. 9, 1833, on the ground that his equivalent for the tithes was assessed too low:—*Held*: (1) the previous writing of the comr. was operative before the making of the award; (2) the cause of complaint arose on the execution of such writing, & the appeal was too late.

(3) The Act directed, that all notices necessary to be given by the comr. should be given by advertisement in a certain paper, & by affixing such notice on the church door eight days before the time for doing the business to be notified. The comr. on executing the above writing, sent the applt. a copy of the sched., with notice of the tithes having been extinguished & the corn rents assessed, but the sched. in no way referred to the writing. He also published notices in the newspaper & on the church door, declaring that he had assessed the corn rents by writing of Oct. 3, which was deposited with the clerk, whose address was given, in London; & these last-mentioned notices further stated the days when the tithes were to cease, & on which the rents were to be payable. It also appeared by a correspondence, that the

matter which formed the ground of the appeal was in fact known to the applt. before Dec. 13, 1832:—*Held*: supposing any notice to applt. to have been necessary, & *semble*: it was not, he had, by the communications above stated, sufficient notice of the cause of complaint to have appealed within four months.—**R. v. NOCKOLDS** (1834), 1 Ad. & El. 245; 3 Nev. & M. K. B. 334; 2 Nev. & M. M. C. 241; 3 L. J. M. C. 87; 110 E. R. 1199.

**3428. — Notice of award—Sufficiency of notice.]—R. v. NOCKOLDS, No. 3427, ante.**

**3429. Validity of award—Rentcharge charged in one entire sum on lands of one proprietor—Construction of Act.]—**(1) An Act for dividing & allotting lands in a parish in Oxfordshire, & creating a rentcharge upon certain lands in lieu of tithes, enacted, that the rentcharge should be charged on the lands & grounds of W., in exoneration of the lands & grounds of all other proprietors of lands & hereditaments in the parish; & further, that it should be lawful for a barrister or comr., by his award, to divide & apportion the rentcharge into so many parts or portions as he should think fit, & to charge each such part or portion on a separate & distinct part of the lands & grounds of W., in order that each separate & distinct part might be subject only to that part of the rentcharge which was charged thereon. The comr. awarded that the yearly rentcharge of £236 0s. 9d. should be charged in one entire sum on all the lands & grounds of W. situate in the parish:—*Held*: sufficient; as although the comr. had the power to specify particular lands, & the amount of charge upon them, it was not compulsory upon him to do so.

(2) An Allotment Act, creating a rentcharge upon certain lands in lieu of tithes, provided that the rentcharge should be payable at stated times, & that when & so often as any part thereof should be behind & unpaid, for three calendar months next after it should become due & payable, the rector should have such & the like powers & remedies for recovering the same, together with all expenses, etc. as by the common or statute law are given to landlords, for the recovery of rent when in arrear. W. was not shown to be in the occupation of the lands charged, & no person was mentioned in the Act by whom the rentcharge should be paid:—*Held*: debt would not lie against W. for arrears of the rentcharge. *Semble*: if the Act intended to give a remedy by action of debt at all, it would only lie against the occupier of the lands charged. **WILLOUGHBY v. WILLOUGHBY** (1843), 4 Q. B. 687; 12 L. J. Q. B. 281; 1 L. T. O. S. 160; 7 J. P. 543; 7 Jur. 798; 114 E. R. 1057; *subsequent proceedings* (1845), 6 Q. B. 722.

*Annotations*:—As to (2) **Folld. Bedford v. Sutton Coldfield, Silvester v. Bedford** (1857), 3 C. B. N. S. 449. **Consd. Christie v. Barker** (1884), 53 L. J. Q. B. 437. **Refd. Hyde v. Berners** (1889), 53 J. P. 453.

—**Incumbent at date of award holding two preferments.]—See COMMONS, Vol. XL, p. 71, No. 940.**

**3430. Effect of award—Allotment in respect of tithe free lands.]—**A. having purchased an estate free from rectorial title, with a right of common thereto annexed; the common was afterwards inclosed under an Act of Parliament, & certain land was allotted to A. in lieu of his right of common:—*Held*: no tithe was payable in respect of the allotted land.—**STEELE v. MANNS** (1821), 5 B. & Ald. 22; 106 E. R. 1101.

*Annotations*:—**Appld. Askew v. Wilkinson** (1832), 3 B. & Ad. 152. **Expld. Blachford v. Kirkpatrick** (1842), 6 Beav. 332.

**3431. — Allotment in respect of land subject to modus.]—**CARLISLE (BP.) v. BLAIN, No. 3382, ante.

**3432. — Allotment of land in lieu of tithes—Effect on former burden on tithe owner—Custom to provide bull & boar.]—**Where, under an Inclosure Act, lands have been allotted "in satisfaction & discharge of" the great tithes, the burden of keeping up a custom that the parson as owner of the great tithes shall provide & keep a bull & boar for the common use of the parishioners is not, in the absence of express words in the Act to that effect, shifted to the allottees of those lands.—LANCHBURY v. BODE, [1898] 2 Ch. 120; 67 L. J. Ch. 190; 78 L. T. 14; 62 J. P. 248; 14 T. L. R. 178.

*Annotation:—*Consd. *Re* Abns Corn Charity, Charity Comrs. v. Bode, [1901] 2 Ch. 750.

**3433. — Ancient charge for benefit of poor.]—**(1) In 1881 deft. purchased from the Ecclesiastical Comrs. certain lands which, in 1834, had been allotted to their predecessors in title under a private inclosure Act, in lieu of the great tithes of the parish of H. There was evidence that from time immemorial an annual payment of a certain quantity of corn had been made out of the tithes for the benefit of the poor of the parish, & from 1831 to 1881 the same payment had been made by the owners or occupiers of the lands in question. The conveyance to deft. was expressed to be made free from incumbrances, but was also expressly subject to the unredeemed land tax, title commutation rentcharge, both rectorial & vicarial, & to all other payments & outgoing, ecclesiastical or civil, charged upon or payable out of the lands conveyed:—*Held*: the payment of corn constituted a valid charge to which the lands allotted in lieu of the tithes became subject by virtue of s. 60 of the inclosure Act, & deft. by the terms of his conveyance took the lands subject to the charge.

(2) Deft. had mortgaged the lands by a deed which expressly stated in terms similar to those used in the conveyance that the mtgee. was subject to all payments & outgoing, ecclesiastical or civil, charged upon or payable out of the mortgaged property. The mtgee. had made no inquiry as to the existence of any charges upon the property:—*Held*: having regard to Conveyancing Act, 1881 (c. 39), s. 3 (1) (ii), the mtgee. must be taken to have had notice of the charge in question, & mortgaged property was subject thereto.

(3) By the parsonage is meant the endowment of the benefice. It is thus defined in Degge's Parson's Counsellor (ed. 1703), 190: "A parsonage, or rectory, is a certain portion of land, tithes & offerings, established by the laws of this kingdom, for the maintenance of the minister that hath the cure of souls within the parish where he is rector, or patron, & properly comprehends"—" *integra ecclesia parochialis, cum omnibus suis juribus, prædiis, decimis, aliisque proventuum speciebus; alias vulgo dictum beneficium*." (STIRLING, J.).—*Re* ALMS CORN CHARITY, CHARITY COMRS. v. BODE, [1901] 2 Ch. 750; 71 L. J. Ch. 76; 85 L. T. 533; 17 T. L. R. 102; 45 Sol. Jo. 103; 723.

**3434. — Lands in township omitted from award—Whether rector's right barred.]—**Comrs. under an inclosure Act were to allot by their award to the rector of the parish so much of the lands to be inclosed in the township of S. & of the titheable parts of the township of W., as should, quantity, quality, & situation considered, contain, or be equal in value to, two-fifteenth parts of the

titheable places thereof, in lieu of tithes arising within the same lands; after the enrolment of the award of the comrs. all tithes, arising within the lands inclosed, were to cease; but there was a saving to all persons, other than the persons to whom any compensation should be made by virtue of the Act, in respect of the interest for which such compensation should be made, of all such interest as they had in respect of the lands before the passing of that Act. An award, by which the comrs. allotted to the rector, in lieu of the tithes of S. & A., lands more in quantity than two-fifteenth parts of the lands inclosed in S. & A., but less than two-fifteenth parts of the lands inclosed in S., A. & W., without any allotment expressed to be in lieu of the tithes of W.:—*Held*: the award was not a bar to the rector's claim of the tithes in W.—COOPER v. THORPE (1820), 2 Russ. 78; 38 E. R. 265, L. C.; *subsequent proceedings, sub nom.* THORPE v. COOPER (1828), 5 Bing. 110, Ex. Ch.

*Annotations:—*Consd. *Casimajor v. Strode* (1832), 5 Blm. 87; *Bunbury v. Fuller* (1853), 9 Exch. 111.

**3435. — Commutation for corn-rent—For what period due.]—**An inclosure Act directed that, in lieu of tithes, a corn-rent should be payable to the impropricator & vicar by the person having the possession & occupation of the lands. Part of the lands inclosed were uncultivated & untenanted for some years, during which time the owner lived on another estate. He afterwards demised them to a tenant who entered & occupied:—*Held*: (1) the corn-rents were due for the time during which the land was unproductive; (2) during that time the landlord was legally in the possession of the lands so as to be liable to the burdens imposed by the statute, & the tenant coming in under him was liable to be distrained upon for the arrear of rent.—NEWLING v. PEARSE (1823), 1 B. & C. 437; 2 Dow. & Ry. K. B. 607; 1 L. J. O. S. K. B. 140; 107 E. R. 102.

*Annotations:—*Reid. *Willoughby v. Willoughby* (1843), 4 Q. B. 687. *Mentd.* *Re v. Morgan* (1834), 2 Ad. & El. 618, n.

**3436. — Who liable.]—**NEWLING v. PEARSE, No. 3435, ante.

**3437. — Commutation for rentcharge—How recoverable.]—**WILLOUGHBY v. WILLOUGHBY, No. 3429, ante.

**3438. — Lands of single owner with different occupiers.]—**By a private inclosure Act all tithes in respect of old inclosed lands were extinguished, & in lieu thereof yearly rents were charged, which were to be paid to the rector for the time being at the rectory-house. The rector, in addition to all present powers for the recovering of tithes, was to have the same powers for recovering the yearly rents, when in arrear, as by common law or statute are given to landlords for the recovering of rack-rent when in arrear. To prevent difficulties to the rector, in case of division of the lands so charged, it was provided that a comr. should make a schedule of the several lands, & apportion the rent to be charged on each part, & upon any division, except by demise at rack-rent, the lands so divided were thenceforth to be exclusively liable to the payment of so much of the yearly rent as should be specified in the schedule, & such apportioned part might be recovered from the lands charged therewith, or from the owners thereof, in the same manner as the whole of the yearly rents were thereby made recoverable:—*Held*: (1) this Act did not empower the rector to maintain an action against the owners of inclosed lands in his parish, to recover the amount of the rentcharge thereby created; (2) a distress by the rector for a joint sum, being the amount of rent-

*Sect. 5.—Tithe and tithe rentcharge: Sub-sect. 2, A., B., C. & D.; sub-sect. 3, A.]*

charge imposed upon lands acquired before the Act, plus the amount imposed upon other lands acquired since the Act, was illegal.—*BEDFORD v. SUTTON COLDFIELD (WARDEN, ETC.), SILVESTER v. BEDFORD (1857)*, 3 C. B. N. S. 449; 27 L. J. C. P. 105; 31 L. T. O. S. 57; 22 J. P. 371; 4 Jur. N. S. 133; 140 E. R. 815.

*Annotations:—As to (1) Reid. Hyde v. Borners (1880)*, 53 J. P. 453. *As to (2) Reid. Phillips v. Whitshed (1860)*, 2 E. & E. 804.

**3439.** — Whether conclusive as to liability to tithe.]—*BUNBURY v. FULLER*, No. 3410, *ante*.

**3440.** — Proviso in case of conversion into tillage—Planting fruit trees—Whether conversion into tillage.]—The comr. appointed under an inclosure Act stated that lands in the parish were subject to a certain modus, which extended only to the lands when occupied by the owners thereof, or by residents, but that such lands would become liable to the payment of tithes, the amount of which he specified in a schedule, when otherwise occupied, or if converted into tillage. A resident owner built in one of his fields, then subject to the modus, a house, attached to it a garden, & planted fruit trees on the rest of the field:—*Held*: by the planting of the fruit trees there had not been a conversion into tillage so as to destroy the modus & render the land subject to the increased tithe.

The conversion into tillage of any part of the land, if such conversion had actually taken place, would not under this award make the whole field, but only that part of it which was so converted, liable to the increased tithe (*LORD SELBORNE, C.*). —*DUDMAN v. VIGAR (1873)*, L. R. 6 H. L. 212; 42 L. J. C. P. 297; 20 L. T. 552; 38 J. P. 36; 22 W. R. 170, H. L.; *affg. S. C. sub nom. VIGAR v. DUDMAN (1872)*, L. R. 7 C. P. 72, Ex. Ch.

**3441.** — Part of field converted into tillage—Whether whole field subject to proviso.]—*DUDMAN v. VIGAR*, No. 3440, *ante*.

**3442.** Application for revision—Time for making.]—By a local inclosure Act, a corn-rent, of a stated amount, was given to the rector of a parish in place of certain dues; such rent to be paid on Jan. 5 & July 5, the first payment to be on such of those days as should be directed by the award of inclosure comrs. The comrs. were, by such award, to apportion such rent among the landholders; & the rent was to be subject to future variation as follows: the quantity of wheat equivalent to the amount stated in the award being ascertained it was enacted that the rector of the landowners might apply to the justices at the first quarter sessions to be held for the division in the week after the Feast of Easter next after the expiration of 21 years to be computed from the making of the award, to cause the amount of rent to be re-ascertained & increased or diminished according to the average price of wheat for the 21 years then last past; notice of such application to be given in Jan. next preceding. The rent was to be re-ascertained by comrs. the amount reported by them at the next July sessions & an order there made accordingly; & such rent was to continue payable from the half yearly day of payment next after that order, until the same should at the end of 21 years then next ensuing be again varied by such application, & in such manner as before mentioned; & so from time to time, at the end of every 21 years, for ever:—*Held*: (1) the application for re-ascertainment could take place only at the expiration of one of the periods fixed by the Act & if then omitted

could not be made till the next 21 years had expired; (2) the application, at the end of any such period (other than the first) must be made to the Easter sessions next after the close of the twenty-first year, notice being given in the January preceding; & the justices were right in refusing to hear an application made on notice in January of the twenty-second year to the ensuing Easter sessions.—*R. v. LINDSEY JJ. (1850)*, 13 Q. B. 484; 18 L. J. Q. B. 163; 13 L. T. O. S. 184; 13 J. P. 426; 13 Jur. 491; 116 E. R. 1348.

**3443.** Expenses of award—Whether incumbent liable—Construction of Act.]—A local inclosure Act empowered comrs., amongst other things, to allot lands to the vicar or other the persons entitled to tithes, & to the vicar in respect of glebe lands, as an equivalent & compensation for their claims, & to divide the remainder among persons interested in the lands. It directed the comrs., before making any allotments, to mark out for sale a portion of the lands, & sell the same for the purpose of paying the expenses of carrying out the Act, & in case the amount raised by the sale should be insufficient, to make up the deficiency by a rate to be made upon the several persons interested in the lands to be inclosed, except the vicar & persons entitled to tithes. It directed also that the allotments, except the allotments to the vicar & other persons in lieu of tithes, should be fenced by the persons to whom they were allotted, & that the allotments to the vicar & other persons in lieu of tithes should be fenced at the expense of the inclosure expenses fund:—*Held*: as the word "other" was omitted in the clause excepting the vicar & persons entitled to tithes from being rated to the additional rate, & as the framework of the Act seem to show that the omission was intentional, the vicar was exempt absolutely from ratability in respect of the land allotted to him for glebe as well as for the land allotted to him for tithes, & the exemption was not intended to be in respect of lands granted in lieu of tithes only.—*EDDISON v. BROOKES (1864)*, 17 C. R. N. S. 606; 11 L. T. 378; 29 J. P. 87; 13 W. R. 98; 144 E. R. 243.

*Procedure under Inclosure Acts.] further, COMMONS, Vol. XI., pp. 58 et seq.*

*B. Under Other Local and Private Acts.*

**3444.** Commuted rentcharge—District chapelry constituted separate ecclesiastical parish—Annexation of portion of rentcharge—*St. Giles, Cripplegate.*]—A church, called *St. Bartholomew, Moor Lane*, was built in the parish of *St. Giles, Cripplegate*, under Church Building Act, 1819 (c. 134), s. 16, & a district was assigned to it, & authority given to solemnise marriages, baptisms, etc., therein. By an indenture, reciting a local Act, which extinguished the tithes of *St. Giles* & made an annuity of £1,800 payable in lieu thereof, the vicar of *St. Giles*, under 1 & 2 Will. 4, c. 45, s. 21, annexed to the church of *St. Bartholomew*, one-sixth part of this annual sum for the benefit of the incumbent of *St. B.* & his successors. The churchwardens having raised objections to the validity of this deed, & refused payment of the annuity so annexed:—*Held*: (1) the annexation of a portion of the annuity due to the vicar of *St. Giles*, was competent under 1 & 2 Will. 4, c. 45; (2) though under New Parishes Act, 1856 (c. 104), *St. Bartholomew* had become a separate parish, yet it was still a district chapelry for all other purposes, & capable of receiving such annexation from the vicar of *St. Giles.*—*HUGHES v. DENTON (1859)*, 5 C. B. N. S. 765; 28 L. J. M. C.

140; 33 L. T. O. S. 50; 23 J. P. 279; 5 Jur. N. S. 575; 7 W. R. 305; 141 E. R. 307.

*Annotation:—Generally. Mentd. Backhouse v. Bishopwearmouth* (1860), 9 C. B. N. S. 315.

**3445. — Remedy for non-payment—Against owner of part for whole.**—Deft. was the owner & occupier of a portion of certain lands in the parish of P., which by a private Act were charged with the payment to the vicar of an annual sum of £270 in lieu of all tithes. The Act provided that if the annual rents were in arrear, the vicar was to have such & the same powers & remedies for recovering the same as by the laws & statutes of the realm are provided for the recovery of rent in arrear; & also that, if no sufficient distress was found on the premises, the vicar might enter & take possession of the same until the arrears were satisfied. Four years' arrears of the annual rent accrued in respect of the whole of the lands charged, during the whole of which period deft. was the owner & occupier of a portion only of such lands:—*Held*: (1) the vicar might maintain an action of debt against deft. for the whole amount in arrear, the remedy by real action, which was a higher remedy than the action of debt, having been abolished by Real Property Limitation Act, 1833 (c. 27), s. 30; (2) deft. had his remedy in an action against the co-owners for contribution.—*CHRISTIE v. BARKER* (1884), 53 L. J. Q. B. 537, C. A.

*Annotations:—As to* (1) *Refd. Bowman v. Smith* (1885), 2 T. L. R. 101; *Squire v. Cooke* (1890), 43 Ch. D. 519; *Re Herbage Rents, Greenwich Charity Comrs. v. Green*, [1896] 2 Ch. 811; *Pertwee v. Townsend*, [1896] 2 Q. B. 129; *Foley's Charity Trustees v. Dudley Corpn.*, [1910] 1 K. B. 317.

**3446. — Appointment of collectors—Who may enforce.**—*R. v. SHARP* (1895), 11 T. L. R. 337.

**3447. — How enforced.**—By a local Act for the commutation of tithes for a fixed rentcharge it was provided that four, three, or two substantial householders, not being of the people called Quakers, to be nominated yearly by the inhabitants of the township should be tithe collectors for the township to levy the several sums chargeable by the Act upon the tenements within the township as & for the proportion of the township with all reasonable expenses attending the same. The inhabitants resolved that no persons should be appointed who did not pledge themselves to comply with certain conditions, & particularly not to charge more than 15 per cent. for expenses of collection. No one could be found to accept these conditions:—*Held*: the conduct of the inhabitants amounted to a refusal to fulfil their statutory duty of nominating collectors, & since no other remedy was provided by the Act a *mandamus* should issue to compel them to perform it.—*R. v. LANCASTER (INHABITANTS)* (1900), 64 J. P. 280.

**3448. Tithes partially extinguished—Interpretation of Act—Jurisdiction of commissioners under 1836 Act.**—By a private Act of Parliament, passed in 1762, for carrying into effect an agreement between the landowner & rector for the commutation of tithes on certain lands in the parish of W., it was declared that certain rents therein specified should be vested in the rector, in lieu of & as full compensation for all tithes of corn, grain, hay, wool, lamb, & all other tithes whatsoever, except as after mentioned, arising from all or any of the lands in the parish, save & except marriage, churching, & burial fees, provided that nothing in the Act should prejudice the right of the rector, or his successors, to any marriage, churching, or burial fees, nor the right of tithes & customary stocking, in certain specified lands, the modus in the Groves & Ancient Closes adjoining to the town,

& all other petty & personal tithes not herein mentioned & relinquished, all which the rector reserved, & they were thereby reserved to him & his successors in full right & in as ample manner as they had always been enjoyed. The assistant tithe comr. having decided that the lands, called the Ancient Closes, were not exempt from tithes:—*Held*: the tithes of the Ancient Closes were not commuted or extinguished by the private Act of 1762, & therefore the jurisdiction of the comrs. was not taken away by Tithe Act, 1833 (c. 71), s. 90.

*Semble*: even if the tithes of wool & lamb were not included in the modus reserved to the rector, & were therefore extinguished by the Act of 1762, such partial extinguishment of tithes arising out of the lands would not satisfy s. 90 so as to deprive the comrs. of jurisdiction.—*Re WINTINGHAM TITHES, Ex p. CARBINGTON (LORD)* (1862), 31 L. J. Q. P. 274; 9 Jur. N. S. 277.

#### C. Under Tithe Acts.

See Sect. 4, *post*.

#### D. By Agreement.

See Sub-sect. 1, II., *ante*.

### SUB-SECT. 3.—LONDON TITHES AND PAYMENTS IN LIEU OF TITHES.

#### A. Within the City.

*NOTE.*—*Tithes or payments in the nature of tithes payable in respect of property in the City of London under 37 Hen. 8, c. 12, were commuted under London (City) Tithes Act, 1879 (c. clxxvi) & St. Botolph Without, Aldgate Act, 1881 (c. cxcvii) & the properties formerly subject thereto were charged with tithe rentcharge & tithe rate respectively.*

**3449. Whether payable in respect of houses—At common law.**—*PAYMENT OF TYTHES IN LONDON CASE* (1617), Calth. 51; 80 E. R. 672; *sub nom. DUNN v. BURRELL & GORRE*, 1 Gwill. 299; 1 Eag. & Y. 270.

*Annotations:—Refd. St. Paul's (Minor Canons) v. Crickett* (1817), Dan. 37; *Vivian v. Cochran* (1855), 4 De G. M. & G. 818.

**3450. Under 37 Hen. 8, c. 12—Incorporeal hereditaments.**—By a charter in the reign of James I., a grant was made of certain tithes issuing out of the rectory of St. Botolph Without Aldgate, in the city of London, to persons named in the grant, their heirs & assigns.

In 1801, by a marriage settlement, it was provided that an annuity or clear yearly rentcharge of £610 should issue & be payable out of the tithes in question for the term of 1,000 years. The tithes afterwards became vested in the trustees of a will, subject to the annuity created by the settlement. The trustees sold part of the tithes to certain railway cos. for the sum of £30,670. The tenant for life under the will contended that the trustees of the will might, under Settled Land Act, 1882 (c. 38), s. 38, invest or apply the £30,670 as capital money arising under that Act. By sect. 21 of the same statute it is provided that capital money shall be applied (*inter alia*) in discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement. The tenant for life asked that the trustees might be at liberty to apply the £30,670 in the purchase of the annuity created by the settlement with a view to its discharge:—*Held*: (1) the tithes were unquestionably an

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incorporeal hereditament; & as sect. 2, sub-sect. 10, of the Settled Land Act, 1882, includes incorporeal hereditament, such tithes as the tithes in question were included; (2) the annuity created by the settlement was not a rent, because it did not issue out of a corporeal hereditament; but it was an incumbrance on the tithes, & an incumbrance affecting the inheritance within the meaning of the Settled Land Act, 1882; (3) the trustees might be at liberty to purchase the annuity with a view to its discharge.—*Re ESDAILE, ESDAILE v. ESDAILE* (1880), 54 L. T. 637.

*Annotation:—Generally, Mentd. Re* (Gisborough's S. E., [1921] 2 Ch. 39.

**3451. — Whether tithe in kind—Within Tithe Act, 1832 (c. 100), s. 1.]—**37 Hen. 8, c. 12, provided that the inhabitants of the City of London for the time being should yearly for ever pay their tithes in respect of their houses after certain rates. A lay impropriator of the tithes in a parish within the City having brought an action to recover from the inhabitants of certain houses within the parish tithes payable under this statute, it appeared that so far as was known no tithes or payments in lieu of tithes had ever been paid in respect of those houses.—*Held*: (1) upon the authority of *Andrews v. Drever*, No. 3400, *ante*, that apart from statute mere non-payment afforded no defence even against a lay impropriator; (2) the payments imposed by 37 Hen. 8, c. 12, were not a tender of tithes in kind within the meaning of above section, & that Act afforded no defence; (3) the payments imposed by 30 Hen. 8, c. 12, were "annuities or periodical sums of money charged upon land" within Real Property Limitation Act, 1833 (c. 27), s. 1, & that statute, as amended by Real Property Limitations Act, 1871 (c. 57), afforded a defence to the action.—*PAYNE v. ESDAILE* (1888), 13 App. Cas. 613; 58 L. J. Ch. 209; 59 L. T. 508; 53 J. P. 100; 37 W. R. 273; 4 T. L. R. 781, H. L.; *reversq.* S. G. *sub nom.* *ESDAILE v. PAYNE* (1885), 52 L. T. 530, C. A.; (1886), 51 L. T. 705, C. A.

*Annotations:—As to* (2) *Reid. ESDAILE v. City of London Union Assmt. Com.* (1887), 18 Q. B. D. 599. *As to* (3) *Reid. Jones v. Withers* (1896), 74 L. T. 572. *Generally, Mentd. Re Hodgson's S. E., Altamont v. Forsyth* (1912), 106 L. T. 456.

**3452. — Whether annuities or periodical sums of money charged upon land—Within Real Property Limitation Act, 1833 (c. 27), s. 1.]—***PAYNE v. ESDAILE*, No. 3451, *ante*.

**3453. — Whether redeemable under London (City) Tithes Act, 1879 (c. clxxvi).]**—*R. v. BOARD OF AGRICULTURE* (1899), 15 T. L. R. 176.

**3454. — Whether deanery of St. Paul's exempt.]—***ST. PAUL'S (WARDEN, ETC.) v. ST. PAUL'S (DEAN)*, No. 3384, *ante*.

**3455. — Ascertainment—Form of reference.]—**(1) A rector of a parish in the city of London received for some years, without objection, a fixed sum by way of tithes of particular premises, & then filed his bill for an account.—*Held*: the receipt of such fixed sum, though less than the annual value, did not necessarily imply a composition; & much stronger evidence would be required to establish such a payment as a composition than in the ordinary case of a money payment in lieu of tithes in kind.

*Qu*: whether the rule requiring six months' notice for determining an ordinary composition for tithes in kind is applicable to the case of a composition for a money payment in lieu of tithes.

(2) Form of reference to the master to take an

account of tithes due under 37 Hen. 8, c. 12, where the rent or annual value of the buildings & premises is increased by means of implements or fittings not titheable let or used therewith.—*LETTS v. LONDON CORN EXCHANGE CO.* (1852), 1 De G. M. & G. 398; 21 L. J. Ch. 684; 18 L. T. O. S. 340; 42 E. R. 605, L. C.

*Annotation:—Generally, Reid. Vivian v. Cochrane* (1855), 4 De G. M. & G. 818.

**3456. Tithe rate in St. Botolph Without, Aldgate—Whether ratable to poor rate.]—**By 37 Hen. 8, c. 12, provision was made for payment to the clergy of the city of London & their successors of a rate made upon the inhabitants & calculated upon the rent of the houses in the city. In this & several subsequent statutes these payments were described as tithes. A special Act passed in 1881 provided that all tithes & sums of money in lieu of tithes arising or growing due in a parish in London should cease & be extinguished & the tithe owner should receive in lieu & satisfaction thereof a fixed annual sum to be levied & collected in the same manner as the poor rates. Neither the above-mentioned tithes nor the fixed annual sum in lieu thereof, had ever been assessed for the relief of the poor.—*Held*: the owner was not ratable to the poor rate in respect of this fixed annual sum, as such sum was a personal payment & was not a payment in lieu of tithes ratable under Poor Relief Act, 1601 (c. 2).—*ESDAILE v. CITY OF LONDON UNION ASSESSMENT COMMITTEE* (1887), 19 Q. B. D. 431; 56 L. J. M. C. 149; 57 L. T. 719; 35 W. R. 722; 3 T. L. R. 770; Ryde Rat. App. (1886-90), 105, C. A.

*Annotation:—Reid. Edwards v. St. Olave's Union Assmt. Com.* (1892), 8 T. L. R. 647.

**3457. Evidence of composition.]—***LETTS v. LONDON CORN EXCHANGE CO.*, No. 3455, *ante*.

**3458. Commissioners for payment of rector's rentcharge—Liberty of St. Andrew's, Holborn—Effect of City of London Union of Parishes Act, 1907 (c. cxl).]**—A local Act provided that the churchwarden of the City liberty of St. A., which has two liberties outside the City, two inhabitant householders of the City liberty who are overseers, if not Quakers, & ten elected inhabitants shall be comrs. charged with the duty of paying the rector £700 *per annum* in lieu of tithe.

City of London Union of Parishes Act, 1907 (c. cxl), provided that certain parishes, including St. A., shall for purposes other than ecclesiastical, charitable, or purposes of income tax, inhabited house duty, & land tax be united in one parish of which the common council shall be overseers.—*Held*: this c. ot make the common council a constituent or a commission, & the churchwarden & elected comrs. could act alone.—*WAGSTAFF v. CITY OF LONDON COMMON COUNCIL* (1908), 99 L. T. 791; 72 J. P. 477; 25 T. L. R. 1; 7 L. G. R. 69.

**Compensation payable on compulsory purchase of property liable.]—***See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 270, No. 2030.

#### *B. Without the City.*

**3459. In Middlesex—On houses—By custom—Jurisdiction of court to try.]—***LEIFIELD v. TYSDALE* (1614), Hob. 10; 80 E. R. 161.

*Annotations:—Consd. Champneys v. Buchan* (1857), 4 Drew. 104. *Reid. Startup v. Dodderidge* (1705), 2 Ld. Raym. 1158.

**3460. — — — — — Must be certain.]—**Bill by the rector of the parish of Whitechapel against certain householders claiming payments in respect of their houses, either as tithes or in lieu of tithes,



or as a rate-tithe. Pltf. did not by his bill specifically state whether he claimed in respect of a modus proper, or of a special custom affecting all houses in the parish, or in respect of prescriptive rights affecting the particular houses, but at the Bar contended that there was a custom. With reference to the claim on the ground of modus proper, the evidence showed that pltf. claimed a distinct annual sum as payable by the occupier of each house in the parish; & he claimed also an additional annual payment in respect of every additional building which might be erected on the site of any building already liable. With reference to the ground of prescription, the evidence showed that, as to three of the defts. their houses had been erected within memory; as to the fourth, the date of the erection of his house was not known, & a payment for 120 years was proved; but it appeared that the amount paid had varied; down to 1811 it was 8s. per year, & then it was increased to 14s. With reference to the ground of custom affecting all the houses in the parish whenever built, the custom alleged was that, as to new houses, the annual amount payable was such as should be agreed upon, & if no agreement could be come to, then to be ascertained by reference to the amounts paid for other buildings of a like nature. There was no personal evidence of the custom; & the account books referred to, though they showed payments, did not show on what certain principle the custom was founded:—*Held*: the claim could not be supported as a prescriptive right; & as grounded on a custom, & the custom, if well alleged, was too uncertain, & it was not alleged with sufficient distinctness.—*CHAMPNEYS v. BUCHAN* (1857), 4 Drew. 104; 29 L. T. O. S. 47; 21 J. P. 340; 5 W. R. 461; 62 E. R. 41.

**3461. — Presumption of legal origin.**—On a bill filed to enforce the payment of certain specified sums in lieu of tithes, it was proved that the respective occupiers of certain houses, either ancient or built upon ancient sites, & situate in that part of the parish of St. Andrew, Holborn, which is without the city of London, had for the last hundred years uniformly paid certain specified & invariable sums in respect of each house; but such payments were never made by the owners or occupiers of houses built upon new sites. The payments varied in amount on different houses, & were not in any distinct rate or proportion to the value of the houses *inter se*, & were general through this part of the parish:—*Held*: the ct. were warranted in inferring from these facts that the payments had been made from time immemorial, & they could assign a legal origin for such payments which could legally be enforced by the rector of the parish.—*BERESFORD v. NEWTON* (1835), 1 Cr. M. & R. 901; 5 Tyr. 432; 4 L. J. Ex. 113; 149 E. R. 1316.

*Annotations*:—*Reid*. *Champneys v. Buchan* (1857), 4 Drew. 104. *Mentd.* *Robinson v. Purday* (1846), 16 M. & W. 11.

**3462. — Whether claimable by prescription.**—*CHAMPNEYS v. BUCHAN*, No. 3460, *ante*.

**3463. In Surrey—St. Saviour's Southwark—Claimed neither by custom nor by prescription.**—*POCOCK v. TITMARSH* (1721), Bunb. 101; 145 E. R. 610.

*Annotation*:—*Reid*. *Champneys v. Buchan* (1857), 4 Drew. 104.

**3464. — St. Olave Southwark—Claim by immemorial custom.**—*HILL v. HUMBLE* (1762), cited 5 Tyr. 432.

*Annotation*:—*Reid*. *Beresford v. Newton* (1835), 5 Tyr. 432.

#### SUB-SECT. 4.—TITHE RENTCHARGE UNDER TITHE ACTS.

##### A. In General.

**3465. Nature of rentcharge created—Whether charge on land or produce.**—Where tithe rentcharge in lieu of tithe was in arrear, & the owners of the tithe rentcharge found nothing upon the land, subject to the tithe rentcharge, upon which to distrain, nor were there any rents & profits issuing out of the land, or any means by which, if pltf. took possession of the land, they could repay themselves the arrears of the rentcharge, upon action to recover the arrears:—*Held*: (1) the rentcharge was a charge on the produce, & not on the inheritance; (2) pltf. were not entitled to sell the land or any part thereof to pay the arrears; (3) their only remedies were those given by Tithe Act, 1836 (c. 71), namely, distress or entry; (4) in any case they could not recover more than two years' arrears.—*BAILEY v. BADHAM* (1885), 30 Ch. D. 84; 54 L. J. Ch. 1007; 53 L. T. 13; 40 J. P. 600; 33 W. R. 770; 1 T. L. R. 548.

*Annotations*:—*As to* (1) *Reid*. *Searle v. Cooke* (1890), 43 Ch. D. 519. *As to* (2) *Distd.* *Hambro v. Hambro*, [1894] 2 Ch. 564.

**3466. Right of incumbent to - Informal union of parishes.**—*A.-G. v. DURHAM (Earl)*, No. 2436, *ante*.

**3467. Whether Apportionment Act, 1834 (c. 22), applies.**—Upon the death of a tenant for life, under a will executed before Apportionment Act, 1834 (c. 22), of tithes, which after the Act were commuted for a rentcharge, payable at fixed periods, under Tithe Act, 1836 (c. 71):—*Held*: the award of the Tithe Comrs. was "an instrument under which the rentcharge was payable" within Apportionment Act, 1834 (c. 22), s. 2, & therefore, the rentcharge was apportionable.—*HEASMAN v. PEARSE* (1869), L. R. 8 Eq. 599.

**3468. Payment by mistake—Delay in claim for repayment—Until tithe owner barred.**—Pltf., by mistake, paid to defts., who were owners of the tithes of a parish, tithe rentcharge in respect of lands not in his occupation. Pltf. did not discover the mistake until the two years limited by Tithe Act, 1836 (c. 71), for the recovery of a tithe rentcharge had expired & defts. had lost their remedy for the arrears against the lands actually chargeable:—*Held*: (1) there was no duty cast on pltf. in relation to defts. which made his delay in discovering the mistake laches on his part; (2) he was entitled to recover back the amount paid as money paid under a mistake of fact.—*DURRANT v. ECCLESIASTICAL COMRS.* (1880), 6 Q. B. D. 234; 50 L. J. Q. B. 30; 44 L. T. 348; 45 J. P. 270; 29 W. R. 443, D. C.

*Annotations*:—*Generally*. *Reid*. *Baylis v. London, Bp.* [1913] 1 Ch. 127. *Mentd.* *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49.

**3469. — To sequestrator appointed by bishop—Liability of bishop as principal for money had & received—Though money paid over.**—*BAYLIS v. LONDON (Bp.)*, No. 2539, *ante*.

*See, generally*, *AGENCY*, Vol. I., pp. 609 *et seq.*; *CONTRACT*, Vol. XII., pp. 540 *et seq.*; *MISTAKE*.

**3470. Assessment of owner of rentcharge—To rate for money borrowed under Public Works Loans Act, 1824 (c. 36)—For repair of church & chancel.**—According to the true construction of the above Act, the owner of a tithe rentcharge in a parish, though not liable to be rated to an ordinary church rate, is liable to be assessed to a rate made for the repayment of money borrowed by the churchwardens & overseers from the Public Works Loan Comrs., under the provisions of that



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Act, for the purpose of repairing & enlarging the parish church, including the chancel.—**SMALLBONES v. EDNEY** (1870), L. R. 3 P. C. 444; 7 Moo. P. C. C. N. S. 286; 40 L. J. Eccl. 8; 24 L. T. 241; 35 J. P. 484; 19 W. R. 287; 17 E. R. 109, P. C.; *revers.* S. C. *sub nom.* **EDNEY & LUNN v. SMALLBONES** (1869), 21 L. T. 506.

**Annotations**.—*Reid.* **Asterley v. Adams** (1871), L. R. 3 A. & E. 361; *A.-G. v. Parr*, [1920] 1 Ch. 339. *Mentl.* **Meyers v. Hennell** (1912), 76 J. P. 321.

— **To property tax.**—*See* INCOME TAX.

**Apportionment map—As evidence of boundaries.]**

— *See* BOUNDARIES, Vol. VII., p. 310, Nos. 359–362.

— **As evidence of right of way.]**—*See* HIGHWAYS.

**B. Apportionment and Reapportionment.**

*See* Tithe Act, 1842 (c. 54), s. 14.

**3471. Cost of apportionment—Certificate of commissioners—Certiorari.]**—Tithe Act, 1836 (c. 71), s. 90, takes away the writ of *certiorari*. A certificate of the Tithe Comrs. recited that differences had arisen as to the expenses of apportionment in a particular parish, under the above Act, & ordered A. to pay to B. & C. a certain sum for those expenses:—*Held*: (1) a rule would be refused for a *certiorari* to remove that certificate upon affidavits, stating that no such differences had arisen, that those costs had been paid to the knowledge of the comrs. two years before, & that the real object of the certificate was to compel the payment of other costs, viz. the costs of a reference of certain objections to the apportionment; (2) no declaration made by the comrs. themselves subsequently to their signing the certificate would be received, which could affect the rights of third parties under that certificate; (3) if any charge of corruption was intended to be made against the comrs., complainant should proceed by criminal information.—*Ex p. ACLAND* (1847), 9 L. T. O. S. 146; *sub nom.* **Re ACLAND**, 11 J. P. Jo. 348.

**3472. — On sale of portion of land subject to one rentcharge.]**—Part of property contracted to be sold was subject, together with other land not belonging to the vendor, to one tithe rentcharge. The contract for sale contained no provision as to apportionment:—*Held*: the purchaser could not call on the vendor to procure an apportionment at the vendor's expense.—*Re EBSWORTH & TIDY'S CONTRACT* (1889), 42 Ch. D. 23; 58 L. J. Ch. 665; 60 L. T. 841; 37 W. R. 657, C. A.

**Annotations**.—*Mentl.* *Re Bryant & Cullingford to Barningham* (1889), 62 L. T. 53; *Re Stamford, Spalding & Boston Banking Co. & Knight's Contract*, [1900] 1 Ch. 287.

**C. Effect of Award.**

**3473. How far conclusive—As between tithe owner & tithe payer.]**—(1) A confirmed award under Tithe Act, 1842 (c. 54), is final as between the tithe owners & tithe payers, but does not exclude from further investigation a case between the tithe owners themselves, in which there was before the award, a just title to tithes, which by accident & mistake was not brought forward till after the award was made. Thus, by an award, made with the concurrence of A., the patron, the whole rentcharge was made payable to B., the rector, A. being at the time entitled to one-half of the corn tithes, but ignorant of his rights:—*Held*: A. might have relief in that et. as against B.

(2) X. & Y. were entitled to tithes in equal moieties. Y. under mistake received the whole:—*Held*: a bill by X. against Y. for his moiety should be dismissed with costs.—**CLARKE v. YONGE, YOUNG v. YONGE** (1842), 5 Beav. 523; 49 E. R. 680.

**Annotations**.—*As to* (1) *Consd.* **Hicks v. Sallitt** (1854), 3 De G. M. & G. 782; **Hicks v. Hastings** (1857), 3 K. & J. 701. *Reid.* *R. v. Tithe Comrs.* (1850), 15 Q. B. 620; *Walker v. Bentley* (1852), 9 Hare, 629.

**3474. — As between rival claimants to tithe.]**—**CLARKE v. YONGE, YOUNG v. YONGE**, No. 3473, *ante*.

**3475. — Jurisdiction of commissioners.]**

—(1) The comr. under Tithe Act, 1836 (c. 71), has by his award to fix the amount of rentcharge payable in lieu of tithe, & for that purpose to decide upon the tithe ability of lands, but he has no jurisdiction to decide thereby who is the party entitled to receive the rentcharge.

(2) A dispute, therefore, between rival claimants to the tithe is not a "difference" within sect. 45 of that Act which enables the comr. to determine any question of *modus* or composition, "or any difference whereby the making of his award shall be hindered."

(3) Nor, consequently, under sect. 46 of that Act can the title of claimant to tithe be made the subject of a feigned issue by way of appeal against the comr's. award, although the award, after deciding on the liability of the landowner to tithe, has improperly gone on to say who is the party entitled to tithe.—**EDWARDS v. BUNBURY** (1842), 3 Q. B. 885; 3 Gal. & Dav. 229; 12 L. J. Q. B. 45; 6 J. P. 816; 6 Jur. 1014; 114 E. R. 748.

**Annotation**.—*Generally.* *Reid.* *University College, Oxford v. Garton* (1847), 11 Jur. 907.

**3476. — ]**—The award to be made by Tithe Comrs. under Tithe Act, 1836 (c. 71), is for the purpose only of settling disputes between tithe owner & landowner, & not of deciding questions of title between rival claimants of tithe. Therefore, where tithes of agistment were claimed by both rector & vicar, & the vicar called upon the comrs. to determine such claims before making their award, on return to a *mandamus*:—*Held*: the comrs. were not bound so to determine, the difference not being one, within sect. 45 of the above Act, by which the making of the award was hindered, but they would do rightly in awarding rentcharges for the tithes, including that of agistment, to the parties respectively in possession, leaving them to litigate the title subsequently, as they might do, under sect. 71 of the same Act, notwithstanding the award.

No statement appearing as to the receipt of agistment tithe by any party:—*Held*: the comrs. might properly consider the rector as the person in actual possession, within sect. 12 of the Act.—*R. v. TITHE COMRS.* (1850), 15 Q. B. 620; 4 New Mag. Cas. 116; 19 L. J. Q. B. 505; 15 L. T. O. S. 300; 14 J. P. 433; 14 Jur. 954; 117 E. R. 504.

**Annotations**.—*Consd.* *Shepherd v. Londonderry* (1852), 18 Q. B. 145. *Reid.* *R. v. England & Wales Tithe Comrs.* (1852), 16 Jur. 857.

**3477. — ]**—The Tithe Comrs. have no power, under Tithe Act, 1836 (c. 71), ss. 45, 50, to determine a suit pending between two rival claimants of tithes; inasmuch as the words "touching the right to any tithes," in sect. 45, refer only to suits which raise questions as to the titheability of particular lands, not to those which bring into question the right of particular

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**3478. How far conclusive—As between tithe owner & tithe payer.]**—The

apportionment of tithe rentcharge made by comrs. under 4 Geo. 4, c. 50, is not in every case conclusive evidence of the amount payable by the tithe-payer.—

*PLUNKET v. MALLEY* (1863), 15 Ir. Jur. 83.—*IR.*

*a.* — *Impropiator not named.]*—A certificate by comrs. under Tithe

parties to tithes of which the existence is admitted; & further, because a suit raising only a question of title between two claimants of tithes is not a "difference" "whereby the making" of the award by the comrs. is "hindered," within sect. 45.—*SHEPHERD v. LONDONDERRY (MARQUIS) (1852)*, 18 Q. B. 145; 21 L. J. Q. B. 204; 19 L. T. O. S. 179; 10 J. P. 357; 10 Jur. 796; 118 E. R. 54.

**3478. As to liability of land to tithe.**—(1) The enactment of the Tithe Act, 1846 (c. 73), s. 10, that every instrument purporting to merge any tithes, & made with the consent of the Tithe Comrs., shall be absolutely confirmed & made valid, both at law & in equity, in all respects, is not limited to cases in which the person executing the instrument has a title to the tithe, but operates as well where such person has no estate in the tithe, as where his estate is insufficient to effect the merger.

(2) The intention of the Tithe Acts is that the lands on which the apportionment of the tithe in each parish is cast, & these lands only, shall be liable in respect of the tithe payable for any lands in the parish, & that lands on which no apportionment is cast shall not be liable to tithe.

(3) Lands which on the agreement & apportionment under the Tithe Acts, confirmed by the Tithe Comrs., are treated as free from tithe cannot be afterwards made subject to tithe.

(4) The intention of the Legislature was to preclude all questions of merger of tithe in all cases where declarations of merger had been made with the consent of the Tithe Comrs., leaving the parties affected by an erroneous declaration to their remedy against the party making it; & such being the intention, the merger is effected, although the sanction of the Comrs. has been erroneously given.

(5) The words "every instrument," in Tithe Act, 1846 (c. 73), s. 10, cannot be read as "every such instrument."—*WALKER v. BENTLEY (1852)*, 9 Hare, 620; 68 E. R. 665; *on appeal*, 20 L. T. O. S. 120, C. A.

*Annotation*:—*Generally*, *Reid. Jacomb v. Turner*, [1892] 1 Q. B. 47.

**As to exemption of land from extraordinary tithe rentcharge—Waste land turned into hop garden.**—*See No. 3484, post.*

**As to boundaries.**—*See BOUNDARIES*, Vol. VII., pp. 267, 268, Nos. 19–24.

**As evidence generally.**—*See EVIDENCE*.

#### D. Custody of Deed of Apportionment.

**3479. Jurisdiction of parish council**—Under Local Government Act, 1894 (56 & 57 Vict., c. 73), s. 17 (8).—(1) A parish council has power under the above sub-sect. to direct that the copy of the tithe apportionment of the parish in the custody of the incumbent of the parish under Tithe Act, 1836 (c. 71), s. 64, shall be removed from his custody & deposited with the council.

(2) Where the parish council has given such a direction & the county council has affirmed it, a ct. of summary jurisdiction has jurisdiction under 23 & 24 Vict., c. 93, s. 28, to make an order enforcing the removal.—*LEWIS v. POOLE*, [1898] 1 Q. B. 164; 67 L. J. Q. B. 73; 77 L. T. 369; 61 J. P. 776; 40 W. R. 93; 14 T. L. R. 15; 42 Sol. Jo. 14, D. C.

*Annotation*:—*Consd.* *Fox v. Pett*, [1918] 2 K. B. 196.

**3480. Jurisdiction of county council**—Under Local Government Act, 1894 (c. 73), s. 17 (8) (9)—*Order as to custody of map apart from instrument of apportionment.*—A county council made an

order under sect. 17 of the above Act, that the tithe apportionment map of a parish should be deposited in the parish school. The map was in the possession of the incumbent of the parish, & the order not having been complied with, an application was made to justices in petty sessions, under Tithe Act, 1800 (c. 93), s. 28, for an order that the map should be removed from the custody of the incumbent & deposited in accordance with the directions contained in the order of the county council. On the hearing of the application the incumbent tendered evidence to prove that the order of the county council did not provide for the security & due preservation of the map, nor for the convenience of the persons interested therein. The justices ruled that the order of the county council was final & that the evidence tendered, therefore, could not be received, & they made the order for the removal of the map as asked for:—*Held*: Tithe Act, 1800 (c. 93), s. 28, had not been impliedly repealed by Local Government Act, 1894 (c. 73), s. 17 (8), & the justices had jurisdiction to hear & consider the evidence, & while giving due weight to the directions contained in the order of the county council, to make such order as, having regard to the evidence, they thought proper in the circumstances.

The order of the county council was invalid in that it purported to deal with the custody of the map separately from the sealed copy of the instrument of apportionment (*DARLING, J.*).—*Fox v. PETT*, [1918] 2 K. B. 196; 87 L. J. K. B. 920; 119 L. T. 187; 82 J. P. 252; 16 L. G. R. 674, D. C.

**3481. Application for removal under Tithe Act, 1800 (c. 93), s. 28—Statutory notice.**—Tithe Act, 1800 (c. 93), enacts that "whenever any person other than the persons legally entitled to the possession of the same, shall have possession of the sealed copy of any confirmed instrument of apportionment, it shall be lawful for any two justices of the peace for the county or other jurisdiction within which the lands mentioned in the apportionment are situate, upon the application of any person interested in the lands or rentcharge, & upon fourteen days' notice in writing of such application to the person or persons in whose custody such copy shall be at the time of such application, to hear & determine such application":—*Held*: such notice required under Tithe Act, 1800 (c. 93), s. 28, referred to a notice of an application that had already been made; & where a fourteen days' notice had been given of an intention to apply to the justices, & they heard the application *ex p.*, & made an order under the above sect., that ct. would grant a writ of *certiorari* to quash same.—*R. v. SAYERS & THACKWELL (1800)*, 3 L. T. 405; *sub nom.* *R. v. GLOUCESTERSHIRE JJ.*, 24 J. P. 807.

**3482. After resolution under Local Government Act, 1894 (c. 73), s. 17 (8)—Jurisdiction of justices.**—*LEWIS v. POOLE*, No. 3479, *ante*.

**3483. To hear evidence.**—*FOX v. PETT*, No. 3480, *ante*.

#### E. Extraordinary Tithe Rentcharge.

*See, note*, Extraordinary Tithe Redemption Act, 1886 (c. 51).

**3484. Lands subject to—Lands not subject to tithe at date of ordinary commutation.**—In a parish in a hop district where the tithes had been commuted under Tithe Act, 1836 (c. 71), certain lands, being waste lands at the time of the commutation, had no rentcharge in lieu of tithes

Composition Act, 1823 (c. 99), s. 25, is valid, though it only finds generally

that tithes are payable to a lay proprietor, without giving his name.—

*GREVILLE v. FLEMING (1845)*, 8 E. R. 201; 2 Jo. & Lat. 335.—*IR.*

*Sect. 5.—Tithe and tithe rentcharge.**E. & F. (a) & (b) 1. & 2. Charge: Sub-sect. 4,*

apportioned on them. The lands within a district assigned these lands were included 40 of the above Act by the Comrs. under sect. 42, the tithes &c., the lands within which muted, were elsewhereof should have been commuted, in case they should be rentcharge &c. with hops, with an additional acre to be equal to the extraordinary charge per district awarded in respect of lands in such upon that were cultivated with hops:—*Held*: those lands being afterwards cultivated with hops they were liable to the extraordinary charge of £1 per acre awarded by the Comrs. under sect. 42, because those lands at the time of the award, were potentially, though not then actually, subject to tithes, & that potentiality was commuted so as to bring the lands within the second part of sect. 42.—*WALSH v. TRIMMER* (1867), L. R. 2 H. L. 208; 30 L. J. Q. B. 318; 16 L. T. 722; 31 J. P. 570; 15 W. R. 1150, H. L.; *reversg.* S. C. *sub nom.* *TRIMMER v. WALSH* (1863), 4 B. & S. 40, Ex. Ch.

*Annotations:—Held.* *Russell v. Tithe Comrs.* (1871), L. R. 6 C. P. 596. *Mentd.* *Gunn v. Johnson* (1871), L. R. 6 C. P. 461.

**3485. — Lands cultivated as market garden after commutation.—New district assigned after commutation.**—After the making & confirmation of an award for the commutation of tithes in the parish of P., by which award no district was assigned within which the amount charged upon any hop grounds or market gardens within such district by way of apportionment of tithe rentcharge was distinguished into two parts, to be called the ordinary & the extraordinary charge, some land in the same parish of P. was newly cultivated as market gardens, & thereupon, the vicar of the parish requested defts. to award & fix an extraordinary charge per acre in respect of such lands so newly cultivated, & to declare the parish of P. a district within which the extraordinary charge should be payable in respect of all lands which then were, or thereafter might be, cultivated as market gardens. Thereupon defts. sent down as assistant comr. who made an award by which he awarded the sum of 6s. per acre as an extraordinary charge on lands newly cultivated as market gardens in the parish, & declared the whole parish a district within which such extraordinary charge should be payable. Pltfs., who were landowners in the parish of P., then sued in prohibition, praying the ct. to prohibit defts. from confirming this award, or from taking any further steps for declaring the parish of P. a district within which such extraordinary charge should be payable in respect of lands newly cultivated as market gardens:—*Held*: (1) the last-mentioned award was good; (2) the words “beyond the limits of every district in which any extraordinary charge for hop grounds or market gardens shall have been distinguished as aforesaid at the time of the commutation” in Tithe Act, 1836 (c. 71), s. 42, were applicable to lands in any parish, no matter whether, at the original commutation, a district was or was not assigned in such parish under sect. 40 of that Act, within which an extraordinary charge was payable, under sect. 42 of that Act, in respect of the lands cultivated as hop grounds or market gardens.—*RUSSELL v. TITHE COMRS.* (1871), L. R. 6 C. P. 596; 40 L. J. C. P. 265; 24 L. T. 908; 35 J. P. 679; 19 W. R. 1007.

**3486. Whether liable to land tax.**—The annual rentcharge, payable under Extraordinary Tithe Redemption Act, 1886 (c. 54), in lieu of the

extraordinary charge previously levied, under the Tithe Commutation Acts, on hop grounds, orchards, fruit plantations, & market gardens, is exempt from land tax.—*CARR v. FOWLE*, [1893] 1 Q. B. 251; 62 L. J. Q. B. 177; 68 L. T. 123; 57 J. P. 130; 41 W. R. 365; 9 T. L. R. 181; 37 Sol. Jo. 196; 5 R. 163, D. C.

**3487. Charge under—Whether attaches to whole farm—Or hop ground only.**—By the Extraordinary Tithe Redemption Act, 1886 (c. 54), after reciting in the preamble that by the Acts relating to the commutation of tithes power was given to impose an “extraordinary charge” on hop grounds, orchards, fruit plantations, & market gardens, it was provided by sect. 2 that the Land Comrs. for England shall “ascertain in each parish in England & Wales & certify the capital value of the extraordinary charge on each farm, or, where not a farm, on each parcel of land, in respect of which the charge is payable at the date of the passing of this Act,” & by sect. 4 (1), that “land in respect of which at the date of the passing of this Act extraordinary charge is payable shall, so soon as the capital value of the charge shall have been certified under the provisions of this Act, be charged with the payment of an annual rentcharge equal to 4 per cent. on such capital value, in lieu of the extraordinary charge . . . such rentcharge to be a charge upon the particular farm or parcel of land in respect of which same has been assessed”:—*Held*: the rentcharge under the Act was only chargeable on land in respect of which at the date of the passing of the Act extraordinary charge was payable, & therefore, where part only of a farm was cultivated, & chargeable with extraordinary charge, as hop ground at the date of the passing of the Act, the whole farm could not be made chargeable with such rentcharge under the Act.—*SIMMONDS v. HEATH*, [1894] 1 Q. B. 29; 63 L. J. Q. B. 214; 69 L. T. 841; 58 J. P. 180; 42 W. R. 122; 10 T. L. R. 12; 37 Sol. Jo. 840; 9 R. 29, C. A.

**3488. Costs of investment of redemption money—Compulsory redemption—Jurisdiction of court to deal with.**—The Dean & Chapter of Canterbury Cathedral were the owners of extraordinary tithe charged on the lands of W. applied to the Board of Agriculture for compulsory redemption, & under their direction paid the assessed amount of redemption money into ct. The Dean & Chapter applied by summons for investment of the redemption money. The Extraordinary Tithe Redemption Act, 1886 (c. 54), provided that the money might be dealt with as if it were money paid in under the Tithe Commutation Acts. None of these Acts contained any direction as to costs:—*Held*: the ct. had jurisdiction to deal with the costs, & they would have to be paid by W., the landlord seeking compulsory redemption.—*Re GRAHAM-WIGAN*, [1911] 2 Ch. 438; 105 L. T. 405; *sub nom.* *Re WIGAN*, *Ex p.* EXTRAORDINARY TITHE REDEMPTION ACT, 1886, 80 L. J. Ch. 670.

*F. Recovery.**(a) In General.*

*See, now*, Tithe Act, 1891 (c. 8), ss. 1 (3), 2 (2) (3).

**3489. Nature of remedy—Whether limited to statutory remedies.**—*BAILEY v. BADHAM*, No. 3465, *ante*.

—*Against owner.*—*See* Sub-sect. 4, F. (b), *post*.

—*Against occupier.*—*See* Sub-sect. 4, F. (c), *post*.

**3490. Distress—On goods of tenant—After termination of lease.—**Declaration alleged that pltf. was tenant of a farm to deft. for a term of years, after the expiration of which there became due & payable, from deft. to the Ecclesiastical Comrs., money in respect of a tithe commutation rent charged on the farm & land, which farm & land was liable to the payment of the rent, as deft. knew: that, deft., having neglected to pay it, the Comrs., according to the provisions of Tithe Act, 1836 (c. 71), distrained for it a stack of wheat of pltf., then lawfully being on the farm & land, & afterwards sold it, in satisfaction of the sum in arrear, costs & charges; & pltf. was deprived of the stack; yet deft., though he had notice of these several matters & was requested by pltf. to indemnify him, had not indemnified him:—*Held*: the declaration showed no cause of action, the facts stated creating no liability on the part of deft. to indemnify pltf.—(GRIFFINHOOFER v. DAUBUZ (1855), 5 E. & B. 746; 25 L. J. Q. B. 237; 26 L. T. O. S. 313; 20 J. P. 180; 2 Jur. N. S. 392; 1 W. R. 131; 119 E. R. 659, Ex. Ch.)

*Annotations*:—*Reid*, A.-G. v. Durham (1882), 46 L. T. 16; Edmunds v. Wallingford (1884), 14 Q. B. D. 811.

**3491. — Action of replevin—Right of successful tithe owner to costs.**—The owner of a rent-charge in lieu of tithes, distraining under Tithe Act, 1836 (c. 71), s. 81, & afterwards obtaining judgment in an action of replevin, is not entitled to double costs under Distress for Rent Act, 1737 (c. 19), s. 22, neither, consequently, is he entitled to the "full & reasonable indemnity as to costs," substituted for double costs, by Limitations of Actions & Costs Act, 1842 (c. 97), s. 2. —NEWNHAM v. BEVER (1849), 8 C. B. 500; 19 L. J. C. P. 129; 137 E. R. 627.

*See, generally*, DISTRESS.

**3492. — Followed by rescue Right to affidavit of documents in action for treble damages.**—An action for pound-breach & rescue of chattels distrained for non-payment of tithe rentcharge, in which pltf. claims treble damages under 2 Will. & Mar., c. 5, s. 4, is a penal action, & pltf. is, therefore, not entitled to an affidavit of documents.—JONES v. JONES (1889), 22 Q. B. D. 425; 58 L. J. Q. B. 178; 60 L. T. 421; 37 W. R. 479, D. C.

*Annotations*:—*Apprvd.* Hobbs v. Hudson (1890), 25 Q. B. D. 232. *Consd.* Saunders v. Wiel (1892), 67 L. T. 207.

*See, generally*, DISCOVERY.

**Time for distress.**—*See* Nos. 3499, 3502, *post*.

**Restraint of distress—Under Companies Act, 1862 (c. 89), ss. 87, 163.**—*See* COMPANIES, Vol. X., p. 908, No. 6653.

**Remedy where no sufficient distress.**—*See* No. 3465, *ante*, Nos. 3499, 3501, 3502, *post*.

**3493. Loss of right to claim—Tithe owner lay corporation.**—The right to the tithe rentcharge in Ireland was vested in a spiritual corpn. sole until 1871, when it was transferred by statute to a lay corpn. In 1877 the lay corpn. brought an action against the persons liable to pay tithe rentcharge to recover six years' arrears. For more than twenty years next before action there had been no payment & no acknowledgment in writing:—*Held*: (1) tithe rentcharge was "rent" within Real Property Limitation Act, 1833 (c. 27), s. 1, & not a "composition" within the exception to sect. 1, compositions in Ireland having been

abolished by Tithe Rentcharge Act, 1838 (c. 109); (2) Real Property Limitation Act, 1833 (c. 27), s. 2, applied as between the owner & the persons liable to tithe rentcharge; (3) the lay corpn. could not avail themselves of the provisions of sect. 29 in favour of spiritual corps. sole; (4) the action was barred by the lapse of twenty years.—IRISH LAND COMMISSION v. GRANT (1884), 10 App. Cas. 14; 52 L. T. 228; 33 W. R. 357, H. L.

*Annotations*:—*Apld.* Asplen v. Pullin, [1917] 1 K. B. 187. *Reid*, Bailey v. Badham, (1885), 54 L. J. Ch. 1067; Jones v. Withers (1896), 74 L. T. 572. *Mentd.* Howitt v. Harrington, [1893] 2 Ch. 497; *Re* Devon's S. E., White v. Devon, *Re* Steer, Steer v. Dobell, [1896] 2 Ch. 562.

**3494. — Tithe owner spiritual or eleemosynary corporation.**—Tithe rentcharge, payment of which by Tithe Act, 1836 (c. 71), s. 67, was substituted for payment of tithes, is not a *modus* or composition belonging to a spiritual or eleemosynary corpn. sole within the exception to "rent" in Real Property Limitation Act, 1833 (c. 27), s. 1, & therefore, by sects. 29 & 34 of that Act, cannot be recovered after the expiration of sixty years after the right to it has first accrued.—ASPLEN v. PULLIN, [1917] 1 K. B. 187; 86 L. J. K. B. 237; 115 L. T. 780.

(b) *Against Owner.*

i. *In General.*

*See, now*, Tithe Act, 1891 (c. 8), s. 1 (1).

**3495. Who is "owner"—Whether reversioner subject to long building leases.**—PEED v. KING (1891), 11 T. L. R. 18.

*Annotation*:—*Distd.* Eccl. Comrs. v. Upjohn, [1913] 1 K. B. 501.

ii. *Where Owner also Occupier.*

*See, now*, Tithe Act, 1891 (c. 8), s. 2 (2).

**3496. What constitutes occupation—Whether occupation of part of lands chargeable.**—Tithe Act, 1891 (c. 8), s. 2 (2), which provides that tithe rentcharge issuing out of any lands shall, when "the lands are occupied by the owner thereof," be recovered by distress, applies only when the owner is in occupation of the whole of the lands.—ECCLESIASTICAL COMRS. v. UPJOHN, [1913] 1 K. B. 501; 82 L. J. K. B. 435; 108 L. T. 417.

**3497. —** (1) A demand is not a condition precedent to proceedings under Tithe Act, 1891 (c. 8), no such provision being included either in the statute itself or under the rules made under it (*per Cur.*).

(2) It is clear from the authorities upon a reasonable interpretation of the statute, that unless there is someone else in occupation of the lands who can be made the means by which the tithe will be taken out of the land & given to the tithe owner, the owner of the land is himself in occupation for the purposes of the Act (*per Cur.*).—*Re* TITHE ACT, 1891, ECCLESIASTICAL COMRS. v. M'CREEGH, FRANKLIN v. M'CREEGH (1922), 153 L. T. Jo. 340, D. C.

**3498. Whether demand condition precedent.**—*Re* TITHE ACT, 1891, ECCLESIASTICAL COMRS. v. M'CREEGH, FRANKLIN v. M'CREEGH, No. 3497, *ante*.

**Recovery by distress.**—*See* Nos. 3490-3492, *ante*.

**3499. Recovery by proceedings for possession—Whether previous attempt to distrain condition precedent.**—If the half yearly payments of a rentcharge on land under Tithe Act, 1836 (c. 71), be in arrear & no sufficient distress found,

PART VII. SECT. 5, SUB-SECT. 4.—  
F. (a).

t. *Rentcharge illegally varied by justices.*—Where an order has been

made by justices at quarter sessions, without jurisdiction, varying tithe rentcharge, the tithe owner can recover the original & unvaried amount in a collateral proceeding, notwithstanding

the fact that the order of the justices has not been quashed on certiorari.—BLACKBURN v. GERSON (1898), 33 L. T. 119.—*IR.*

**Sect. 5.—Tithe and tithe rentcharge: Sub-sect. 4, P. (b) ii. & iii. & (c), G., H., I. & J.; sub-sects. 5 & 6. Sect. 6: Sub-sects. 1 & 2.]**

the owner of the rentcharge may recover such arrear for a period not exceeding two years, by assessment & writ of *habere facias possessionem* under sect. 82, although he may not have attempted to levy the arrear by distress under sect. 81, at the end of each, or any but the last, of the half years, & although at the end of one or more of such previous half years there may have been a sufficient distress for the amount then due.—*Re CAMBERWELL RENT CHARGE* (1843), 4 Q. B. 151; 3 Gal. & Dav. 305; 12 L. J. Q. B. 155; 7 Jur. 128; 114 E. R. 854. *Annotation:—Folld. Re Hammersmith Rent Charge* (1849), 4 Exch. 87.

**3500. — Where no sufficient distress—Sufficient distress at due date of rentcharge.]—***Re CAMBERWELL RENT CHARGE*, No. 3490, *ante*.

**3501. — Growing crops.]—**The tithe rentcharge owner is bound to distrain growing crops under Tithe Act, 1836 (c. 71), s. 81, before having recourse to proceedings under sect. 82 to obtain possession of the land itself.—*Ex p. ARNISON* (1808), 1 L. R. 3 Exch. 50; *sub nom. HEYSHAM v. HESKETT*, *Ex p. ARNISON*, 37 L. J. Ex. 57; 32 J. P. 103; *sub nom. Re PLUMPTON WALL TITHES RENTCHARGE*, *HEYSHAM v. HESKETT*, 17 L. T. 480; 10 W. R. 368.

**3502. — Temporary insufficiency.]—***Re COMMUTATION OF TITHES ACT*, *Ex p. JONES* (1880), 5 T. L. R. 512.

**3503. — Application for order—Whether ex parte.]—**Under Tithe Act, 1836 (c. 71), s. 82, where the half-yearly payment of rentcharge on land shall be in arrear, & unpaid for the space of forty days, & there shall be no sufficient distress upon the premises liable to the payment thereof, it shall be lawful for any judge of Her Majesty's courts of record at Westminster, upon an affidavit of the facts, to order a writ to issue to the sheriff, requiring him to summon a jury to assess the arrears of the rentcharge remaining unpaid, & to return the inquisition thereupon taken to some one of the superior cts., etc.:—*Held*: such order could be made on an *ex p.* application to the judge.—*Re HAMMERSMITH RENT-CHARGE* (1849), 4 Exch. 87; 19 L. J. Ex. 66; 14 L. T. O. S. 85; *subsequent proceedings* (1850), 4 Exch. 101.

*Annotations:—Mentl. Abley v. Dale* (1850), 10 C. B. 62; *Bonaker v. Evans* (1851), 15 Jur. 460; *Huchanan v. Kinning* (1851), 2 L. M. & P. 526; *Cooper v. Wandsworth Board of Works* (1863), 14 C. B. N. S. 180; *Met. Ry. v. Turnham* (1863), 14 C. B. N. S. 212; *R. v. Cheshire Lines Committee* (1873), L. R. 8 Q. B. 344; *Wood v. Wood* (1874), L. R. 9 Exch. 190.

iii. *Where Owner not Occupier.*

*See, now*, Tithe Act, 1891 (c. 8), s. 2 (3).

**What constitutes occupation.]—***See Nos.* 3490, 3497, *ante*.

(c) *By Owner against Occupier.*

*See, now*, Tithe Act, 1891 (c. 8), s. 1 (1) (3).

**3504. Under contract to pay tithe rentcharge—What constitutes contract—Agreement to pay taxes or assessments.]—**Covenant in a lease by A. to deft. afterwards assigned by A. to plffs., that deft. would pay "all taxes & assessments whatsoever which shall be taxed, charged, or assessed on the demised premises, or on the landlord in respect of same." A., at the time of the lease, was owner of the tithe commutation rentcharge, which he assigned to plffs. as well as his reversion:—*Held*: the tithe commutation rentcharge was not

a tax or assessment which deft. was bound to pay by the covenant.—*JEFFREY v. NEALE* (1871), L. R. 6 C. P. 240; 40 L. J. C. P. 191; 24 L. T. 362; 30 J. P. 39; 19 W. R. 700.

*Annotation:—Folld. Lockwood v. Wilson* (1874), 43 L. J. C. P. 179.

**3505. — Agreement to pay all taxes assessment & charges whatsoever.]—**By a lease, the tenant agreed to pay the rent, "without any deduction in respect of any taxes, rates, assessments, or charges whatsoever, the landlord's property tax only excepted":—*Held*: the tenant was bound to pay the tithe rentcharge imposed upon the demised hereditaments.—*LOCKWOOD v. WILSON* (1874), 43 L. J. C. P. 179; 30 L. T. 761; 22 W. R. 919.

**3506. — Contract for reimbursement subsequent to act—Whether valid.]—**Tithe Act, 1891 (c. 8), s. 1 (1), which provides that "any contract made between an occupier & owner of lands after the passing of this Act for the payment of the tithe rentcharge by the occupier shall be void," prohibits not only a contract by the occupier to pay the tithe rentcharge directly to the tithe owner, but also a contract to reimburse the landlord such sums as shall be paid by him for tithe rentcharge.—*LUDLOW (LORD) v. PIKE*, [1904] 1 K. B. 531; 73 L. J. K. B. 274; 90 L. T. 458; 68 J. P. 243; 52 W. R. 475; 20 T. L. R. 276; 48 Sol. Jo. 277. *Annotation:—Folld. Tuff v. Guild of Drapers of City of London*, [1913] 1 K. B. 40.

**3507. — — — — —.]—**A contract made after the passing of Tithe Act, 1891 (c. 8), by which an occupier of land agrees to pay to the owner thereof sums which the owner shall pay in respect of tithe rentcharge issuing out of the land, is void by reason of the provisions of sect. 1 (1) of the above Act.—*TUFF v. GUILD OF DRAPERS OF CITY OF LONDON*, [1913] 1 K. B. 40; 82 L. J. K. B. 174; 107 L. T. 635; 29 T. L. R. 36; 57 Sol. Jo. 43, C. A.

*Annotation:—Folld. Neall v. Beadle* (1912), 57 Sol. Jo. 77.

**3508. Nature of remedy—Whether by action.]—**Where an owner of land has paid tithe rentcharge, which by lease executed before the passing of Tithe Act, 1891 (c. 8), his tenant covenanted to pay, his remedy to recover the sum so paid by him from his tenant is by distress alone, sect. 1 (3) of the Act being an absolute bar to the maintenance of an action for its recovery.—*CHURCH v. MAXSTED* (1898), 67 L. J. Q. B. 823.

— *By distress.]—See Nos.* 3490–3492, *ante*.

**3509. Failure by landowner to give notice of occupier's liability—Application for certificate under Tithe Act, 1891 (c. 8), s. 2 (6)—Jurisdiction of county court judge.]—**Plff. failed to serve notice under the above sect. on the tithe owner of his tenant's liability to pay tithe. Plff. paid tithe & applied to the county ct. judge for the certificate, which was granted. On appeal against this order:—*Held*: the only questions for the county ct. judge, when an application for a certificate came before him, were whether there was sufficient cause for the failure to give notice, & whether the tenant had been prejudiced by the failure; (2) it was not the county ct. judge's duty to inquire whether the tenant was, under his lease, liable to pay tithe.—*Re TITHE ACT, 1891, HUGHES v. RIMMER*, [1893] 2 Q. B. 314; 69 L. T. 417; 58 J. P. 23; 42 W. R. 79; 37 Sol. Jo. 584; 5 R. 475, D. C.

*G. Contribution between Persons Liable.*

*See Tithe Act, 1842 (c. 54), s. 16.*

**3510. Justices' order for contribution—Form of**

**PART VII. SECT. 5, SUB-SECT. 4.—G.**

a. *General rule—Death of one con-*

*tributory.]—*In a suit to recover tithe composition, plff. obtained a decree, with costs, & levied all the costs

off one deft.:—*Held*: deft. was entitled to contribution from his co-defts., & payment of that contribution

order.]—An order, made by two justices under Tithe Act, 1842 (c. 54), s. 10, for payment, by way of contribution, of a proportion of rentcharge on a close, after stating that complaint on oath had been made, before one of the justices, of the several matters giving them jurisdiction to make the order, proceeded as follows: " & now at this day " complainant & the party summoned " appear before us, the undersigned justices, & we having examined into the merits of the said complaint, do, in pursuance of the statute in that case made & provided, determine that the just proportion," etc. " to be contributed by B," on whom the order was made, " in respect of the said close " is, etc. The order then declared the amount of the proportion payable, & ordered payment:—*Held*: the order, upon the face of it, was insufficient, inasmuch as it did not show any adjudication, express or implied, of the truth of the matters of complaint.—*R. v. WILLIAMS* (1852), 18 Q. B. 393; 21 L. J. M. C. 150; 19 L. T. O. S. 105; 10 J. P. 506; 16 Jur. 1005; 118 E. R. 147.

## II. Remission.

3511. Under Tithe Act, 1891 (c. 8), s. 8—Application of provision.—Lands assessed under schedule D.]—An owner-occupier of agricultural land had exercised the option given by Customs & Inland Revenue Act, 1887 (c. 15), s. 18, to be assessed for property & income tax purposes under sched. D., in lieu of sched. B. He subsequently applied under Tithe Act, 1891 (c. 8), s. 8 (5), for a certificate from the district comrs. for taxes of the annual value of his land. The comrs. declined to give the certificate unless appct. first consented to have his land assessed for the purposes of sched. B. under sect. 8 (4) of the last-mentioned Act:—*Held*: the comrs. were right, inasmuch as the certificate to be granted under sect. 8 (5), of last-mentioned Act, only applied to the annual value of land under that sect. & that sect. referred only to assessments ascertained & entered under sched. B., or, if not already so entered, to be ascertained for the purposes of sched. B., under sect. 8 (4) & no assessment under sched. D. was made applicable for the purposes of remission of the tithe rentcharge under that sect. — *R. v. PETERSFIELD DIVISION OF HANTS TAX COMRS.*, *Ex p. Woods* (1893), 63 L. J. Q. B. 357.

3512. — Application for reduction of assessment to income tax—Who may appeal.]—Tithe Act, 1891 (c. 8), s. 8 (3), which gives the owner of tithe rentcharge the same right of appeal as the owner of lands, gives a right of appeal to the owner of tithe rentcharge where the assessment on land made by the surveyor for Income Tax Act, 1853 (c. 34), sched. B., has been reduced by the Comrs., on appeal by the occupier of land, to such an extent that the tithe rentcharge exceeds two-thirds of the annual value of the land, as ascertained by the assessment, in consequence of which so much of the tithe rentcharge as is equal to the excess is liable to be remitted under sect. 8 (1) of the former Act.—*R. v. BARSTABLE DIVISION OF ESSEX TAXES COMRS.*, [1895] 2 Q. B. 123; 64 L. J. Q. B. 759; 72 L. T. 800; 59 J. P. 470; 43 W. R. 686; 11 T. L. R. 427; *sub nom. R. v. TAXES COMRS. FOR BARSTABLE, ESSEX*, *Ex p. GIBSON*, 15 R. 471, D. C.

would be compelled by summary order. One co-deft. having died after taxation, the others were not bound to contribute in greater proportion than if he were living.—*STAPLES v. SMITH* (1843), 8 I. Eq. R. 211.—*IR.*

## I. Redemption.

3513. Recovery of redemption money—Jurisdiction of county court.]—A county ct. has jurisdiction under Tithe Act, 1891 (c. 8), ss. 2, 10 (4), to make an order for recovery of redemption money.—*R. v. PATTERSON*, [1895] 1 Q. B. 31; 64 L. J. Q. B. 20; 71 L. T. 671; 43 W. R. 127; 11 T. L. R. 11; 39 Sol. Jo. 28; *sub nom. R. v. ESSEX COUNTY COURT JUDGE*, 15 R. 79, D. C.

## J. Merger.

3514. 1846 Act, s. 19—Application of section.]—*WALKER v. BENTLEY*, No. 3478, *ante*.

3515. — "Every instrument"—Construction.]—*WALKER v. BENTLEY*, No. 3478, *ante*.

3516. Effect of declaration sanctioned by commissioners—Though declaration & sanction erroneous.]—*WALKER v. BENTLEY*, No. 3478, *ante*.

## SUB-SECT. 5.—RATING OF TITHE AND TITHE RENTCHARGE.

*See, generally, RATES AND RATING.*

Where more than one benefice held by incumbent.]—*See* No. 2437, *ante*.

## SUB-SECT. 6.—INCOME TAX ON TITHE AND TITHE RENTCHARGE.

*See* INCOME TAX.

## SECT. 6.—THE PARSONAGE OR ENDOWMENT.

### SUB-SECT. 1.—IN GENERAL.

3517. Definition.]—*ANON.* (1675), No. 2487, *ante*.

3518. —.]—*Re ALMS CORN CHARITY, CHARITY COMRS. v. BODE*, No. 3433, *ante*.

3519. Whether a manor.]—*ANON.* (1580), *Godb.* 3; 78 E. R. 2.

As to manors generally, *see* COPYHOLDS, Vol. XIII., pp. 9 *et seq.*

3520. Whether franchises may be appendant to—Where manor part of parsonage.]—*ANON.* (*temp.* 1327–1377), *Keil.* 147; 72 E. R. 319.

### SUB-SECT. 2.—PARSONAGE HOUSE.

3521. Acquisition or erection—Fund available for—Compensation for part of churchyard compulsorily acquired.]—Funds representing the purchase-money of part of a churchyard taken compulsorily for street improvements applied in the purchase, alteration, & repair of a house for a vicarage.—*Ex p. ST. BOTOLPH, ALDGATE (VICAR)*, [1894] 3 Ch. 544; *sub nom. Ex p. LONDON SEWER COMRS. & ST. BOTOLPH WITHOUT, ALDGATE (VICAR)*, 63 L. J. Ch. 862; 38 Sol. Jo. 682; 8 R. 649.

3522. — Petition by vicar to transfer to Queen Anne's Bounty—Costs of petition.]—Where a sum of money, applicable to the purposes of a vicarage, had been paid into ct. under Church Building Act, 1818 (c. 45), & a petition was

## PART VII. SECT. 5, SUB-SECT. 4.—I.

b. Recovery of redemption money—Land Judge's court.]—In case of the redemption of the tithe rentcharge, where an estate is sold to tenants in the

Land Judge's Ct., that Ct. is the proper tribunal to fix the redemption price.—*Re MUNDY'S ESTATE, HOLFORD, PETITIONER*, [1899] 1 L. R. 191; 33 L. L. T. 8.—*IR.*

**Sect. 6.—The parsonage or endowment: Sub-sects. 2, 3 & 4.]**

presented by the vicar asking for payment of the fund to the Governors of Queen Anne's Bounty, who were contributing to the erection of a new vicarage-house, the Ecclesiastical Comrs. as representing the Church Building Comrs. had to pay the costs of the petition, excepting the costs of the Governors of Queen Anne's Bounty, which had to be paid by petitioner.—*Ex p. MARGATE (VICAR)* (1805), 12 L. T. 792.

**3523. Repair—Liability of Incumbent.]—**Wise v. METCALFE, No. 421, *ante*.

**3524. ———.]—**It is the duty of the incumbent to keep the parsonage house & outbuildings in good & substantial repair, & to hand them down to his successor in the same form & condition in which they were originally erected; & that duty extends, where necessary, to restoration as well as reparation.—*TAYLOR v. PYE* (1846), 7 L. T. O. S. 370; 10 J. P. 470, N. P.

**3525. ——— Right of Incumbent to cut timber for.]—**STRACHY v. FRANCIS, No. 433, *ante*.

**3526. ——— Right to votes for repair of outbuildings.]—**STRACHY v. FRANCIS, No. 433, *ante*.

Estovers generally, *see* COMMONS, Vol. XI., pp. 17 *et seq.*; LANDLORD & TENANT; REAL PROPERTY; SETTLEMENTS.

**3527. ——— Fund applicable for—Compensation for part of churchyard compulsorily acquired.]—***Ex p. ST. BOTOLPH, ALDgate (VICAR)*, No. 3521, *ante*.

**Dilapidations & waste.]—***See* Sect. 9, *post*.

**3528. Disposal of site—Site no longer required.]—**Under the powers contained in Church Building Act, 1838 (c. 107), s. 9, land was purchased by the Ecclesiastical Comrs.; but such land not being required for the purpose of a site for a residence, they had contracted to sell the same, & the question was whether they had power to do so:—*Held*: the effect of sect. 9 of Act was to bring land which had been bought under the power thereby conferred into the same category as land which had been brought under the powers of Church Building Act, 1818 (c. 45), & therefore the Comrs. could make a good title.—*ECCLESIASTICAL COMRS. TO KING* (1890), 62 L. T. 535; 38 W. R. 473; 6 T. L. R. 200.

**3529. Residence attached to chapel of ease—Recovery of possession.]—**PHILLIPS v. GODFREY (1901), 45 Sol. Jo. 746.

**Exchange of parsonage—Endowment to pay rates & taxes—Construction of local Act.]—***See* No. 3543, *post*.

**SUB-SECT. 3.—GLEBE.**

**3530. Whether hereditament—Construction of local Act.]—**R. v. BARKER, No. 3359, *ante*.

**3531. Rights of Incumbent over—Exchange.]—**

**PART VII. SECT. 6, SUB-SECT. 3.**

**a. Rights of incumbent over—Ejectment.]—**In ejectment by a rector for glebe land, he must prove presentation, institution & induction.—*DOR CRKEN v. FRISMAN* (1841), 1 U. C. R. 420.—*CAN.*

**d. Gift of land for—Right of incumbent.]—**A grant of land to the rector, churchwardens & vestry of a parish "for a glebe," sufficiently signifies that it is to be for the use & benefit of the rector under 36 Geo. III., c. 11.

The rector has, during his incumbency, a legal estate of freehold in

such glebe lands granted to the church corp., & may make leases thereof, binding upon himself, without the assent of the corp.—*HAMPTON (RECTOR, ETC.) v. TITTS* (1849), 1 All. 278.—*CAN.*

**e. Adverse possession for twenty years—Whether rector barred.]—**A rector is not barred by adverse possession of the glebe land for twenty years, unless he has been incumbent during the whole of that time.—*HILL v. MCKINNON* (1858), 16 U. C. R. 318; *conad.* STOTHARD v. HILLIARD, 19 O. R. 542.—*CAN.*

**PART VII. SECT. 6, SUB-SECT. 4.**

**1. Grant by Crown—Terms of**

*MORGAN v. CLARK* (1629), 1 Rep. Ch. 41; 21 E. R. 501.

**Annotation.]—***Reid.* Harper v. Hedges, [1923] 2 K. B. 314.

**3532. ——— Rights to emblements on resignation.]—***BULWER v. BULWER*, No. 2390, *ante*.

**3533. ——— Enforcement—Whether possession condition precedent.]—***BULWER v. BULWER*, No. 2390, *ante*.

**3534. Gift of land for glebe—Within Church Building Acts—What is.]—**R., by her will, bequeathed a sum of £14,000 to trustees, upon trust for investment, & to pay the income to the incumbent for the time being of a certain church, so long as he should permit all the sittings in the church to be occupied free of pew-rents; & she directed that if any incumbent should make any claim for pew-rents the £14,000 should fall into her residuary personal estate. She also gave three acres of arable land to the trustees, upon trust for the benefit of the same church, upon the same trusts & conditions as those respecting the £14,000:—*Held*: the gift of the three acres of land was not a gift of glebe within Church Building Acts, & it consequently failed as being within Mortmain Act.—*Re RANDELL, RANDELL v. DIXON* (1888), 38 Ch. D. 213; 57 L. J. Ch. 899; 58 L. T. 626; 36 W. R. 543; 4 T. L. R. 307.

**Annotations.]—***Mentd.* Re Bowen, Lloyd Phillips v. Davis, [1893] 2 Ch. 491; *Re Blunt's Trusts*, Wigan v. Clinch, [1904] 2 Ch. 767; *Re Peel's Release*, [1921] 2 Ch. 218.

**3535. Glebe allotted under Inclosure Act—Liability of incumbent for expenses of Act.]—***EDDISON v. BROOKES*, No. 3443, *ante*.

**3536. Proceeds of sale—Application.]—***Re LOUTH & EAST COAST RY. CO., Ex p. GRIMOLDBY (RECTOR)*, No. 3582, *post*.

*See, also*, No. 3565, *post*.

**Exchange of glebe—Endowment to pay rates & taxes—Construction of local Act.]—***See* No. 3543, *post*.

**SUB-SECT. 4.—ENDOWMENT.**

**Of old parish church—New church substituted for old.]—***See* Sect. 3, sub-sect. 3, *ante*.

**3537. ——— Endowment for repair—Division of parish—Rights in fund.]—**A.-G. v. LOVE, No. 3063, *ante*.

**3538. ——— & chapel of ease—Endowment for repair—Chapel of ease constituted separate parish.]—**Where there was a trust fund for the repair of a parish church & a chapel of ease, which was afterwards formed into a separate ecclesiastical scheme:—*Held*: the fund having been applicable for the repair of the two named churches, the chapel of ease was not deprived of a portion thereof by reason of its having been given an independent ecclesiastical district.—*Re RICHARD CLOUDESLEY'S CHARITY* (1900), 17 T. L. R. 123.

**Annotation.]—***Reid.* *Re Hyde Park Place Charity*, [1911] 1 Ch. 678.

**grant.]—**Under 31 Geo. III., c. 31, a patent establishing & endowing a rectory or parsonage is not void for want of a grantee being named in it; nor for not defining the limits of the parish within which the rectory was to be, it being established in & for a certain township.—*A.-G. v. GRAMMETT* (1856), 6 Gr. 200.—*CAN.*

**g. ——— Subsequent sale of land & distribution of proceeds.]—**The church of St. J. was erected into a rectory "at the city of T. within the township of Y." by patent under 31 Geo. III., c. 31, s. 35, in 1836, & was endowed at different times with lands situate, some in T., & some in



**3539. Of vicarage—Whether deed necessary.]—**COPE *v.* BEDFORD (1027), Palm. 426; 81 E. R. 1151.

**3540. — Ancient endowment—Presumption from long usage.]—**Where there is an old endowment of a vicarage, but the modern usage varies from it, there is ground to presume that the variance hath arisen from the act of persons competent to make it. The endowment is not therefore conclusive evidence in favour of the vicar, but his right is properly triable at law.—CARR *v.* HENTON (1788), 7 Bro. Parl. Cas. 100; 1 Anst. 313, n.; 3 E. R. 65, H. L.

**3541. — — — — —.]—**The ct. will presume a subsequent enlarged endowment in support of an appropriation by a rector, which has been acted on for a very great length of time, although an insufficient endowment has been actually produced in evidence, appearing on the face of it to be inadequate to that required to be made by the terms of the condition of the original licence, where it is not shown by proof of some deficiency in any particular respect, that the vicarage is in fact, incompetently endowed.

Where a rectory was granted by the Crown in 1517 with licence to appropriate on condition of endowing a vicar, & the vicarage had continued endowed through all time subsequent; but the instrument of endowment produced did not pursue the terms of the grant, & the specific benefits actually enjoyed by the vicar did not appear; the ct. presumed a second deed in conformity with the conditions of the original licence, & that it had been lost by time, or accident.—WOLLEY *v.* BROWNHILL (1824), 13 Price, 500; McCle. 317; 3 Eng. & Y. 1152; 147 E. R. 1061, Ex. Ch.

*Annotations:—*Mentd. Jesus College *v.* Gibbs (1835), 1 Y. & C. Ex. 115; Tomlinson *v.* Swinnerton (1838), 2 Jur. 393; Esdaile *v.* Peacock (1859), John. 216.

*See, generally, CHARITIES, Vol. VIII., pp. 331, 335.*

**3542. — — Constituted under New Parishes Acts—Whether assessable to poor rate—Rentcharge granted by rector of mother parish.]—**By way of endowment of the minister of a new district constituted under New Parishes Act, 1843 (c. 37); New Parishes Act, 1844 (c. 91); & New Parishes Act, 1856 (c. 101), the rector of the parish of T. granted to such minister & his successors "one clear yearly rentcharge or sum of £150, to be payable half-yearly," etc. "to be for ever issuing & payable out of & charged upon & being part of all that the rectory," etc. The deed gave a power of entry & distress in case of non-payment of the money, but the money had been paid & the power had not been exercised. The parish officers of T. assessed the minister for the relief of the poor:—*Held*: he was not liable to be assessed.—FRIEND *v.* TOLLESHUNT KNIGHTS (CHURCHWARDENS) (1859), 1 E. & E. 753; 28 L. J. M. C. 169; 23 J. P. 677; 5 Jur. N. S. 1080; 120 E. R. 1092.

*Annotation:—*Redd. R. *v.* Groves (1860), 2 E. & E. 793.

**3543. Agreement to pay rates & taxes on parsonage & glebe—Effect of exchange of parsonage & glebe—Construction of local Act.]—**In 1749, by an agreement between plff.'s predecessor,

the township of Y. When the lands were sold under 29 & 30 Vict. c. 16, & the proceeds had to be distributed by the synod of T. under 41 Vict. c. 69, there were incumbents of parishes in T. & in the township of Y., & it was contended that only the incumbents of the city parishes were entitled to participate in the distribution. On a

special case being stated for the opinion of the ct.:—*Held*: T. was, for the purposes of the grant erecting the rectory, to be considered as being within & a part of the territory of the township of Y., & the grant was for the benefit of both the township & the city as one territory, & the incumbents of the churches in the township

P. B., as rector of B., & the lord of the manor of B., which was embodied in a private Act of Parliament it was agreed that an annual sum or yearly rentcharge of £77 issuing & going out of all that the manor or lordship of B. shall be payable & paid to the P. B. & his successors for ever, free from all deductions for or in respect of any taxes, charges, or assessments, taxed or imposed or to be charged or assessed upon the said premises or any part thereof out of which the annuity or yearly rentcharge is to issue by any present or subsequent Act of Parliament. It was further agreed that the lands, tenements, & hereditaments charged with the above perpetual annuity should after the passing of the Act be also charged with the payment of all Parliamentary & parochial taxes, rates, & assessments imposed on the parsonage house, outhouses, yard, garden, orchard, & glebe lands belonging to P. B., except the window tax. In consideration of these two agreements the lands of the lord of the manor were discharged from the payment of tithes. In 1785 a deed of exchange, approved by the Lord Bishop of Lincoln, was executed, by which the rector agreed with the then lady of the manor to exchange for ever the existing parsonage house for another residence. In 1805 the glebe land held by plff.'s immediate predecessor in title was exchanged for other land within the parish, & the new glebe took the place of the old glebe for the purposes of 1749 Act. In 1905 deft. purchased 300 acres of land from the lord of the manor with notice of the provisions of 1749 Act. One of the conditions of sale provided that the liability in regard to taxes on the parsonage & glebe, if any, should be deemed charged exclusively on lot 2, which was the lot purchased by deft. Plff. became rector of the parish in 1910. Plff. claimed a declaration (a) that deft.'s lands were charged with a sum in respect of rates & assessments paid by plff. since 1910, (b) that plff. was entitled to enforce such charge by distress or otherwise, & (c) that the annual payment of £77 payable by deft. was payable free of income tax. Deft. contended that 1749 Act referred to the specific parsonage; that the specific parsonage was demolished long ago, & that 1749 Act had ceased to apply, & that the exchange of 1785 was contrary to law & void, & that the substitution of a new parsonage house for the old one was not binding on deft.:—*Held*: on the construction of 1749 Act the provision with regard to the payment of the rates & taxes was limited to a specific house & to specific glebe land, namely, the then existing parsonage house & the then existing glebe land. The benefit of the charge did not apply to the new parsonage house exchanged for the old one in 1785 nor to the glebe land received in exchange in 1895, & plff.'s claim therefore failed.—HARRIST *v.* HEDGES (1923), 40 T. L. R. 156; 87 J. P. Jo. 804, C. A.

**3544. Stock vested in rector under private Act—Effect of sale & reinvestment in land.]—**POWER *v.* BANKS, No. 3553, *post*.

**Out of municipal corporation funds—Whether intra vires.]—***See* LOCAL GOVERNMENT.

**Private benefactions.]—***See* Sect. 12, *post*.

must, under 11 Vict. c. 69, s. 2, be included among the participants in the fund.—TORONTO DIOCESE INCORPORATED SYNOD *v.* LEWIS (1887), 13 O. R. 738.—CAN.

*h. — — — — —.]—*HURON SYNOD *v.* SMITH (1887), 13 O. R. 755, n.—CAN.

## SECT. 7.—DISPOSITION.

## SUB-SECT. 1.—IN GENERAL.

**3545. Whether Settled Land Acts apply.]**—Some houses in a cathedral city had from time immemorial been granted by the bishop of the diocese for the time being to one of the ecclesiastical dignitaries, for his life. The deed of grant was called a "collation," & the grantee was "inducted" by the registrar of the diocese into possession of the property. By the last deed of collation the bishop granted the houses to the then archdeacon of the city for his life, but so long only as he should continue to be archdeacon. On the deed was indorsed a certificate signed by the registrar that five days after the date of the deed the grantee was duly inducted by him into the actual corporal possession of the property. Upon a summons by the archdeacon, with the approval of the bishop, asking that trustees might be appointed for the purposes of Settled Land Act, 1882 (c. 38), of the settlement created by the deed, the object being that the archdeacon, as tenant for life, or having the powers of a tenant for life under the Act might sell the houses, & that the proceeds of sale might be invested in the names of trustees, & the income thereof paid to the persons who would have been from time to time entitled to the rents of the houses if unsold:—*Held*: this being ecclesiastical property, the Act did not apply to it, & the application was accordingly refused.—*Re BATH & WELLS* (Bp.), [1899] 2 Ch. 138; 68 L. J. Ch. 521; 81 L. T. 69; 15 T. L. R. 421.

**3546. — Land awarded to vicar & his successors.]**—An award under an Inclosure Act to "A. B., & his successors, vicars of X.," of lands in respect of glebe is not an instrument limiting an estate or interest in land "to or in trust for any persons by way of succession," so as to constitute "a settlement" within Settled Land Act, 1882 (c. 38), s. 2 (1). But where the purchase-moneys of glebe lands comprised in such an award & afterwards taken by a railway co. are paid into ct., then by the combined operation of 1882 Act, s. 32, & Lands Clauses Consolidation Act, 1845 (c. 18), s. 69, & upon the authorities, such moneys may be dealt with as capital moneys arising under Settled Land Acts, & the ct. has discretionary jurisdiction under Settled Land Act, 1887 (c. 30), to authorise the application of them in the redemption of terminable rentcharges on the glebe created under Land Improvement Act, 1864 (c. 114).—*Ex p. CASTLE BYTHAM* (VICAR), *Ex p. MIDLAND RY. CO.*, [1895] 1 Ch. 348; 64 L. J. Ch. 116; 71 L. T. 606; 43 W. R. 156; 11 T. L. R. 2; 39 Sol. Jo. 10; 13 R. 21.

*Annotation*:—*Consd. Re Bath & Wells, Bp.*, [1899] 2 Ch. 138.

*See, also, Glebe Lands Act, 1888* (c. 20), s. 8 (4).

**3547. Contracts of ecclesiastical corporations.—Whether deed necessary.]**—*CARTER v. ELY* (DEAN), No. 3005, *post*.

**3548. Union of bishoprics — Confirmation — Whether by both chapters.]**—Two bishoprics, W. & L., were lawfully united & consolidated; but the chapters remained several. The bishop aliened lands of the See of L. with confirmation of the Chapter of L. The union was not extant:—*Held*: as the usage hath been after the union, that the several deans & chapters have severally made confirmations, it shall be intended that the union was made specially in such manner, that the estates shall be severally confirmed as before the union.—*BISHOP'S & DEAN'S LEASES* (1610), 12 Co. Rep. 71; 77 E. R. 1350.

## SUB-SECT. 2.—BY SALE.

## A. In General.

**3549. Power of sale—Reversion—Under Ecclesiastical Commissioners Act, 1860** (c. 124), ss. 36 37.]—The ct., on a petition by the tenant for life of freehold & ecclesiastical leasehold property, ordered a sale of a portion of the freeholds for the purpose of purchasing the leaseholds.—*Re ADAMS'S SETTLED ESTATES* (1869), 20 L. T. 511; 17 W. R. 582.

**3550. — — — Consent of tenant for life of settled estate.]**—Testator by his will bequeathed renewable leaseholds held under a dean & chapter to trustees in trust for a tenant for life, with remainders over, subject to provisions for renewals of the lease. The property became vested in the Ecclesiastical Comrs., who refused to renew, but agreed with the trustees, subject to the approval of the ct. for the sale to them of the reversion in a part of the property, on the terms of a surrender of the other part, & the payment of a sum of £2,620:—*Held*: under sects. 20, 35, 37, & 39 of the above Act, the ct. had power to direct the agreement to be carried into effect against the wish of the tenant for life, although her income would be considerably reduced by the purchase.—*HOLLIER v. BURNE* (1873), L. R. 16 Eq. 163; 42 L. J. Ch. 789; 28 L. T. 531; 21 W. R. 805.

*Annotations*:—*Consd. Maddy v. Hale* (1876), 3 Ch. D. 327. *Apld. Re Barber's S. E.* (1881), 18 Ch. D. 624. *Consd. Re Ranelagh's Will* (1884), 26 Ch. D. 590.

**3551. — Land purchased for parsonage site.]**—*ECCLESIASTICAL COMRS. TO KING*, No. 3528, *ante*.

**3552. — Land subject to charge—Power to transfer charge to purchase-money.]**—*Re ALMS CORN CHARITY, CHARITY COMRS. v. BODE*, No. 3433, *ante*.

*See, now, Loans* (Incumbents of Benefices) Amendment Act, 1918 (c. 42), s. 4.

**3553. — Stock vested in Incumbent & successors by private Act.]**—By a private statute, South Sea Annuities were vested in a rector & his successors as endowment, subject to a provision for sale & reinvestment in land with the consent of the bishop. Under 16 & 17 Vict. c. 23, the annuities were redeemed & the redemption money paid to the then rector on his sole receipt. A successor having received the redemption money, acting without the consent of the bishop, invested part in land which was conveyed to himself, his heirs & assigns. He resigned & conveyed the land to the next successor, his heirs & assigns. That successor, with his concurrence, sold & conveyed part of the land to deft.; he subsequently misappropriated the proceeds. The solr. acting for both parties believed that the land was "church property." In an action by the present rector against the purchaser:—*Held*: (1) the South Sea Stock being, by the private Act, exceptionally vested in the rector for the time being as a corp. sole, he could, on its conversion receive & give a good discharge for the money representing it; (2) the purchase of the land did not purport to be & was not under the Act, & did not create any trust for the rector as a corp. sole; (3) the land was not subject to 13 Eliz. c. 10, & the conveyance to deft.'s vendor was not void under that Act, & was not a breach of trust, there being no beneficiary who could elect to take the land in specie.—*POWER v. BANKS*, [1901] 2 Ch. 487; 70 L. J. Ch. 700; 85 L. T. 376; 60 J. P. 21; 49 W. R. 679; 17 T. L. R. 621.

*Annotations*:—*Held. Re Jenkins & Randall's Contract*, [1903] 2 Ch. 362. *Mentd. Re Bourne, Bourne v. Bourne*, [1906] 1 Ch. 113.

— **Of burial ground.**—See BURIAL, Vol. VII., p. 552.

— **For street improvements.**—See BURIAL, Vol. VII., pp. 555 *et seq*.

**3554. Avoidance under 13 Eliz. c. 10—What lands within—Whether lands purchased with proceeds of sale of endowment.**—POWER v. BANKS, No. 3553, *ante*.

**3555. Consent to sale—Advowson settled to use of infant as tenant in tail—Who may consent to sale of glebe.**—A private Act authorised the sale of glebe land with the consent of the patron to be given in case of the infancy of the patron by his guardian. An infant was tenant in tail male under a settlement which gave trustees the right of presentation during the minority of the tenant in tail:—*Held*: the trustees were not patrons within the Act, & the guardian of the infant was the proper person to give the consent of the patron to a sale of glebe land.—LEIGH v. LEIGH, [1902] 1 Ch. 100; 71 L. J. Ch. 195; 86 L. T. 219; 50 W. R. 380.

**3556. — Under Church Building Act, 1839 (c. 49), s. 15.**—Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919 (c. 63), provides that on the making, after the passing of the Act, of a contract for the sale of a holding, or part of a holding, held by a tenant from year to year, any current & unexpired notice to determine the tenancy shall be null & void, unless the tenant agrees in writing, after the Act, & before such contract, that such notice shall be valid. The above sect. of 1839 Act makes the consent of certain persons necessary for the validity of the sale of church lands to which the Act relates, these consents to be testified by such persons by their execution of the conveyance to the purchaser. A contract to sell to plff. land under this Act was entered into before the passing of 1919 Act, by several, but not all, of the persons whose consent was necessary to the sale. At the time of the contract deft. was in occupation of the land as yearly tenant, but was under a notice to quit which had been served upon him by the vendors. All the persons whose consents were necessary for the sale subsequently joined in the conveyance to plff., which was executed after the passing of 1919 Act:—*Held*: the contract of sale was entered into with plff. before the passing of the last-mentioned Act, & the notice to quit, therefore, was valid, & plff. was entitled to possession.—BROOKS v. BLOOR (1920), 90 L. J. K. B. 577; 124 L. T. 316; 36 T. L. R. 826; 64 Sol. Jo. 685, D. C.

**3557. Application to enforce sale—For recovery of arrears of rentcharge—Whether Ecclesiastical Commissioners necessary parties.**—A rentcharge for a certain period of time, in arrear, charged by an order made by the Inclosure Comrs. upon the inheritance of the glebe lands of a rectory, under an Improvement Act was ordered to be raised by a sale of the glebe lands. In an action by the owners of a rentcharge in arrear, charged on glebe lands, for a declaration that they were entitled under the order made by the Inclosure Comrs. to a charge on the lands for the sums due & to become due of the rentcharge, & asking for a sale of the lands, the Ecclesiastical Comrs. were made defts. On demurrer:—*Held*: they were not necessary parties.—SCOTTISH WIDOWS' FUND v. CRAIG (1882), 20 Ch. D. 208; 51 L. J. Ch. 303; 30 W. R. 463.

**Annotations.**—*Distd.* Bailey v. Badham (1885), 54 L. J. Ch. 1067. *Apud.* Northern Assoc. v. Harrison (1849), W. N. 74. *Reid.* Hambro v. Hambro, [1894] 2 Ch. 564; Hornsey District Council v. Smith, [1897] 1 Ch. 843; Blackburne v. Hope-Edwards, [1901] 1 Ch. 419.

**3558. Proceeding for specific performance—**

**Contract for sale under Ecclesiastical Leasing Acts, 1842 (c. 108), & 1858 (c. 57)—Powers of Ecclesiastical Commissioners.**—In 1873 a vicar, with the approval of the above Comrs. & with the consent of the patron of his living, agreed to sell the glebe lands of the vicarage under the powers of the above Acts, to the trustee of a settled estate who had power to invest trust funds in the purchase of land. The contract was entered into with the consent of the then tenant for life of the settled estate, & the Comrs. were parties to & executed it. The title was accepted, & the then tenant for life entered into possession, & paid the vicar interest on the purchase-money. The vicar died, the estate devolved, & payment of the interest which was more than an investment of the purchase-money would have produced, was continued by the tenant for life for the time being to the vicar for the time being until 1890, when, the purchase-money being still unpaid, the Comrs. brought an action against the present vicar, the tenant for life, & the legal personal representatives of the trustee, for specific performance of the contract & damages, or an account & a declaration that they were entitled to a lien on the lands & to enforcement thereof:—*Held*: it was the duty of plffs. to see that the powers given by the above Acts were properly applied, & they had good ground of action.—ECCLESIASTICAL COMRS. v. PINNEY, [1899] 1 Ch. 99; 68 L. J. Ch. 30; 79 L. T. 604; 47 W. R. 136; 43 Sol. Jo. 27, C. A.; *subsequent proceedings*, [1900] 2 Ch. 736, C. A.

**Investment of proceeds—Costs of investment—Proceeds of enfranchisement.**—See COPYHOLDS, Vol. XIII., p. 150, No. 2022.

**3559. Church plate—When sale authorised.**—

(1) The ordinary has, in the exercise of his discretion, jurisdiction in a cause of faculty promoted by the incumbent & churchwardens of a parish within his diocese to grant a faculty authorising the sale of church plate belonging to the parish, but this jurisdiction should not be exercised without the greatest hesitation & caution & not so as to authorise any unrestricted sale or, in any case, unless the ordinary is satisfied that the financial position of the parish renders a sale necessary & that the uses of the plate for secular purposes are guarded against. Where a faculty was granted for the sale of church plate in a case where, in the opinion of the Chancellor of the Diocese of London, the straitened circumstances of a parish within the diocese justified a sale, the faculty was decreed on the condition that the destination of the plate should be specified & approved by the ordinary before the plate was actually sold.

(2) Suggestions as to church plate not in use being placed in a museum on loan from the parishioners & still remaining the property of the parish or being deposited in a treasury or museum to be established in the Cathedral of the diocese (see No. 3610, *post*).—ST. MARY, NORTHOLT (VICAR & CHURCHWARDENS) v. ST. MARY, NORTHOLT (PARISHIONERS), ST. GEORGE-IN-THE-EAST (RECTOR & CHURCHWARDENS) v. ST. GEORGE-IN-THE-EAST (PARISHIONERS), [1920] P. 97; *sub nom.* *Re* ST. MARY'S, NORTHOLT, *Re* ST. GEORGE'S-IN-THE-EAST, 36 T. L. R. 331.

*B. For Redemption of Land Tax.*

*See, generally,* LAND TAX.

**3560. What may be sold—Prebendal property.**—

A prebendary sold to a trustee for himself, in 1803, certain prebendal property for the redemption of the land tax. The Lords Comrs. & other necessary persons were parties to the sale. The

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of the Acts of Parliament, executed a mtge. of the lands belonging to the chapel to secure the repayment of certain sums at which they had been taxed & assessed under the Acts:—*Held*: the curate had no authority under the Acts to charge the lands, & the mtge. was bad.—*HORDEN v. HURST* (1854), 18 J. P. 471.

Compliance with formalities, *see* No. 3572, *ante*.

**3579. — On redemption of land tax—Omission to declare option to be considered purchaser.]—***KILDERBEE v. AMBROSE*, No. 3577, *ante*.

**3580. Application of proceeds of loan—Contract for rebuilding parsonage house—Who may enforce—Whether nominee under Pluralities Act, 1838 (c. 106), s. 62, or incumbent.]—***Seem*: where a loan has been raised to rebuild a parsonage house, & a nominee appointed under the above sect., who has entered into contracts with a builder, the right to sue for a breach thereof is vested in the incumbent, & not in the nominee, who is a mere agent in the matter.—*NICHOLSON v. RICHMOND PARSONAGE* (1816), 7 L. T. O. S. 471; 10 J. P. 520.

**3581. Effect of charge upon living—Whether charge upon advowson.]—**A. purchased an advowson. The living itself was subject to a mtge. to the governors of Queen Anne's bounty for money advanced to repair the parsonage house. The existence of this mtge. on the living was not communicated to the purchaser of the advowson, who discovered it after the arrangements for the purchase had been made; no fraud, or wilful concealment or misrepresentation was charged:—*Held*: the purchaser was not entitled to compensation in respect of this mtge., which was a charge upon the living, but not upon the advowson, & he was bound specifically to perform his contract.—*EDWARDS-WOOD v. MARJORIBANKS* (1860), 7 H. L. Cas. 806; 30 L. J. Ch. 176; 3 L. T. 222; 6 Jur. N. S. 1167; 11 E. R. 321, H. L.

*Annotations:—**Distd.* *Gatayes v. Flather* (1865), 34 Beav. 387. *Mentd.* *Torrance v. Bolton* (1872), 41 L. J. Ch. 643.

**3582. Repayment of charge—Funds applicable—Whether purchase-money of land compulsorily taken—Glebe.]—**The purchase-money of glebe lands taken by a railway co. had been paid into et. & on a petition presented by the rector, the prayer that a portion of it might be allowed for the repairs of the rectory buildings was granted, & that other portions of it might be allowed for the restoration of the chancel, & in paying off the money borrowed from the Governors of Queen Anne's Bounty was not.—*RE LOUTH & EAST COAST RY. CO., Ex p. GRIMOLDBY* (RECTOR) (1876), 2 Ch. D. 225; 24 W. R. 723.

**3583. — Unconsecrated portion of land acquired for church.]—***Ex p. LONDON COUNTY COUNCIL, Ex p. CHRIST CHURCH, EAST GREENWICH* (VICAR), No. 3890, *post*.

*See, now, Loans* (Incumbents of Benefices) Amendment Act, 1918 (c. 42), s. 5.

**SUB-SECT. 4.—BY LEASE.**

**A. In General.**

**3584. Under 13 Eliz. c. 10—Whether lease to Crown included.]—**Leases made to the Queen, by

colleges, deans & chapters, wardens of hospitals, or any other having spiritual or ecclesiastical livings, against the above statute are restrained by the same Act, as well as leases made to common persons.—*ECCLESIASTICAL PERSONS CASE* (1601), 5 Co. Rep. 14 a; 77 E. R. 69, H. L.

*Annotations:—**Reid.* *Walker v. Lamb* (1632), Cro. Car. 258; *Threadneedle v. Linum* (1674), Freem. K. B. 179; *A. G. v. Allgood* (1743), Park. 1. *Mentd.* *Gee v. Freedland* (1626), Cro. Car. 47.

**3585. — Effect of grant of lease ultra vires.]—***ROE d. BERKELEY* (EARL) *v. YORK* (ARCHBP.) (1805), 6 East, 80; 102 E. R. 1219; *sub nom.* *DOE d. BERKELEY* (EARL) *v. YORK* (ARCHBP.), 2 Smith, K. B. 166.

*Annotations:—**Reid.* *Hamerton v. Stead* (1824), 3 B. & C. 478; *Doe d. Rochester, Bp. v. Bridges* (1831), 9 L. J. O. S. K. B. 113; *Lovell v. Smith* (1857), 3 C. B. N. S. 120. *Mentd.* *Doe d. Lewis v. Bingham* (1821), 4 B. & Ald. 672; *Doe d. Willmot v. Pickering* (1823), 3 Dow. & Ry. K. B. 497; *R. v. Hughes* (1826), 5 B. & C. 886; *Golding v. Penn* (1828), 1 Man. & Ry. K. B. 617; *Doe d. Courtail v. Thomas* (1829), 9 B. & C. 288; *Doe d. Biddulph v. Poole* (1848), 11 Q. B. 713; *Doe d. Egremont v. Courtenay* (1848), 11 Q. B. 702; *Ward v. Lumley* (1860), 1 L. T. 376; *Noble v. Ward* (1867), L. R. 2 Exch. 135.

**3586. Ecclesiastical Leases Act, 1842 (c. 27), ss. 1, 4—Whether previous powers restricted.]—**

The above Act for better enabling incumbents of ecclesiastical benefices to demise the lands belonging to their benefices upon farming leases, does not restrict any power of leasing which the incumbent before possessed.—*GREEN v. JENKINS* (1800), 1 De G. F. & J. 454; 29 L. J. Ch. 505; 2 L. T. 311; 24 J. P. 452; 6 Jur. N. S. 515; 8 W. R. 380; 45 E. R. 435, L. C. & L. J.; *previous proceedings, sub nom.* *JENKINS v. GREEN* (No. 3) (1859), 28 Beav. 87.

**3587. Who may lease—Parsonage appropriated to bishop during life of incumbent—Whether bishop or incumbent.]—**When a parsonage is appropriated to a bishop, living the incumbent, a lease by the bishop, before the incumbent's death, is void.—*BLACKMORE v. CUMBERFORD* (1680), 1 Freem. K. B. 527; 89 E. R. 395.

**3588. What may be leased—Fair.]—**A lease made by a bishop, by deed indented, of a fair, parcel of the possessions of the bishopric, for three lives, reserving the old rent, & confirmed by the dean & chapter, does not bind his successor. If the lease had been made for 21 years, the successor might avoid it.—*JEWEL'S CASE* (1588), 5 Co. Rep. 3 a; 77 E. R. 51.

*Annotations:—**Reid.* *Salisbury's, Bp. Case* (1614), 10 Co. Rep. 58 b; *Gee v. Freedland* (1626), Cro. Car. 47; *Bally v. Wells* (1769), Wilm. 341; *British Telescope & Biograph Co. v. Homer*, [1901] 1 Ch. 671. *Mentd.* *Young v. Fowler* (1639), Cro. Car. 555.

**3589. — First crop of meadow—Under Crown grant.]—**The Bishop of Oxford & his successors were Crown grantee of the first crop of certain meadow:—*Held*: this was not an hereditament within the statute of which a lease by the bishop can bind his successors, even if rent be accepted by the successor.—*OXFORD'S* (BP.) *CASE* (1622), Palm. 174; 81 E. R. 1032.

**3590. — Whether whole parsonage.]—***Qu.*: whether a parson may demise all his living; because it may amount to non-residence (*HOLT, C.J.*).—*ANON.* (1698), 12 Mod. Rep. 236; 88 E. R. 1287.

**3591. — Land annexed to perpetual curacy.]—***DOE d. RICHARDSON v. THOMAS*, No. 1887, *ante*.

**3592. For what term—Lease for four lives—One life dropping during life of grantor—Whether**

**PART VII. SECT. 7, SUB-SECT. 4.—A.**

**k. For what term—Twenty-one years—Whether succeeding rectors bound.]—**A lease of glebe lands by the rector

& church corporn. for a term not exceeding 21 years:—*Held*: binding on a succeeding rector.—*HAMPTON* (RECTOR, ETC.) *v. TITUS* (1849), 1 All.

278.—*CAN.*

1. — — — — — *G.*, a rector, in 1861, leased land to *pltf.* for twenty-one years, at an annual rent, with a

successor bound.]—**SALISBURY'S (BP.) CASE** (1614), 10 Co. Rep. 58 b; 77 E. R. 1013.

*Annotations*:—**Consd.** Trelawny v. Winchester, Bp. (1757), 1 Burr. 219. **Refd.** Gee v. Freedland (1626), Cro. Car. 47; Evans & Kiffin v. Asculthe (1628), Palm. 457; Sharpe v. Bechenowe (1687), 2 Lut. 1249. **Mentd.** Walker v. Lamb (1632), Cro. Car. 258; Young v. Fowler (1639), Cro. Car. 555; Manby & Richards v. Scott (1660), 1 Lev. 4; R. v. Trinity House (1662), 1 Keb. 331; Threadneedle v. Linnam (1674), Freem. K. B. 179; Ridley v. Pownell (1675), Freem. K. B. 394.

**3593. — Lease for three lives seriatim—Whether valid.**—OWEN v. THOMAS AP REES, No. 3610, *post*.

**3594. — From year to year—Whether successors bound.**—The incumbent of a living, may sustain ejectment against parties in possession of the glebe lands, though the current year of a tenancy from year to year, created by his predecessor, is unexpired.—**DOE d. KERRY v. CARTER** (1825), Ry. & M. 237, N. P.

*Annotation*:—**Mentd.** Rumsey v. Nicholl (1877), 2 C. P. D. 179.

**3595. — Nine hundred & ninety-nine years—Lease by vicar & vestrymen—Under powers conferred by local Act.**—Information & bill to set aside three leases, one for 999 years, & two for 1000 years, granted by a vicar & vestrymen under an unlimited power to lease given by an Act of Parliament:—**Held**: the A.-G. ought not to have been made a party, & the leases were valid.—**A.-G. v. MOSES** (1817), 2 Madd. 291; 56 E. R. 342.

*Annotations*:—**Refd.** A.-G. v. Hungerford (1831), 8 Bl. N. S. 437; Sheehy v. Muskerry (1818), 1 H. L. Cas. 576.

**3596. —**—A vicar & vestrymen having, under an Act of Parliament, a power of leasing lands belonging to the vicarage for any number of years, at the best rents, a lease for 999 years will not be set aside on the principles applicable to leases by trustees of charities.—**A.-G. v. WRAX** (1821), Jac. 307; 37 E. R. 867, L. C.

*Annotation*:—**Refd.** Sheehy v. Muskerry (1818), 1 H. L. Cas. 576.

**3597. Whether binding on successor.**—**PRESS v. HINCHMAN** (1641), 1 Rep. Ch. 148; 21 E. R. 534.

**3598. Whether binding on incumbent—Presented by patron—After avoidance by presentee of grantee for one turn only—Original lease confirmed by patron.**—If a patron make a lease of the next avoidance, & afterwards confirms a lease made by the parson, & on the death of the incumbent, a presentee of the grantee of the next avoidance enters & avoids the lease by the parson, & dies, & then the patron presents a new incumbent, such presentee shall hold the benefice discharged of the lease by the parson, although it were confirmed by the patron who presented him.—**FLOWDEN v. OLDFORD** (1640), Cro. Car. 581; 79 E. R. 1099; *sub nom.* OLDFIELD v. FLOWDEN, W. Jo. 454.

**3599. Effect of deprivation of lessor—For non-conformity.**—A parson let his rectory for three years, & covenanted that the lessee should have & enjoy it during the term without expulsion or anything done or to be done by the lessor. Afterwards for not reading the Articles he was deprived *ipso facto* by 13 Eliz. c. 12. The parson presented another, who being inducted ousted the lessee:—**Held**: no cause of action for the lessee was not ousted by any act done by the lessor, but rather for non-feasance, & so out of the compass of the covenant.—**ANON.** (1577), 4 Leon. 38; 74 E. R. 714.

proviso for re-entry on non-payment.  
*Semble*: such lease was binding on the

rector & those claiming under him  
until forfeited.—**O'HARE v. MC-**

**CORMICK** (1871), 30 U. C. R. 567.—**CAN.**

**3600. — Quid mere laicus.**—A sentence of deprivation *quia mere laicus*, does not make marriage, or any spiritual act done by the person, void; not even a lease made by him, & confirmed by the patron & ordinary.—**COSTARD v. WINDER** (1600), Cro. Eliz. 775; 78 E. R. 1005.

*Annotation*:—**Consd.** R. v. Millis (1841), 10 Cl. & Fin. 334.

**3601. Recovery of rent—Loss of right to recover—Refusal of tender with a view to impeaching lease.**—A bishop who refused a tender of rent due under a lease made by his predecessor, because he intended to impeach the lease:—**Held**: he was not entitled to recover the arrears in equity after his translation to another see.—**SALISBURY (BP.) v. NOSWORTHY** (1672), 2 Rep. Ch. 60; 21 E. R. 616.

**Rights of lessors & lessees—To cut timber.**—**See AGRICULTURE**, Vol. II., p. 71, Nos. 480, 487.

**3602. — Whether lessee can impeach lessor's title—On ground of simoniacal presentation.**—**COOKE v. LOXLEY**, No. 2281, *ante*.

#### B. Agreements for Lease.

Contracts of corporations generally, *see* CORPORATIONS, Vol. XIII., pp. 378 *et seq.*

**3603. Of capitular lands—House in London—Whether valid.**—**CRANE v. TAYLOR** (1617), Hob. 269; 80 E. R. 415.

*Annotations*:—**Refd.** Mun v. Baylles (1673), Freem. K. B. 310; Vivian v. Blomberg (1836), 3 Bing. N. C. 311. **Mentd.** Lyn v. Wyn (1665), O. Bridg. 122; Betesworth v. St. Paul's (Dean & Chapter) (1726), Cus. temp. King, 66.

**3604. — Signed by dean only—Whether chapter bound.**—An agreement for a dean & chapter estate, though signed by the dean only, shall bind the chapter.—**ELY (DEAN & CHAPTER) v. STEWART** (1710), 2 Atk. 41; Barn. Ch. 170; 26 E. R. 123, L. C.

**3605. — Entry in chapter-book signed by majority—Whether chapter bound.**—(1) An entry in the books of a corp. of the terms of an agreement entered into by them does not bind them, although it is signed by a majority of the members; (2) an ecclesiastical corp. is not bound by any agreement unless it can be manifested by deed.—**CARTER v. ELY (DEAN)** (1831), 7 Sim. 211; 4 L. J. Ch. 132; 58 E. R. 817.

**3606. Of lands of benefice—Effect of resignation of incumbent during term.**—If an incumbent contract to let lands belonging to the benefice for a term of years, his resignation of the living during the term is a breach of his contract.—**PRICE v. WILLIAMS** (1836), 1 M. & W. 6; 1 Gale, 302; Tyr. & Gr. 197; 5 L. J. Ex. 129; 150 E. R. 323. *Annotations*:—**Refd.** Rickard v. Graham, (1910) 1 Ch. 722. **Mentd.** Newborough v. Schroeder (1819), 7 C. B. 342.

#### C. Compliance with Formalities.

**3607. Of capitular property—By dean—With assent of & under seal of chapter.**—A lease by a dean with the assent of his chapter & the seal of the chapter affixed is good, if the dean alone is parson, in right of his deanery.—**CHAFFYN DE MEERE'S CASE** (1538), 1 Dyer, 40 b; 73 E. R. 88.

**3608. — By deed—Operation.**—If a dean & chapter seal a lease it is their deed immediately; but if at the same time they make a letter of attorney to deliver it this is not their deed till the delivery.—**WILLIS v. JERMIN** (1590), Cro. Eliz. 167; 78 E. R. 424.

*Annotation*:—**Mentd.** Phillips v. Bury (1694), Skin. 447.

**3609. —**—**ANON.** (1671), 1 Vent. 257; 86 E. R. 171.

*Annotation*:—**Refd.** Merchants, etc. of Staple of England v. Bank of England (1887), 21 Q. B. D. 160.

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**3610. — Parties—Description of lessors by disused name—Whether valid.]—**HAYWARD v. FULCHER (1628), Palm. 491; W. Jo. 166; 81 E. R. 1186.

*Annotation:—*Mentd. R. v. London Corpn. (1691), 12 Mod. Rep. 17.

*See, generally,* CORPORATIONS, Vol. XIII, pp. 281, 282.

**3611. — Omission of former reservations—Though reservation no longer operative.]—**Where lands of a dean & chapter have been usually let excepting the woods & underwoods, & allowing the tenant sufficient bote & estovers; a lease without such exception is not binding, though the woods had been so wasted & cut down at the time of the demise as not to leave sufficient bote, etc.—**SAUNDERS v. TAYLOR** (1677), 1 Freem. K. B. 232; 89 E. R. 166.

**3612. — Confirmation—Time for.]—**ANON. (1566), Owen, 33; 74 E. R. 879.

**3613. — Necessity for—Dean & Chapter of Wells.]—**The deanery of Wells is a spiritual & not a temporal promotion, nor is it a donative, therefore leases made by the dean need not the confirmation of the King, nor even of the bishop, the Act of Parliament that erected the new deanery on the surrender of the old one, & gave the nomination of the dean to the King, enacting also, that the new dean & his successors might grant, demise or depart with their possessions in the same manner as the ancient deans could, whose leases only required the confirmation of their chapter.—**WALKOND v. POLLARD** (1568), 3 Dyer, 273 a; 73 E. R. 610; *subsequent proceedings* (1570), 3 Dyer, 293 b.

*Annotations:—***Refd.** Exeter, Bp. v. Jenner Fust & Canterbury Archbp. (1860), 14 Jur. 876. **Mentd.** Grendon v. Lincoln, Bp. (1577), 2 Plowd. 493; *Bugge's Case* (1616), 11 Co. Rep. 93 b; R. v. Patrick (1666), 2 Keb. 164; Fletcher v. Soudes (1827), 1 Bl. N. S. 114; Doe d. Butcher v. Musgrave (1840), 1 Scott, N. R. 451; Phillips v. Boyd (1875), L. R. 6 P. C. 435.

**3614. — For part of term—Whether valid.]—**ANON. (1574), Ben. 238; 123 E. R. 167.

**3615. — Whether confirmation of whole.]—**A prebendary made a lease for 70 years. The dean & chapter confirmed the demise for 51 years & no more:—**Held:** this was a confirmation of the whole term of seventy years.—**BELFORD v. FOORD** (1595), Cro. Eliz. 447; 78 E. R. 687.

*Annotation:—***Mentd.** Mirehouse v. Rennell (1832), 8 Bing. 490.

**3616. — Reference to master to settle form—Model form settled.]—**Under an Act of Parliament a dean & chapter had power to grant building leases of their lands at K., & it having become necessary that the lessors should grant a large number of such leases; one of which had been settled in chambers, the etc. allowed them to grant building leases, from time to time, in the same form without a reference to chambers; & directed that a copy of the model lease should be annexed, in a schedule, to the order.—**A.-G. v. CHRIST CHURCH, OXFORD** (1862), 3 Giff. 514; 7 L. T. 238; 8 Jur. N. S. 989; 66 E. R. 512.

**3617. Confirmation—By what bishop—Extra diocesan parsonage.]—**HERBERT v. MUNDAY (1597), Cro. Eliz. 587; 78 E. R. 830.

**3618. — Whether necessary—Lease by Chancellor of Wells.]—**Bisco v. HOLTE (1663), 1 Lev. 112; 83 E. R. 323; *sub nom.* Bis v. HOLT, 1 Sid. 158.

**3619. Whether lease by indenture valid—Premises usually demised by copy.]—**BAUGH v. HAYNES, No. 3639, *post*.

**3620. Whether consent of ordinary necessary—**

**Lease for lives by incumbent of augmented perpetual curacy.]—**DOE d. RICHARDSON v. THOMAS, No. 1887, *ante*.

**3621. Effect of non-compliance—Land Tax Redemption Act, 1802 (c. 116), s. 88—Voidable lease granted on surrender of former lease—Whether former lease revives.]—**(1) In a lease of lands belonging to a bishop in right of his see, granted after the passing of Land Tax Redemption Act, 1802 (c. 116), the land tax having been redeemed by such bishop with money raised pursuant to the Act, such redeemed land tax must, in addition to the ancient & accustomed rent, be expressly reserved & made payable during the term granted by the lease; & therefore, a lease of such lands granted by a bishop, in which the redeemed land tax was not so reserved & made payable, was voidable by the successor; & although such land tax had been regularly paid to the bishop who granted the lease.

(2) Such lease being granted in consideration of the surrender of a former lease, which was in fact surrendered by deed under seal:—**Held:** the first lease did not become revived by the circumstance of the second not being binding on the successor.—**DOE d. ROCHESTER (Bp.) v. BRIDGES** (1831), 1 B. & Ad. 847; 9 L. J. O. S. K. B. 113; 100 E. R. 1001.

*Annotations:—***As to (2) Refd.** Doe d. Egremont v. Forwood (1812), 3 Q. B. 627; Doe d. Biddulph v. Poole (1848), 11 Q. B. 713; Doe d. Egremont v. Courtenay (1848), 11 Q. B. 702. **Generally, Mentd.** Stevens v. Jeacocke (1848), 11 Q. B. 731; Couch v. Steel (1854), 3 E. & B. 492; Lamplugh v. Norton (1889), 22 Q. B. D. 452; Jlegg, Parkinson v. Earby Gas Co. (1896) 1 Q. B. 592; Johnston & Toronto Type Foundry, Co. v. Consumers' Gas Co. of Toronto, [1898] A. C. 447; Pasmore v. Oswaldtwistle U. C. (1898) A. C. 387; Devonport Corpn. v. Tozer, [1902] 2 Ch. 182; Hulme v. Ferranti, [1918] 2 K. B. 426; R. v. Poplar B. C. (No. 1), [1922] 1 K. B. 72; Waghorn v. Collison (1922), 127 L. T. 8; Phillips v. Britannia Hygienic Laundry Co., [1923] 2 K. B. 832.

**3622. — Covenant to build required by local Act omitted—Whether void or voidable.]—**A dean & chapter were empowered by a local Act to grant building leases of certain lands for ninety-nine years, provided that in every such lease there was a covenant by the lessee to build. They granted a lease for ninety-nine years, omitting the covenant. During the supposed term, after the death of the dean under whom the lease had been granted, the lessee remained in possession, & continued to pay the reserved rent to the succeeding deans & chapter, who distributed it among themselves:—**Held:** (1) if the lease was voidable only, it was made good, as against each successive dean & chapter, for their own times respectively, by their receipt & distribution of the rent; (2) if the lease was absolutely void, such receipt & distribution were evidence from which, without proof of any instrument under seal, a demise from year to year might be presumed against them; the presumption in such case being the same against a corpn. aggregate as against an ordinary person.—**DOE d. PENNINGTON v. TANIÈRE** (1818), 12 Q. B. 998; 18 L. J. Q. B. 49; 13 L. T. O. S. 204; 13 Jur. 119; 116 E. R. 1144.

*Annotations:—***As to (1) Consd.** Pennington v. Cardale (1858), 3 H. & N. 656. **As to (2) Consd.** Bourne & Hollingsworth v. Marylebone B. C. (1908), 72 J. P. 129. **Refd.** Kidderminster Corpn. v. Hartwick (1873), L. R. 9 Exch. 13; Lawford v. Billericay R. C., [1903] 1 K. B. 772.

**3623. — ———.]—**A dean & chapter were empowered by a local Act to grant building leases of certain lands for ninety-nine years, provided that in every such lease there was a covenant by the lessee to build, etc. They granted in June, 1786, to deft.'s predecessor a lease for ninety-nine years, but which lease was not in accordance with the powers granted. During the supposed term,

after the death of the dean, under whom the lease had been granted, the lessee remained in possession & continued to pay the reserved rent to the succeeding deans & chapters who distributed it among themselves.

Subsequently in Sept. 1849, the then dean & chapter granted a lease for twenty-one years to plffs., in renewal of former leases & surrenders, made by them, or those under whom they claimed, reserving, nevertheless, unto the dean & chapter & their successors, all rents, rights, interests, benefits, etc., which had been, were or should be reserved to them by any building leases of any part of the premises thereby demised, etc. In an ejectment suit brought by plffs. against defts.:—*Held*: the original lease in June, 1786, was not void, but voidable only, as the effect of the disabling & restraining statute is to render leases granted not in conformity with them voidable, but not void, & defts. were entitled to judgment.—PENNINGTON v. CARDALE (1858), 3 H. & N. 656; 27 L. J. Ex. 438; 31 L. T. O. S. 301; 6 W. R. 837; 157 E. R. 631.

*Annotations*:—*Distd.* Magdalen Hospital v. Knotts (1879), 4 App. Cas. 321. *Reid.* Hughes v. Palmer (1865), 19 C. B. N. S. 393.

**3624. — Pluralities Act, 1838 (c. 116), s. 59 — Whether void or voidable.**—A rector who had obtained the bishop's permission to leave his parish to which a curate in charge had been appointed & provided with a suitable residence, granted a lease of the rectory house for the term of his incumbency to a layman. The lease did not contain a condition rendering it void on service on the occupier of a copy of the bishop's order requiring the incumbent to reside therein, as is prescribed by above sect. The bishop had not made any such order:—*Held*: that the lease was not void, but was voidable upon service on the occupier of an order from the bishop requiring the incumbent to reside at the rectory house.—RICKARD v. GRAHAM, [1910] 1 Ch. 722; 79 L. J. Ch. 378; 102 L. T. 482; 26 T. L. R. 384; 51 Sol. Jo. 426.

#### D. Concurrent and Reversionary Leases.

**3625. Of capitular property—Lessee for years ousted—Avoidance of new lease for lives.**

(1) When lands parcel of a bishopric are leased for years, & afterwards the bishop ousts the lessee, & makes a lease confirmed by the dean & chapter for three lives, rendering the ancient & accustomed rent, such lease is voidable by the successor.

(2) Where the statute provides, that the old lease be surrendered within one year, etc., a conditional surrender is not within the Act. *ELMER'S CASE* (1588), 5 Co. Rep. 2 a; 77 E. R. 49; *sub nom.* *ELMOR v. GEALE*, Moore, K. B. 253.

*Annotations*:—*As to* (1) *Reid.* Salisbury's, Bp. Case (1613), 10 Co. Rep. 58 b; *Gee v. Friedland* (1626), Cro. Car. 47; *Evans & Kiffin v. Ascuthe* (1627), Palm. 457; *Lyn v. Wyn* (1662), O. Bridg. 122; *Roe d. Brune v. Prideaux* (1808), 10 East, 158. *As to* (2) *Reid.* Brockham's Case (1628), Litt. 128. *Generally*, *Mentd.* Young v. Fowler (1639), Cro. Car. 555; *Holden v. Smallbrooke* (1667), Vaugh. 187; *Taylor v. Horde* (1757), 1 Burr. 60.

**3626. — Statutory requirement of surrender—Within one year—Conditional surrender bad.**—*ELMER'S CASE*, No. 3625, *ante*.

**3627. — Concurrent leases—Lease for lives & lease for years.**—A bishop's lease for three lives concurrent with a lease for 21 years by his predecessor, is void.—*MARLETT v. WRIGHT & GREEN* (1589), Cro. Eliz. 141; cited Moore, K. B. 253; 78 E. R. 397.

*Annotation*:—*Reid.* *Roe d. Brune v. Prideaux* (1808), 10 East, 158.

**3628. — Leases for years.**—*HUNT v. SINGLETON* (1597), Cro. Eliz. 564; 78 E. R. 809.

*Annotations*:—*Reid.* Lincoln College's Case (1595), 3 Co. Rep. 158; *Lyn v. Wyn* (1662), O. Bridg. 122; *Mun v. Baylies* (1673), Freem. K. B. 340; *Doe d. Berkeley v. York, Archbp.* (1805), 2 Smith, K. B. 166; *Rennell v. Lincoln, Bp.* (1825), 11 Moore, C. P. 139; *Vivian v. Blomberg* (1836), 3 Bing. N. C. 311; *Mallins v. Froomean* (1838), 4 Bing. N. C. 395. *Mentd.* Chamberlaine v. Turner (1628), Cro. Car. 129; *Southwell (Chapter) v. Lincoln, Bp.* (1675), 1 Mod. Rep. 204.

**3629. — WESTMINSTER'S (DEAN & CHAPTER) CASE** (1605), Cart. 9; 124 E. R. 794; *sub nom.* *LYN v. WYN*, O. Bridg. 122.

*Annotations*:—*Distd.* *Vivian v. Blomberg* (1836), 3 Bing. N. C. 311. *Consd.* *Dodds v. Shepherd* (1876), 1 Ex. D. 75. *Mentd.* *Irving v. Cuthbertson* (1860), 6 Jur. N. S. 1211; *Thames Conservators v. Hall* (1868), L. R. 3 C. P. 415; *Thorpe v. Adams* (1871), L. R. 6 C. P. 125; *Garnett v. Bradley* (1878), 26 W. R. 698; *Re Smith's Estate*, *Clements v. Ward* (1887), 35 Ch. D. 589.

**3630. By incumbent—Lease to commence at future date—Whether valid.**—*MUN v. BAYLIES*, No. 2407, *ante*.

**3631. — Houses in City of London—Whether valid.**—A lease by a vicar, of messuages in the City of London, not being the habitation of the vicar, & of ground belonging to the same, not above the quantity of ten acres, for twenty-one years from the date thereof, made at a time when there was less than three years of a former lease unexpired, is not void under the statutes 13 Eliz. c. 10, 14 Eliz. c. 11, & 18 Eliz. c. 11.—*VIVIAN v. BLOMBERG* (1836), 3 Bing. N. C. 311; 2 Hodg. 255; 3 Scott, 681; 6 L. J. C. P. 55; 132 E. R. 430.

#### E. Avoidance by Non-Residence of Incumbent.

**3632. General rule.**—*QUILTER v. MUSSENDINE* (1726), Gilb. Ch. 228; 25 E. R. 158.

*Annotation*:—*Reid.* *Hickard v. Graham*, [1910] 1 Ch. 722.

**3633. —**—Leave of parson void for non-residence when pleaded to a bill brought by lessee for tithes.—*BOKENHAM v. BENTFIELD* (1720), 1 Com. 302; 92 E. R. 1126.

**3634. —**—A lessee barred from recovering tithes, because his lease had been rendered void by the non-residence of the incumbent.—*RILEY v. COSEN* (1755), 2 Lee, 189; 161 E. R. 309.

**3635. Effect—On rights of lessee—To maintain trespass.**—One in possession of glebe land under a lease void by 13 Eliz. c. 20, by reason of the rector's non-residence may yet maintain trespass upon his possession against a wrong-doer.—*GRAHAM v. PEAT* (1801), 1 East, 244; 102 E. R. 95.

*Annotations*:—*Mentd.* *Chambers v. Donaldson* (1809), 11 East, 65; *Harper v. Charlesworth* (1825), 4 B. & C. 574; *Hastings Corp'n. v. Ivall* (1875), L. R. 19 Eq. 558.

**3636. — Right of lessor to bring ejectment.**—A rector may recover in ejectment against his lessee on the ground of the lease of the rectory being avoided on account of his own non-residence, by force of 13 Eliz. c. 20. *FROGMORTON v. SCOTT* (1802), 2 East, 467; 102 E. R. 447.

*Annotations*:—*Reid.* *Arbuckle v. Cowtan* (1803), 3 Bos. & P. 321. *Mentd.* *Harper v. Charlesworth* (1825), 4 B. & C. 574.

#### F. Reservation of Rent.

**3637. Land previously unlet—Whether valid.**—Deft. avowed upon a bishop's lease made by the predecessor of plff. for three lives, confirmed by the dean & chapter; and averred that it was at the usual & ancient rent, & the land usually demised. Plff. replied that it was before usually retained for hospitality, *absque hoc quod fuit magis usualiter dimissa*, etc.:—*Held*: the traverse was good.—*HEREFORD (Bp.) v. SCORY* (1602), Cro. Eliz. 874; 78 E. R. 1099.

*Annotation*:—*Reid.* *Doe d. Tennyson v. Yarborough* (1822), 1 Bing. 24.





## SECT. 8.—INSURANCE.

*See, generally,* Ecclesiastical Dilapidation Measure, 1923 (No. 6), ss. 39, 40, 52.

**3647. Right to recover on policy—Chapter property vested in Ecclesiastical Commissioners under Order in Council—No assignment of policy.]**—*ECCLESIASTICAL COMRS. FOR ENGLAND v. ROYAL EXCHANGE ASSURANCE CORPN.* (1895), 11 T. L. R. 476; 39 Sol. Jo. 623

## SECT. 9.—DILAPIDATIONS AND WASTE.

## SUB-SECT. 1.—DILAPIDATIONS.

## A. In General.

*See, generally,* Ecclesiastical Dilapidations Measure, 1923 (No. 6).

**3648. What constitutes—Injury affecting house or building or walls or fences.]**—(1) An action cannot be maintained against the representatives of a deceased incumbent to recover damages in respect of gravel which he has dug out of the glebe during his lifetime. *Seemle*: (2) An action for dilapidations will not lie for an injury which does not affect houses or buildings or the chancel of the church, or walls or fences, & which cannot be made good by the expenditure of the succeeding incumbent.—*ROSS v. ADCOCK* (1868), L. R. 3 C. P. 655; 37 L. J. C. P. 290; 19 L. T. 202; 16 W. R. 1193.

*Annotation*:—*Generally, Rejd. Eccl. Comrs. v. Wodehouse*, [1895] 1 Ch. 552.

**3649. — Glebe not cultivated in husbandlike manner.]**—Neglect to cultivate the glebe in a husbandlike manner is not a dilapidation for which an incumbent can recover.—*BIRD v. RELPH* (1833), 4 B. & Ad. 820; 1 Nev. & M. K. B. 415; 2 L. J. K. B. 99; 110 E. R. 667.

*Annotations*:—*Rejd. Huntley v. Russell* (1819), 13 Q. B. 572; *Toss v. Adcock* (1868), L. R. 3 C. P. 655.

**3650. — Non-repair of fences—Land allotted in lieu of tithes.]**—Where, by Act of Parliament, certain allotments were given to the vicar in lieu of tithes, & fences put up round these allotments by the comrs.:—*Held*: the vicar was, by the common law & general custom of England, liable to keep those fences in repair; & his exors. were liable to an action on the case for dilapidations in respect of the vicar's omission to keep them in repair.—*BIRD v. RELPH* (1835), 2 Ad. & El. 773; 4 Nev. & M. K. B. 878; 4 L. J. K. B. 128; 111 E. R. 298.

**3651. — Barn pulled down & rebuilt on more convenient site.]**—*HUNTLEY v. RUSSELL*, No. 3719, *post*.

**3652. — Removal of building not fixed to ground.]**—*HUNTLEY v. RUSSELL*, No. 3719, *post*.

**3653. — Removal of hothouses erected by incumbent.]**—A rector erected in the garden of the rectory, apart from the rectory house, hothouses about 70 feet long & between 10 & 20 feet high. They consisted of a frame & glass work, resting on brick walls about 2 feet high, & embedded in mortar on these walls:—*Held*: he, or his exors. in a reasonable time after his death, were entitled to remove them, without incurring any liability as for either dilapidations or waste.—*MARTIN v. ROE* (1857), 7 E. & B. 237; 26 L. J. Q. B. 129; 28 L. T. O. S. 283; 21 J. P. 590; 3 Jur. N. S. 465; 5 W. R. 263; 119 E. R. 1235.

*Annotations*:—*Consd. Jenkins v. Gething* (1862), 2 John. & H. 520; *Parsons v. Hind* (1866), 14 W. R. 880.

**3654. Nature of liability—Apart from statute.]**

The action is on the custom of the realm, which is set out in the declaration, & is a very peculiar one, not founded on any common principle of English law, inasmuch as ordinarily an exor. is not liable in tort, nor where no cause of action, or foundation of action, has accrued in the lifetime of testator. The action is given to a succeeding incumbent, who is allowed to sue his predecessor, or the exor. of a deceased predecessor, for want of repair (*LORD CAMPBELL, C.J.*).—*BRYAN v. CLAY* (1852), 1 E. & B. 38; 22 L. J. Q. B. 23; 20 L. T. O. S. 64; 17 J. P. 38; 17 Jur. 276; 1 W. R. 20; 118 E. R. 351.

*Annotation*:—*Rejd. Re Monk, Wayman v. Monk* (1887), 35 Ch. D. 583.

**3655. — Where order made under Ecclesiastical Dilapidations Act, 1871 (c. 43), s. 34—Debt—Payable pari passu with other debts.]**

Where the bishop has, under above sect., made an order stating the cost of the repairs for which the exors. of a late incumbent are liable, the sum so stated is under sect. 36 a debt payable to the new incumbent out of the assets of the late incumbent *pari passu* with the debts of his other creditors.—*Re MONK, WAYMAN v. MONK* (1887), 35 Ch. D. 583; 56 L. J. Ch. 809; 56 L. T. 856; 52 J. P. 108; 35 W. R. 691; 3 T. L. R. 552.

## B. Who are Liable.

**3656. Prebendary—Residence not appropriated to particular prebend.]**—*SAND'S CASE* (1682), Skin. 121; 90 E. R. 57.

*Annotations*:—*Consd. Doe d. Butcher v. Musgrave* (1810), 1 Man. & G. 625; *Gleaves v. Parfitt* (1860), 7 C. B. N. S. 838. *Rejd. Radcliffe v. D'Oyly* (1788), 2 Term Rep. 630; *Ford v. Harrington* (1870), 31 J. P. 120.

**3657. —**—An action for dilapidations of a prebendal house may be maintained by a succeeding prebendary against his predecessor. The statutes of the church of Ely provide, that the receiver shall require the prebendaries to repair their houses when necessary, & upon their default, repair them at their costs, but the materials are to be supplied out of the funds belonging to the church, & the charges of the workmanship only are to be borne by the prebendaries. On a question, whether a succeeding prebendary should recover against his predecessor the full estimate of repairs wanting, or the amount of the workmanship only:—*Held*: it was reasonable that he should recover the amount of the workmanship only, & the church was still bound to supply the materials.—*RADCLIFFE v. D'OYLY* (1788), 2 Term Rep. 630; 100 E. R. 339.

*Annotations*:—*Rejd. Mason v. Lambert* (1818), 12 Q. B. 795; *Gleaves v. Parfitt* (1860), 7 C. B. N. S. 838; *Ross v. Adcock* (1868), L. R. 3 C. P. 655; *Ford v. Harrington* (1869), L. R. 5 C. P. 282. *Mentd. Mirchouse v. Rennell* (1833), 1 Cl. & Fin. 527.

**3658. Vicar choral.]**—A vicar choral in a cathedral church, who succeeds or is appointed to a house of his predecessor in the vicar choralship, is within the custom of ecclesiastical dilapidations, & therefore his representatives may be sued for the amount due in respect thereof at his death.—*GLEAVES v. PARFITT* (1860), 7 C. B. N. S. 838; 20 L. J. C. P. 216; 6 Jur. N. S. 805; 141 E. R. 1045.

*Annotations*:—*Rejd. Bridgewater v. Durant* (1861), 11 C. B. N. S. 7; *Ford v. Harrington* (1869), L. R. 5 C. P. 282.

*See, now,* Ecclesiastical Dilapidations Act, 1871 (c. 43), ss. 25, 28.

**PART VII. SECT. 9. SUB-SECT. 1.—B.**  
a. *Where no default by vacating incumbent.]*—Dilapidations not arising

from want of annual & necessary repairs, & which arose without the vacating incumbent's wilful default, are to be charged not upon the vacator,

but upon the benefice.—*LIMBICK (Br.) v. STEPHENSON* (1856), 8 Ir. Jur. 113.—*IR.*

*Sect. 9.—Dilapidations and waste: Sub-sect. 1, B., C. (a) & (b), D. & E.]*

**Rector.**—*See* No. 3691, *post*.

**3659. Vicar.**—*SALKARD v. BECKWITH* (1818), 1 Lut. 110; 125 E. R. 61.

*Annotations:—Consd. Radcliffe v. D'Oyly* (1788), 2 Term Rep. 630. *Appl. Wise v. Metcalfe* (1829), 10 B. & C. 299. *Consd. Ross v. Adcock* (1808), L. R. 3 C. P. 655. *Refd. Gileaves v. Parfitt* (1860), 7 C. B. N. S. 838.

**3660.**—*KINGFORD v. LLOYD* (1697), 1 Lut. 117; 125 E. R. 62.

**3661. Curate—Removable at will.**—*PAWLY v. WINEMAN* (1670), 3 Keb. 614; 84 E. R. 910.

*Annotation:—Mentd. Mason v. Lambert* (1848), 12 Q. B. 795.

**3662.**—**For non-resident incumbent—Incumbent liable for repairs under licence for non-residence.**—*PALMER v. BULL*, No. 2654, *ante*.

**3663.**—**Perpetual curate.**—A perpetual curate is liable to an action on the case, at the suit of his successor, for dilapidations.—*MASON v. LAMBERT* (1848), 12 Q. B. 795; 17 L. J. Q. B. 360; 12 L. T. O. S. 311; 12 Jur. 1045; 116 E. R. 1009.

*Annotations:—Consd. Gileaves v. Parfitt* (1860), 7 C. B. N. S. 838; *Re Monk, Wayman v. Monk* (1887), 35 Ch. D. 583. *Mentd. Wallis v. Birks* (1870), L. R. 5 C. P. 222.

**3664. Sequestrator.**—*HURBARD v. BECKFORD*, No. 2542, *ante*.

**3665.**—*—*—The sequestrator of a benefice is bound to repair the vicarage-house, & buildings; & liable for dilapidations in the Bishop's Ct.—*WHINFIELD v. WATKINS* (1822), 2 Phillim. 1; 161 E. R. 1059.

*Annotation:—Mentd. Harding v. Hall* (1842), 10 M. & W. 42.

**3666.**—*—*—*Re BURKILL, GODFREY v. BURKILL* (1873), 1 Seton's Judgments & Orders, 7th ed. 417.

**3667.**—*—*—**Under order made under Ecclesiastical Dilapidations Act, 1871 (c. 43), s. 34—Death of incumbent during sequestration—Inspections & report after death of incumbent.**—Where a benefice was under sequestration at the death of the incumbent, & after the avoidance the buildings were inspected by the diocesan surveyor, & the bishop made an order pursuant to above sect., stating the cost of the repairs required, & declaring the exors. or administrators of the incumbent liable for the same:—*Held*: upon sect. 53 of the Act, the sequestrator was not liable for the cost of the repairs, & was not entitled to deduct the same from the profits of the benefice in his hands.—*JONES v. DANGERFIELD* (1875), 1 Ch. D. 438; 45 L. J. Ch. 161; 34 L. T. 387; 24 W. R. 203.

*Annotations:—Refd. Kimber v. Paravicini* (1885), 15 Q. B. D. 222; *Burrow v. Tilson* (1898), 14 T. L. R. 214.

**3668.**—*—*—A benefice having been sequestered under a writ of sequestration in an action an inspection of the glebe buildings by the diocesan surveyor was directed by the bishop, & a report made by such surveyor under Ecclesiastical Dilapidations Act, 1871 (c. 43). The report estimated the cost of the necessary repairs to the buildings at £140, & no objections were taken to such report under sect. 16 of the Act. The sequestrator, being subsequently of opinion that the repairs provided for by the surveyor's report were inadequate, expended on the repairs of the buildings a much larger sum than £140. No inspection or report, except as before mentioned, was ordered by the bishop or made by the surveyor:—*Held*: the sequestrator had no authority to expend on repairs out of the proceeds of the benefice a larger sum than that estimated as necessary by the surveyor's report under the above Act, & such expenditure must be disallowed.—*KIMBER v.*

*PARAVICINI* (1885), 15 Q. B. D. 222; 54 L. J. Q. B. 471; 53 L. T. 299; 33 W. R. 907; 1 T. L. R. 513.

*Annotation:—Refd. Burrow v. Tilson* (1898), 14 T. L. R. 214.

*—*—*See, also*, No. 2547, *ante*.

*See, now*, Ecclesiastical Dilapidations Measure, 1923 (No. 6), s. 22.

#### C. Procedure to Ascertain.

*See, now*, Ecclesiastical Dilapidations Measure, 1923 (No. 6).

#### (a) By Agreement.

**3669. Appointment of valuer—Duty of valuer.**—

(1) Declaration that pltf., being rector of F. agreed with the extrix. of the late incumbent to have the dilapidations valued as between them, by valuers to be appointed by each side; & in case the valuers disagreed then by an umpire, to be appointed by the valuers; such valuation to be final & conclusive on both parties; that pltf., at the request of defts., being valuers & surveyors, & knowing the premises, retained them as such valuers, for reward, to value the dilapidations on his behalf, & to use their best endeavours to procure the same to be settled at a reasonable amount, as between pltf. & extrix.; & defts. accepted the employment, & entered upon it with a valuer appointed on behalf of extrix.; that through defts.' negligence & unskilfulness the amount was settled by them & the other valuer at a less sum than the same ought to have been had they used due care & skill, by reason of which pltf. was obliged to receive a much smaller sum from extrix. than he otherwise would & ought to have received:—*Held*: the cause of action disclosed was not against defts. as quasi-arbitrators, but that defts., by holding themselves out as valuers & surveyors had represented themselves as competent as such, & had thereby induced pltf. to employ them, & they had been guilty of a breach of their implied undertaking that they were competent.

(2) The evidence was, that defts., having been employed by pltf. as alleged in the declaration had agreed with the valuer of extrix. in valuing the dilapidations at a smaller sum, having valued as between outgoing & incoming tenant merely, & not as between late & present incumbent, being ignorant of any distinction:—*Held*: this was a want of such ordinary skill & knowledge as might reasonably be expected of the defts. as country surveyors & valuers, they were not to be expected to supply accurate knowledge of the law, but they might properly be required under the circumstances of their employment, to know the general rules applicable to the valuation of ecclesiastical property & the broad distinction between the cases of outgoing & incoming tenant, & of late & present incumbent; & defts. had therefore, been guilty of a breach of their engagement; & a verdict for defts. under the above circumstances was against the evidence.—*JENKINS v. BETHAM* (1855), 15 C. B. 108; 24 L. J. C. P. 94; 24 L. T. O. S. 272; 1 Jur. N. S. 237; 3 W. R. 283; 139 E. R. 381.

*Annotations:—Consd. Chambers v. Goldthorpe, Restell v. Nye*, [1901] 1 K. B. 624. *Refd. Cooper v. Shuttleworth* (1856), 25 L. J. Ex. 114; *Pappa v. Rose* (1872), L. R. 7 C. P. 525; *Turner v. Goulden* (1873), L. R. 9 C. P. 57.

*See, generally*, VALUERS & APPRAISERS.

#### (b) Under Ecclesiastical Dilapidations Act, 1871 (c. 43).

*See, now*, Ecclesiastical Dilapidations Measure, 1923 (No. 6).

#### 3670. Direction to surveyor to inspect—Time

[*for.*]—Within three calendar months after the avoidance of a benefice by resignation the bishop of the diocese directed the surveyor to inspect the buildings which were out of repair. After the expiration of the three months the surveyor inspected & reported to the bishop, who, thereupon, under Ecclesiastical Dilapidations Act, 1871 (c. 43), made an order for the cost of the repairs. The new incumbent having brought an action upon the order against the late incumbent, the latter pleaded that the surveyor neither inspected nor reported within the three months limited by sect. 29:—*Held*: this was no defence to the action, for the three months mentioned in the sect. referred not to the surveyor's inspection & report, but to the bishop's direction to the surveyor.—*GLEAVES v. MARRINER* (1876), 1 Ex. D. 107; 34 L. T. 406; 40 J. P. 168; 21 W. R. 539.

*Annotation*:—*Reid*. *Caldow v. Pixell* (1877), 2 C. P. D. 562.

**3671.** ———. ———.]—By Ecclesiastical Dilapidations Act, 1871 (c. 43), s. 29, "within three calendar months after the avoidance of any benefice the bishop shall direct the surveyor, who shall inspect the buildings of such benefice, & report to the bishop what sum, if any, is required to make good the dilapidations to which the late incumbent or his estate is liable":—*Held*: the provision as to the time within which the bishop was to direct the surveyor to inspect & report upon the buildings of a benefice after its avoidance was directory only, & not imperative; a direction to inspect & report made by a bishop more than three months after the avoidance of a benefice might be valid.—*CALDOW v. PIRELL* (1877), 2 C. P. D. 562; 46 L. J. Q. B. 541; 36 L. T. 469; 41 J. P. 647; 25 W. R. 773.

**3672. Inspection & report by surveyor—Time for.**—*GLEAVES v. MARRINER*, No. 3670, *ante*.

**3673. Objection to report—Sufficiency.**—The exor. of a deceased incumbent of a benefice, upon being sent a report of the surveyor appointed by the bishop as to the dilapidations in the buildings of the benefice, wrote to the bishop that he had received a communication purporting to be a copy of a report from the diocesan surveyor relative to dilapidations, & that he objected that the communication did not comply with the requirements of Ecclesiastical Dilapidations Act, 1871 (c. 43), ss. 29 & 31, on the ground, *inter alia*, that the communication ordered works to be done for which the exors. were not liable, & the letter went on to say: "I must object to pay any additional costs by reason of an alleged report having been sent to me, & though it will probably be to the advantage of all parties that this matter shall be settled by your Lordship, I write this letter without prejudice & without in any way waiving any right I may have of applying to have the surveyor's present report amended or quashed elsewhere by injunctions or otherwise." The registrar of the diocese wrote to the exor. that if he wished to object to the report he must proceed under sect. 32 of the Act. The exor. made no further objection, & the Bishop, treating the case as uncontested, made an order under sects. 34 & 35 for payment of the sum found due:—*Held*: the letter was an objection to the report of the surveyor within the meaning of sect. 32 of the Act, which the bishop would have to take into consideration.—*DE BEAUVAIS v. GREEN* (1907), 24 T. L. R. 43, C. A.

**3674. Order by bishop—Signature by stamp—Whether valid.**—*DE BEAUVAIS v. GREEN* (1907), 24 T. L. R. 43, C. A.

#### D. Measure of Liability.

**3675. State of repair required—Old buildings.**—*NORTH v. BARKER* (1810), 3 Phillim. 307; 161 E. R. 1334.

*See, also*, No. 3524, *ante*.

**3676.** ———.]—(1) The exors. of a deceased incumbent are not bound to put the rectory house into a finished state of repair, but are only bound to restore what is actually in decay, & to make such repairs as are absolutely necessary for the preservation of the premises.

(2) If the present incumbent has repaired with timber which grew on the glebe, the exors. of the late incumbent are entitled to be allowed for the value of such timber, in the estate of dilapidations due from them.—*PERCIVAL v. COOKE* (1826), 2 C. & P. 460, N. P.

*Annotation*:—*Reid*. *Bunbury v. Hewson* (1819), 3 Exch. 558.

**3677.** ———. **Distinction between ornament & repair.**—*WISE v. METCALFE*, No. 421, *ante*.

**3678.** ———. **Whether restoration included.**—*TAYLOR v. PYE*, No. 3521, *ante*.

*See, also*, No. 3675, *ante*.

**3679.** ———. **Chancel.**—*PELL v. ADDISON* (1800), 2 F. & F. 291, N. P.

*Annotation*:—*Mentd*. *Angell v. Fellgate* (1861), 10 W. R. 83.

**3680.** ———. **Distinguished from liability of tenant to landlord.**—*PELL v. ADDISON* (1800), 2 F. & F. 291, N. P.

*Annotation*:—*Mentd*. *Angell v. Fellgate* (1861), 10 W. R. 83.

*See, also*, No. 3669, *ante*.

**3681. Allowance for materials—Timber felled on glebe & used for repairs.**—*PERCIVAL v. COOKE*, No. 3670, *ante*.

**3682.** ———. **Timber & stone available on glebe.**—*H.*, the incumbent of a vicarage, died leaving the buildings of the vicarage out of repair. B. succeeded him, & died, whereupon S. was appointed. The premises still being dilapidated, the extrix. of B. was compelled to pay S. the amount necessary to put them in repair, & she then brought an action against the exor. of H.:—*Held*:

(1) the action was maintainable, this being a personal right, which survived to the extrix.; (2) she was entitled to recover so much as would compensate for the dilapidations which occurred in the time of H.; (3) the fact of there being timber or stone on the glebe which might be used for repairs, was only a circumstance in diminution of damages.—*BUNBURY v. HEWSON* (1819), 3 Exch. 558; 18 L. J. Ex. 258; 13 J. P. 571; 151 E. R. 967.

**3683. Proportioned to dilapidations arising during incumbency.**—*BUNBURY v. HEWSON*, No. 3682, *ante*.

**3684. Whether necessary materials & cost of workmanship—Ely Cathedral statutes.**—*ITADCLIFFE v. D'O'LY*, No. 3657, *ante*.

**3685. What buildings are included.**—*MALKARD v. BECKWITH* (1618), 1 Lut. 116; 125 E. R. 61.

*Annotations*:—*Consd*. *Radcliffe v. D'O'ly* (1788), 2 Term Rep. 630. *Apld*. *Wise v. Metcalfe* (1829), 10 B. & C. 299; *Ross v. Adcock* (1868), L. R. 3 C. P. 655. *Reid*. *Gleaves v. Parfitt* (1860), 7 C. B. N. S. 838.

**3686.** ———.]—*KINGFORD v. LLOYD* (1695), 1 Lut. 117; 125 E. R. 62.

*Annotation*:—*Consd*. *Radcliffe v. D'O'ly* (1788), 2 Term Rep. 630.

*See, now*, Ecclesiastical Dilapidations Act, 1871 (c. 43), s. 4.

**3687. Onus of proof.**—*NORTH v. BARKER* (1810), 3 Phillim. 307; 161 E. R. 1334.

#### E. Recovery by Legal Proceedings.

*See, now*, Ecclesiastical Dilapidations Measure, 1923 (No. 6), s. 22.

**3688. Who may sue—Premises held in trust—**

*Sect. 9.—Dilapidations and waste: Sub-sect. 1, E., F. & G.; sub-sect. 2, A. (a), (b) & (c).]*

**To permit vicar to receive profits.]**—In an action for dilapidations by a vicar against his predecessor, *pltf.* declared that *deft.* was seised of the premises in question in right of his vicarage. The premises were copyhold, & were devised to the master & senior fellows of Trinity College, Cambridge, in trust, to permit the vicar for the time being to receive the rents & profits, the charges to the lord, & expenses for necessary reparations, being first deducted:—*Held*: as there was no seisin in the vicar, *pltf.* could not maintain this action.—*BROWNE v. RAMSDEN* (1818), 8 Taunt. 559; 2 Moore, C. P. 612; 120 E. R. 501.

*Annotation*:—*Consd.* *Mason v. Lambert* (1848), 12 Q. B. 795.

**3689. — Executors of deceased incumbent.]**—*HUNBURY v. HEWSON*, No. 3682, *ante*.

**3690. Whether estate of deceased incumbent liable.]**—*HUNBURY v. HEWSON*, No. 3682, *ante*.

*See, also*, No. 3691, *post*.

**3691. Whether more than one action lies—Dilapidations in different parts of rectory.]**—The successor may have separate actions against the *exor.* of the late rector, for dilapidations to different parts of the rectory.—*YOUNG v. MUNBY* (1815), 4 M. & S. 183; 105 E. R. 802.

*Annotations*:—*Appl.* *Warren v. LUGGER* (1849), 3 Exch. 579. *Refd.* *Ross v. Adcock* (1868), L. R. 3 C. P. 655.

**3692. Pleading—Several livings held by one incumbent.]**—In an action by the successor against the *exors.* of a deceased rector, for dilapidations, the declaration alleged that the deceased was rector of the parish church of T.-cum-J., & was seised, in right of the rectory, of certain buildings, & also of certain glebe lands, lying & being, to wit, in the parish. It appeared that the rectory consisted of the parish of T., of which *pltf.* was rector, & of the parishes of J. & C., of which he was vicar:—*Held*: *pltf.* could not recover in respect of dilapidations in the parish of C.—*WARREN v. LUGGER* (1849), 3 Exch. 579; 18 L. J. Ex. 256; 13 J. P. 301; 154 E. R. 975.

**3693. What must be proved—Whether due appointment of plaintiff.]**—*REYNOLDS v. HEWETT* (1700), 1 Lut. 115; 125 E. R. 60.

*Annotations*:—*Appl.* *Ross v. Adcock* (1868), L. R. 3 C. P. 655. *Refd.* *Wise v. Metcalfe* (1830), 8 L. J. O. S. K. B. 126.

**3694. — & assent to articles.]**—*PITKERN v. ELLIS*, No. 2376, *ante*.

**3695. Whether prohibition lies—Plaintiff irregularly presented by Crown.]**—*TOMSONS CASE* (1627), Litt. 60; 124 E. R. 136.

#### F. On Exchange of Livings.

**3696. Where no specific agreement.]**—Two clergymen being possessed of livings, agreed to exchange the one for the other, with the consent of their respective patrons, & the livings were accordingly resigned into the hands of the bishop, & each party respectively was inducted into the other of them. There was no specific agreement entered into upon the subject of dilapidations, but it was found that neither party at the time contemplated any claim for dilapidations. In an action by one of the incumbents against the other, as his successor, for dilapidations:—*Held*: *pltf.* was entitled to recover.—*DOWNES v. CRAIG* (1841), 9 M. & W. 166; 11 L. J. Ex. 230; 6 J. P. 10.

*Annotations*:—*Consd.* *Goldham v. Edwards* (1856), 18 C. B. 389. *Refd.* *Wright v. Davies* (1876), 1 C. P. D. 638; *Keen v. Denny*, [1891] 3 Ch. 169. *Mentd.* *Rumsey v. Nicholl* (1877), 2 C. P. D. 179.

**3697. Agreement not to claim—Whether simoniacal.]**—*GOLDHAM v. EDWARDS*, No. 2270, *ante*.

**3698. — — —.]**—*WRIGHT v. DAVIES*, No. 2271, *ante*.

*See, generally*, Part V., Sect. 5, *ante*.

**3699. — Whether contrary to statute.]**—*WRIGHT v. DAVIES*, No. 2271, *ante*.

#### G. Other Cases.

**3700. Destruction of residence—Without fault of incumbent—Allotment of income for rebuilding.]**—If a parsonage or vicarage house be destroyed without any default in the incumbent, the Ecclesiastical Ct. usually orders a fifth part of the profits of the living to be set apart for rebuilding.—*SOLLERS v. LAWRENCE* (1743), Willes, 413; 125 E. R. 1243.

*Annotations*:—*Refd.* *Mason v. Lambert* (1848), 12 Q. B. 795; *Ross v. Adcock* (1868), L. R. 3 C. P. 655; *Re Monk, Wayman v. Monk* (1887), 35 Ch. D. 583. *Mentd.* *Batthyany v. Walford* (1887), 36 Ch. D. 269; *Finlay v. Chirney* (1888), 20 Q. B. D. 494.

**3701. Execution of repairs by sequestrator—In excess of surveyor's report—Whether allowed.]**—*KIMBER v. PARAVICINI*, No. 3698, *ante*.

**3702. Refusal or neglect to comply with order—What amounts to.]**—Where a bishop or patron requires dilapidations to be made good by an incumbent, & the latter does not within the prescribed period raise objection to the surveyor's report, the mere fact that he has tried unsuccessfully to get a loan & is himself not in a financial position to pay the money, gives the bishop or patron, under Ecclesiastical Dilapidation Act, 1871 (c. 43), s. 23, power to issue sequestration, the "failure" to repair being equivalent to a "refusal" or "neglect" to do the repairs within the meaning of that sect.—*Ex p. LOUGHMAN* (1907), 52 Sol. Jo. 47.

#### SUB-SECT. 2.—WASTE.

##### A. What constitutes.

##### (a) In General.

**3703. Position of incumbent—As compared with lessee for years.]**—(1) It cannot be decided, as a general proposition, without any exception, that the conversion of ancient meadow into arable is to be treated as waste.

(2) In respect to waste, a parson or vicar is not to be considered as merely lessee for years, or as tenant for life, under a will or settlement.

(3) The *ct.* will not restrain an incumbent from ploughing up meadow infested with moss & weeds, for the purpose of laying it down again in grass when properly cleaned.

*Qu.*: whether a patron is in any case entitled to an injunction to restrain the incumbent from ploughing up ancient meadows.—*ST. ALBANS (DUKE) v. SKIPWITH* (1845), 8 Beav. 354; 14 L. J. Ch. 247; 5 L. T. O. S. 123; 9 Jur. 265; 50 E. R. 139.

*Annotation*:—*Generally*, *Refd.* *Ross v. Adcock* (1868), L. R. 3 C. P. 655.

**3704. — As compared with tenant for life.]**—*ST. ALBANS (DUKE) v. SKIPWITH*, No. 3703, *ante*.

**3705. — — —.]**—(1) The parson, with the consent of the patron & ordinary, may open mines.

(2) There is no principle of law on which a rector can obtain more extensive principles as to waste than an ordinary tenant for life.—*MARLBOROUGH (DUKE) v. ST. JOHN* (1852), 5 De G. & Sm. 174; 21 L. J. Ch. 381; 18 L. T. O. S. 252; 16 Jur. 310; 61 E. R. 1068.

*Annotations*:—*As to (1) Dtd.* *Ecc. Comrs. v. Wodehouse*, [1895] 1 Ch. 532. *Refd.* *Holden v. Weekes* (1860), 1 John. & H. 278. *Generally*, *Refd.* *Ross v. Adcock* (1868), L. R. 3 C. P. 655.

(b) *Felling Trees and Timber.*

*Sec. nov. Ecclesiastical Dilapidations Measure, 1923 (No. 6), s. 51.*

**3706. General rule.]—SALISBURY'S (BP.) CASE** (1614), Godb. 259; 78 E. R. 151; *sub nom.* STOCKMAN v. WHITHER, 1 Roll. Rep. 86.

*Annotations:—***Reid.** Jefferson v. Durham, Bp. (1797), 1 Bos. & P. 105; Ross v. Adcock (1868), L. R. 3 C. P. 655; Combe v. De La Bere (1881), 6 P. D. 157.

**3707. Effect of 35 Edw. 1, stat. 2.—Declaratory of common law.]—(1) *Ne rectores prosternant arbores in coemeterio* [35 Edw. 1, stat. 2] is but a declaration of the common law (COKE, C.J.).**

(2) A bishop or archdeacon, abating or selling all the wood he has, may be deposed as a dilapidator.

(3) If the parson of a church will waste the inheritance of his church to his private use in felling trees, the patron may have a prohibition against him (COKE, C.J.).

(4) If a parson of a church & one A. are tenants in common of a wood, & A. endeavours to commit waste, the parson, for the preservation of the timber trees, shall have a prohibition against him that he shall not commit waste (COKE, C.J.).—LAFORD'S CASE (1611), 11 Co. Rep. 46 b; 77 E. R. 1206.

*Annotations:—As to (1) **Conrad.** Jefferson v. Durham, Bp. (1797), 1 Bos. & P. 105. **Reid.** Herring v. St. Paul (Dean & Chapter) (1819), 3 Swan. 492. *As to (2) **Reid.** Magdalen College Case (1616), 11 Co. Rep. 66 b; St. David's, Bp. v. Lucy (1696), 1 Ld. Raym. 539. *As to (3) & (4) **Reid.** Herry v. Heard (1632), Cro. Car. 212; Bradley v. Strachey (1740), Barn. Ch. 399; Jefferson v. Durham, Bp. (1797), 1 Bos. & P. 105; Herring v. St. Paul (Dean & Chapter) (1819), 3 Swan. 492. **Generally, **Mentl.** Russell v. Gulwell (1599), Cro. Eliz. 657; Denbroke v. Syms (1600), Cro. Eliz. 781; Bowles's Case (1615), 11 Co. Rep. 79 b; Smith v. Bole (1618), Cro. Jac. 458; Whilster v. Paslow (1618), Cro. Jac. 487; Jemmot v. Conly (1668), 2 Keb. 270; It. v. Rochester, Bp. & Clark (1671-5), 2 Mod. Rep. 1; Rosewell v. Prior (1700), 1 Ld. Raym. 715; Mitchell v. Reynolds (1711), 1 P. Wms. 181; Turner v. Cordwell (1731), Comm. 129; Waller v. Pain (1739), 2 Com. 633; A.-G. v. Duplessis (1752) Park. 144; Paul v. Paul (1752), 1 Wm. Bl. 251; Walton v. Tryon (1753), 1 Dick. 214; Goodtitle v. Paul v. Paul (1760), 2 Burr. 1089; Ford v. Baister (1815), 4 M. & S. 130; Plue v. Fuge (1829), 4 Man. & Ry. K. B. 277; Leigh v. Heald (1830), 1 B. & Ad. 622; Garland v. Carlisle (1837), 11 Bl. N. S. 421; Hey v. Moorhouse (1839), 6 Bing. N. C. 52; Hellawell v. Eastwood (1851), 6 Exch. 295; Hewitt v. Isham (1852), 16 J. P. 231; Elliott v. Bishop (1854), 10 Exch. 496; Barnett v. Guildford (1855), 11 Exch. 19; Mather v. Fraser (1856), 2 K. & J. 536; Walmsley v. Milne (1859), 7 C. B. N. S. 115; Bailey v. Stephens (1862), 12 C. B. N. S. 91; Delacherois v. Delacherois (1864), 4 New Rep. 501; Sumner v. Bromlow (1865), 11 Jur. N. S. 481; *Re Thomas, Ex p. Willoughby D'Eschby* (1881), 44 L. T. 781; Goodhart v. Hyett (1883), 25 Ch. D. 182; Eastern Construction Co. v. National Trust Co. & Schmidt, [1911] A. C. 197; Pwllbach Colliery Co. v. Woodman, [1915] A. C. 634; *Re Londesborough, Spicer v. Londesborough*, [1923] 1 Ch. 500.*****

**3708. — Proceedings under—How taken.]—**COX v. RICHAFT, No. 3326, *ante*.

**3709. Timber felled not used for repairs—By bishop.]—SALISBURY'S (BP.) CASE** (1614), Godb. 259; 78 E. R. 151; *sub nom.* STOCKMAN v. WHITHER, 1 Roll. Rep. 86; *sub nom.* ANON., 2 Bulst. 279, n.

*Annotations:—***Reid.** Jefferson v. Durham, Bp. (1797), 1 Bos. & P. 105; Ross v. Adcock (1868), L. R. 3 C. P. 655. **Mentl.** Combe v. De La Bere (1881), 6 P. D. 157.

**3710. — By rector—in churchyard.]—BEL-LAMIE v. —** (1615), 1 Roll. Rep. 255; 81 E. R. 471.

*Sec. further, AGRICULTURE, Vol. II., pp. 71, 72.*

(c) *In Respect of Soil and Minerals.*

**3711. Opening mines.]—RUTLAND'S (COUNTESS) CASE** (1663), 1 Lev. 107; 83 E. R. 321; *sub nom.* RUTLAND v. GIE, 1 Sid. 152; *sub nom.* RUTLAND v. GREENE, 1 Keb. 557.

*Annotations:—***Reid.** Eccl. Comrs. v. Wodehouse, [1895] 1 Ch. 552. **Mentl.** Ashmead v. Ranger (1699), Fortes. Rep.

152; Jefferson v. Durham, Bp. (1797), 1 Bos. & P. 105; Hounro v. Taylor (1808), 10 East, 189; Holden v. Weekes (1860), 1 John. & H. 278.

**3712. — By perpetual curate—Necessity for consent of patron of advowson.]—**The perpetual curate of a curacy augmented by the governors of Queen Anne's bounty, with the confirmation of the Ordinary & immediate patron, granted a lease for years of unopened mines, which had not before been leased; but the patron of the advowson was no party:—**Held:** (1) the lease was void at common law, for want of confirmation by such patron paramount; (2) it was not set up by the acceptance of rent by the lessor's successor in the curacy, the only effect of such acceptance of rent being, to create a tenancy from year to year.—DOE d. BRAMMALL v. COLLINGE (1849), 7 O. B. 939; 18 L. J. C. P. 305; 13 L. T. O. S. 236; 13 Jur. 791; 137 E. L. 372.

**3713. — With consent of patron & ordinary.]—**MARLBOROUGH (DUKE) v. ST. JOHN, No. 3705, *ante*.

**3714. — — —.]—**(1) The incumbent of a living cannot open mines without the consent of the patron & ordinary:—*Qu.*: whether he can do so with such consent, without the sanction of the Ecclesiastical Comrs.

(2) The patron is the proper person to institute a suit to restrain the opening of mines, & generally the only proper person:—*Semle*: the ordinary may take proceedings to prevent waste by collusion between the patron & incumbent.

(3) The patron's right is only to restrain future waste, & does not extend to an account of past profits before the filing of the bill.

(4) Upon a bill by patron to have an agreement between himself & the incumbent, for opening & working mines, declared void & cancelled, & to restrain future workings:—**Held**: the workings were not lawful, & the proceeds ought to be laid out for the permanent benefit of the living, & as if duly authorised, the workings would be beneficial to the living, an inquiry would be directed as to what steps should be taken to obtain the concurrence of all necessary parties, & liberty would be given to continue the workings in the meantime, subject to account.—HOLDEN v. WEEKES (1860), 1 John. & H. 278; 30 L. J. Ch. 35; 3 L. T. 437; 6 Jur. N. S. 1288; 9 W. R. 94; 70 E. R. 752.

*Annotations:—**As to (1) **Reid.** Eccl. Comrs. v. Wodehouse, [1895] 1 Ch. 552. *As to (3) **Reid.** Sowerby v. Fryer (1869), L. R. 8 Eq. 417.**

**3715. — Worked from adjacent pits—Royalties taken by successive incumbents.]—**The coal under parts of the glebe of a vicarage had, at different times since 1750, with the consent of the vicars for the time being, been gotten by the persons working adjoining collieries, & royalties had been paid to the vicars for the time being, the working being conducted solely by underground passages from the adjoining collieries without entering on the surface of the glebe:—**Held**: no presumption could be drawn from these facts that there had been any grant authorising the vicars to open mines.—BAILETT v. PHILLIPS (1859), 4 De G. & J. 114; 45 E. R. 160, L. J.

*Annotations:—***Mentl.** Holden v. Weekes (1860), 1 John. & H. 278; Eccl. Comrs. v. Wodehouse, [1895] 1 Ch. 552.

**3716. — Before Ecclesiastical Leasing Act, 1842 (c. 108).]—**After the passing of the restraining statutes of Elizabeth, 13 Eliz., c. 10, & 14 Eliz., c. 11, the opening of mines in glebe lands, & the letting of mines by the incumbent, even with the consent of the patron & ordinary, were illegal until the passing of the above Act, which enabled the mines to be leased with the consent of the Ecclesiastical Comrs.

*Sect. 10.—Fees, dues and offerings: Sub-sect. 1, C. & D.; sub-sects. 2 & 3. Sects. 11 & 12.]*

Act, 1819 (c. 134), s. 10, authorising the assignment of a district to a chapel of ease or parochial chapel, the Ecclesiastical Comrs. were authorised to divide the chapelry into districts & to assign a particular district to the ancient chapel.

(2) The incumbent of a "district parish" in which banns & marriages have been allowed by the Ecclesiastical Comrs. or the incumbent of a "new parish," has an exclusive right to publish the banns & celebrate the marriage of two persons resident in such "district, parish," or "new parish," & retain the fees for the same. When a licence to marry at a particular church is in proper form, the minister of that church may perform the marriage, & retain the fee for the same.—*TUCKNESS v. ALEXANDER* (1863), 2 Drew. & Sm. 614; 2 New Rep. 480; 32 L. J. Ch. 704; 8 L. T. 821; 9 Jur. N. S. 1026; 11 W. R. 938; 62 R. R. 752.

*Annotations:—Generally, Mentd. Fitzgerald v. Fitzpatrick* (1864), 12 W. R. 771; *Stewart v. West Derby Burial Board* (1880), 34 Ch. D. 314; *Re St. Mary, Islington, Burial Fees, Haig v. Barlow* (1891), Trist. 149; *Ex p. Brinckman* (1895), 11 T. L. R. 387.

**3753.** ———.]—The publication of the banns of marriage & the solemnisation of marriage are "ecclesiastical purposes" within the meaning of the New Parishes Act, 1850 (c. 104), s. 14, & where a district becomes within this sect. a separate & distinct parish for ecclesiastical purposes, the incumbent of such parish has the exclusive right of performing the office of marriage in the case of persons resident in his parish, & of receiving the fees for such marriages, & consequently, the incumbent of the mother parish has no right to solemnise such marriages in the church of the mother parish or to receive the fees for the same.—*FULLER v. ALFORD* (1883), 10 Q. B. D. 418; 52 L. J. Q. B. 205; 48 L. T. 431; 47 J. P. 423; 31 W. R. 522.

*Annotation:—Mentd. R. v. Diddin*, [1910] P. 57.

#### *D. Burial Fees.*

*See, generally, BURIAL, Vol. VII., pp. 535-538, 543, 545, 546, Nos. 150-184, 224, 225, 245-255.*

*In respect of burial in chancel.]—See No. 416, ante.*

**3754. Allowance in lieu of—Out of what fund payable—Construction of local Acts.]—SAUNDERS v. HOWES** (1857), 29 L. T. O. S. 108.

*Annotation:—Held. A.-G. v. Leake* (1881), Tudor Law of Charities & Mortmain, 4th ed., p. 1041.

**Mortuaries or corpse-presents.]—See BURIAL, Vol. VII., pp. 538, 539.**

#### SUB-SECT. 2.—OFFERINGS.

**3755. Easter offerings—To whom payable—Admissibility of evidence—Of residuary trust for curates.]—HARTLEY v. GEY** (1879), 1 Wood, 193.

**3756. — Whether payable as of common right.]—Easter offerings are due of common right.—LAURENCE v. JONES** (1724), Bunb. 173; 145 E. R. 637.

*Annotation:—Foll. Carthew v. Edwards* (1749), Amb. 72.

**3757. — — —.]—EGERTON v. STILL** (1725), Bunb. 198; 1 Rayn. 220; 2 Wood, 251; 145 E. R. 640.

**3758. — — —.]—Easter offerings [are] due**

**of common right.—CARTEW v. EDWARDS** (1749), Amb. 72; 2 Gwill, 826; 27 E. R. 43.

*Annotation:—Mentd. Erskine v. Ruffie & Brewster* (1769), 3 Gwill, 961.

**3759. — — —.]—Terriers produced either from the bishop's registry or the parish chest, dating from 1727 to 1835, contained the following statement as a class of "rights belonging to the parish church of B.," viz.: "Easter offerings. Every communicant 2d. every cow 2d. every plough 2d. every foal 1s. every hive of bees 1d. every house 3½d."—Held: (1) the terriers were admissible in proof of a customary right to the oblations therein mentioned; (2) they were evidence of a custom such as excluded the common law claim, supposing it to exist, because they embraced items to which the common law right did not extend; (3) each item was an independent charge, & therefore those following the first were payable by every parishioner, whether a communicant or not; (4) the custom was not confined to houses which were ancient & in existence when the terriers were made, but attached as soon as the house was built & occupied; (5) the term "communicant" might mean every person whom the Church in ancient times regarded as under an obligation to communicate, but, in the absence of evidence to show that it was used in that sense, it was confined to those who actually communicated.**

(6) Concession that on the hearing of an appeal at the Quarter Sessions against an order of justice, it is competent to either party to produce evidence in support of his case additional to that given before them.

(7) *Qu.*: whether a payment of 2d. per head for every member of a family of or above the age of sixteen is due of common right as an Easter offering.—*R. v. HALL* (1806), 1 L. R. 1 Q. B. 632; 7 B. & S. 642; 35 L. J. M. C. 251; 30 J. P. 629; 12 Jur. N. S. 892.

**3760. — Payable by custom—Whether valid.]**

—A custom that every inhabitant of a parish of the age of 16, of whatever religious sect, shall pay 4d. yearly as an Easter offering, is good.—*FULLER v. SAY* (1747), Willes, 629; 125 E. R. 1356.

*Annotations:—Mentd. Mills v. Colchester Corp.* (1867), L. R. 2 C. P. 476; *Lawrence v. Hitch* (1868), L. R. 3 Q. B. 521.

**3761. — — — Evidence of.]—R. v. HALL,** No. 3759, *ante*.

**3762. — — — Construction.]—R. v. HALL,** No. 3759, *ante*.

**3763. — — — Jurisdiction of spiritual court.]—BOWS v. JURAT,** No. 1243, *ante*.

**3764. — — — Jurisdiction of courts of summary jurisdiction.]—An Easter offering of 6½d. from housekeepers was claimed by custom, & summary proceedings under 7 & 8 Will. 3, c. 6, s. 1, were taken to enforce payment:—Held: the justices, on the attorney for the party summoned stating before them that the custom was *bond fide* disputed (there being nothing to show that it was not so) ought under sect. 8 of the above Act to have forbore to give any judgment in the matter; & therefore an order made by them, after such announcement of the defence intended, was bad.—*R. v. KIDD* (1806), 16 L. T. 203; 31 J. P. 181.**

*Annotations:—Distd. R. v. Sandford* (1874), 30 L. T. 601. *Mentd. Ankersen v. Webber* (1868), 32 J. P. 613.

**— Whether subject to income tax.]—See INCOME TAX.**

**3765. Church offertories—At communion service**

**PART VII. SECT. 10, SUB-SECT. 2.**  
**a. Church Offertories—Collections in**

**chapel within parish or district.]—The alms collected, whether at the offertory or during divine service, in**

**a proprietary chapel, not having a district assigned to it belong as of right to the rector of the parish in**



—Disposal of.]—MARSON v. UNMACK, No. 441, *ante*.

3766. — At extra legal services—Disposal of.]—MARSON v. UNMACK, No. 441, *ante*.

— Collections in chapel within parish or district.]—See Nos. 438, 439, *ante*.

— Collection for benefit of incumbent—Whether subject to income tax.]—See INCOME TAX.

3767. Dominicals in lieu of tithe.]—R. v. SANDFORD, No. 3395, *ante*.

Customary offering in kind.]—See No. 3708, *post*.

#### SUB-SECT. 3.—CUSTOMARY DUES AND OFFERINGS.

3768. Provision of refreshment for incumbent & churchwardens, etc.—Coming in procession in Rogation Week.]—REYNOLDS CASE (1615), MOORE, K. B. 916; 72 E. R. 995.

Customary Easter offerings.]—See Nos. 1243, 3759, 3760, 3764, *ante*.

Mortuaries or corse-presents.]—See BURIAL, Vol. VII., pp. 538, 539.

#### SECT. 11.—PEW RENTS.

3769. Applicable to incumbent's stipend—Rights of incumbent.]—Under the Church Building Acts, 1818 (c. 45), & 1819 (c. 134), & the order of the Church Building Comrs., assigning the pew rents to the district, & expressly directing them to be received by the churchwardens, & that out of such rents the latter were to pay the stipend of the minister of the district church, the pew rents (which were payable half-yearly in advance) were, in the first instance, expressly made applicable to the payment of such stipend, subject only to the payment, after certain deduction, of the salary of the clerk. The stipend was to commence at Christmas, & to be paid quarterly on each of the four usual quarterly days of payment; & it was provided that the parish should not, in any case, be answerable to the minister for any greater sum in each year than the amount of the rent of the pews which should have been actually let during the year:—*Held*: (1) whenever the churchwardens should have received pew rents applicable to the payment of the minister's stipend, & the same had become due, a special action upon the above Acts, or an action for money had & received, was maintainable by the minister against the churchwardens to recover the amount. But he was entitled only to recover such pew rents as had been received in respect of quarters expired, & for which the stipend had become due, & not those rents which had been paid in advance, & for periods yet to come, & in respect of which no stipend had yet become payable; (2) sect. 73 of the 1818 Act, & sect. 26 of the 1819 Act, imposed upon the churchwardens the legal duty of paying over to the minister the pew rents applicable to the stipend as soon as they were received; but the minister was not entitled to recover from the present churchwardens the balance of pew rents received by, & in the hands of, the late churchwardens, & not paid over by them to the present churchwardens, but retained to meet certain sums alleged to be payable for expenses incurred in respect of the church. The ct. expressly guarded themselves at the same time

from being supposed to sanction the retention or application of the pew rents by the late churchwardens to any of those expenses which appeared to be otherwise provided for by the above Acts.—LLOYD v. BURRUP (1868), L. R. 4 Exch. 63; 38 L. J. Ex. 25; 19 L. T. 690.

3770. Incumbent's interest in—Whether occupation of land.]—Resp. was placed on the register of voters for a county in respect of "Freehold Land & Pew Rents, St. Mary's Church," which was situate in a borough. He was minister of that church, & as such occupied the parsonage house & was entitled in respect of the house, to a vote for the borough. His stipend as minister was "the residue of pew rents," after certain payments made thereout by the churchwardens:—*Held*: upon a case which reserved only the question whether the pew rents could notwithstanding the Representation of the People Act, 1832 (c. 45), s. 24, be severed from the occupation of the house (which was part of the benefice) so as to give a separate qualification for the county, there was nothing in the above sect. to prevent them being so severed, & consequently, resp. was entitled to have his name retained upon the county register.—BESWICK v. ALKER (1872), L. R. 8 Q. B. 205; 2 Hop. & Colt. 36; 42 L. J. Q. B. 20; 27 L. T. 423; 37 J. P. 151; *sub nom.* BESWICK v. ALKER, 21 W. R. 72.

*Annotations*:—*Consd.* Vickers v. Selwyn (1903), 80 L. T. 747; Wolfe v. Surrey County Council, Reeve v. Same, [1905] 1 K. B. 439. *Mentd.* North Manchester Overseers v. Winstanley, [1908] 1 K. B. 835.

3771. — — — — —]—WOLFE v. SURREY COUNTY COUNCIL CLERK, REEVE v. SAME, No. 413, *ante*.

*See, now*, Representation of the People Act, 1918 (c. 61).

3772. — — — — — Power to mortgage.]—*Re* LEVENSON, *Ex p.* ARROWSMITH, No. 2516, *ante*.

#### SECT. 12.—PRIVATE BENEFACTIONS AND CHARITABLE GIFTS.

3773. Augmentation of living—Whether claimable by prescription—Annual stipend.]—BIRCH v. WOOD (1698), 12 Mod. Rep. 249; 2 Salk. 500; 88 E. R. 1298.

3774. — — — — — Charge upon rectory impropriate—Remedy against impropriator—& his assigns.]—(1) The augmentation of a vicarage, by a yearly payment of corn & money out of the rectory, is a charge upon the rectory impropriate, into whose hands soever it shall come. (2) Where a vicar brings his bill for the arrears of certain annual payments, issuing out of an impropriate rectory, he shall recover against the impropriator, though a considerable time has elapsed between the commencement of the arrears, & the impropriator's possession. But if, pending such a suit, a man purchases the rectory, with notice of the vicar's claim, he shall only be liable for the arrears which accrue after he comes into possession.—COOKE v. SNEE (1745), 2 Bro. Parl. Cas. 184; 1 E. R. 875; *sub nom.* SNEE v. COOK, 2 Wood, 425, II. L.

*Annotation*:—*As to* (2) *Held*. A.-G. v. Naylor (1863), 3 New Rep. 191.

3775. — — — — — Charged upon land—Part of land released from charge—Liability of residue.]—An augmentation had been granted under 29 Car. 2, c. 8, "An Act for confirming & perpetuating augmentations made by ecclesiastical persons to small vicarages & curacies," & charged upon land,

which the chapel is situated, to be disposed of as he & the churchwardens

shall direct, & that, notwithstanding Napier's Act, 14 & 15 Vict. c. 72.—

DOWDALL v. HEWITT (1862), 15 Ir. Jur. 353.—IR.

*Sect. 12.—Private benefactions and charitable gifts.*  
*Sects. 13 & 14: Sub-sect. 1.]*

& a portion of such land was held by deft. as tenant for life in possession, having been acquired by deft.'s predecessors under a contract, whereby they released the residue of the land from the burden of the charge, & indemnified the owners against it. In an action to recover from deft. the whole amount of the arrears of the charge:—*Held*: deft. was liable for the whole amount, notwithstanding that the annual profits of his land fell short of the amount of the charge.—*PERTWEE v. TOWNSEND*, [1896] 2 Q. B. 129; 65 L. J. Q. B. 659; 75 L. T. 104.

*Annotations*:—*Consd.* *Re* *Herbage Rents*, Greenwich Charity Comrs. v. Green, [1896] 2 Ch. 811. *Reid*. *Foley's Charity Trustees v. Dudley Corp.*, [1910] 1 K. B. 317.

**3776.** — *Construction of 29 Car. 2, c. 8.*—*Evidence.*—Construction upon 29 Car. 2, c. 8, for perpetuating augmentations of poor vicarages.

The question is whether this appears to be intended to be reserved for the benefit of the vicar or curate, though not reserved to him, the Act intending to take in not only cases of express reservation, but also of intent; & here that constant regular payment for so long a time is the strongest evidence possible that it was so intended (*LORD HARDWICKE*, C.).—*BENSON v. YORK* (DEAN & CHAPTER) (1748), 1 Ves. Sen. 91; 27 E. R. 911.

**3777.** — *Curacy—Evidence of.*—Proof of a curacy augmented is made by showing an order for the augmentation of it, entered in a book & signed by the governors, according to Queen Anne's Bounty Act, 1711 (c. 10), s. 20; without going on to prove that the money was afterwards laid out in land, & allotted by deed under the corporation seal of the Governors of Queen Ann's Bounty to be annexed to the curacy, & that such deed was enrolled within six months after its execution according to Queen Anne's Bounty Act, 1714 (c. 10), s. 21, & Charitable Uses Act, 1735 (c. 30).—*DOE d. GRAHAM v. SCOTT* (1809), 11 East, 478; 103 E. R. 1088.

*Annotation*:—*Mentd.* *Doe v. Wrighte* (1819), 2 B. & Ald. 710.

— *Whether subject to income tax.* See *INCOME TAX*.

**3778.** *Construction of trust—Payment subject to consent of trustees—Whether consent discretionary.*—The tithes of an impropriate rectory were conveyed by the impropriator, on trust to pay the income to such orthodox minister as should from time to time be placed & settled in the perpetual curacy of the church, with the approbation & consent of the major part of the trustees; & if any such should be appointed without such approbation & consent, other trusts were declared of the income during his incumbency:—*Held*: the consent was wholly discretionary, & might be withheld for an insufficient reason, or none; & therefore, in a case where the trustees declined giving their consent unless the patron of the cure & the proposed curate would concur in arrangements for building a parsonage, the ct. declined to interfere.—*A. G. v. MOSELY* (1848), 2 De G. & Sm. 398; *Cripps' Church* (Cas. 127; 17 L. J. Ch. 446; 12 L. T. O. S. 4; 12 Jur. 889; 64 E. R. 178).

**3779.** — *Gift for benefit of parish church—Whether applicable to repair of chancel.*—A trust had been created in 1705 for the benefit of the parish church of A. The parish church of A., by an Ord. in Council, in 1852, had been divided into two ecclesiastical districts. It was alleged that the chancel had been repaired by the rector, & not out of the trust-funds. *Semble*: the trust-funds ought not to contribute to the repair of the

chancel.—*Re* *NORTH WINGFIELD CHARITY* (1860), 3 L. T. 237.

**3780.** — *Re* *HARTSHILL ENDOWMENT*, No. 2754, *ante*.

**3781.** *Control of benefaction—By donor.*—*Re* *HARTSHILL ENDOWMENT*, No. 2754, *ante*.

— *Gift to incumbent for church repairs.*—See No. 443, *ante*.

*Gifts for religious purposes—Whether charitable.*—See *CHARITIES*, Vol. VIII., p. 247, No. 68, pp. 248 *et seq.*

*Gifts for support of clergy—Whether valid.*—See *CHARITIES*, Vol. VIII., pp. 250, 260, Nos. 99, 100, 216.

*Assurance of personal estate—For provision, etc., of buildings—Churches, chapels, parsonage houses, etc.*—See *CHARITIES*, Vol. VIII., pp. 274–278, Nos. 422–424, 429–432, 442, 445–447, 466, 467, 470, 471, 473, 479, 480, 483, 485, 486.

— *To ecclesiastical charity whose funds are liable to be laid out in land.*—See *CHARITIES*, Vol. VIII., p. 278, Nos. 490–497.

*Gift for endowment of future church—Whether valid.*—See *CHARITIES*, Vol. VIII., p. 280, No. 521.

*Exemptions from restrictions on assurances—To churches, etc.*—See *CHARITIES*, Vol. VIII., pp. 284 *et seq.*

*Property held for benefit of parish—Whether charity within Charitable Trusts Act, 1853 (c. 137), s. 66.*—See *CHARITIES*, Vol. VIII., p. 255, No. 166.

— *Whether "charity property" within City of London Parochial Charities Act, 1883 (c. 36).*—See *CHARITIES*, Vol. VIII., pp. 255, 256, Nos. 167–170.

*Proceedings for transfer of funds to new churchwardens—Whether consent of Charity Commissioners necessary.*—See *CHARITIES*, Vol. VIII., p. 391, No. 2173.

## SECT. 13.—FIRST FRUITS AND TENTHS QUEEN ANNE'S BOUNTY.

**3782.** *First fruits—Nature of.*—*FIRST FRUITS & TENTHS' CASE* (1608), 12 Co. Rep. 45; 77 E. R. 1825.

**3783.** — *Right of Crown to.*—*FIRST FRUITS & TENTHS' CASE* (1608), 12 Co. Rep. 45; 77 E. R. 1825.

**3784.** — *Liability for—Void presentation followed by valid presentation.*—(*CURTIS' CASE* (1628), Litt. 139; 124 E. R. 176).

**3785.** *Tenths—Nature of.*—*FIRST FRUITS & TENTHS' CASE* (1608), 12 Co. Rep. 45; 77 E. R. 1825.

**3786.** — *Right of Crown to.*—*FIRST FRUITS & TENTHS' CASE* (1608), 12 Co. Rep. 45; 77 E. R. 1825.

**3787.** — *Payment.*—Tenths are to be paid at the parsonage, & a person authorised by the bishop must demand them, otherwise the certificate is traversable.—*R. v. BLANCHER* (1587), Cro. Eliz. 81; 78 E. R. 340.

*See, now*, Queen Anne's Bounty Act, 1703 (c. 20), Queen Anne's Bounty Act, 1838 (c. 20), s. 3.

**3788.** *Composition for episcopal first fruits & tenths—Nature of liability for.*—(1) The Apportionment Act, 1870 (c. 35), apportions liabilities as well as rights.

(2) The annual sums payable by a bishop in commutation of first fruits & tenths are "periodical payments in the nature of income" within sect. 2 of the above Act, & therefore apportionable between successive bishops *inter se*; but, though now collected & administered by the Governors

of Queen Anne's Bounty, they are still in fact Crown debts enforceable by writ of extent, & therefore not apportionable against the Crown or the treasurer of Queen Anne's Bounty.—*ROCHESTER (Bp.) v. LE FANU*, [1906] 2 Ch. 513; 75 L. J. Ch. 743; 95 L. T. 602; 22 T. L. R. 800.

**3789.** — **Whether apportionable—Between Crown & bishop.**—*ROCHESTER (Bp.) v. LE FANU*, No. 3788, *ante*.

**3790.** — **Between bishop & successor.**—*ROCHESTER (Bp.) v. LE FANU*, No. 3788, *ante*.

**3791.** **Queen Anne's Bounty—Mortgage of glebe to governors—Recovery of money lent—In whose name action brought.**—*BLUCK v. HODGSON*, No. 2590, *ante*.

**3792.** — **Costs of governors—Petition for payment of money out of court—Compulsory acquisition of glebe.**—(1) A railway co. [was] ordered to pay the costs of a petition for the application of money paid into ct. in respect of glebe land taken by the co. in the erection of a parsonage-house; (2) the costs of the Governors of Queen Anne's Bounty, who had been served with & appeared upon the petition, were directed to be paid out of the fund in ct., & not by the railway co.—*Re WHITEFIELD INCUMBENT* (1861), 1 John. & H. 610; 25 J. P. 693; 7 Jur. N. S. 909; 70 E. R. 888; *sub nom. Ex p. WHITEFIELD INCUMBENT*, 30 L. J. Ch. 816; *sub nom. Re LONDON, CHATHAM & DOVER RY. CO., WHITEFIELD INCUMBENT'S CASE*, 5 L. T. 343; 9 W. R. 761.

*Annotations:—As to (1) Apd. Re Lathropp's Charity* (1866), 1 L. R. 1 Eq. 467. *Generally, Mentd. Re Lands Clauses Act, 1845, Ex p. Dummer* (1865), 6 New Rep. 326.

**3793.** — **Money paid in under Church Building Acts.**—*Ex p. MARGATE (VICAR)*, No. 3522, *ante*.

— **Augmentation of curacy.**—*See Nos. 176, 3777, ante.*

— **Gift of personal estate to—Fund laid out in land.**—*See CHARITIES, Vol. VIII., p. 278, Nos. 490, 491.*

## SECT. 14.—CHURCH RATES.

### SUB-SECT. 1.—IN GENERAL.

**NOTE.**—*By Compulsory Church Rates Abolition Act, 1868 (c. 109), compulsory church rates were abolished except in the case of (1) church rates applicable to secular purposes; (2) rates for the repayment of money due on July 31, 1868, on the security of church rates; (3) church rates levied for certain purposes under private or local Acts of Parliament.*

**Rates applicable to secular purposes.**—*See RATES & RATING.*

**Rates for the repayment of money due on security of church rates.**—*See Sub-sect. 2, post.*

**Rates levied under private or local Acts of Parliament.**—*See Sub-sect. 3, post.*

**Duties of vestries—Transfer to parochial church councils.**—*See, now, Parochial Church Councils (Powers) Measure, 1921 (No. 1), s. 4 (1) (i).*

—*See, generally, Part III., Sect. 7, sub-sect. 4, ante.*

**Powers, duties & liabilities of church trustees under Church Rates Abolition Act, 1868 (c. 809), s. 9—Transfer to parochial church councils.**—*See, now, Parochial Church Councils (Powers) Measure, 1921 (No. 1), s. 4 (1) (iii).*

**3794.** **Refusal to make—Jurisdiction of Spiritual Court.**—*The Spiritual Ct. may excommunicate the parishioners for not making a church rate.*—*BLANK v. NEWCOMB* (1699), 12 Mod. Rep. 327; *Holt, K. B. 594*; 88 E. R. 1350.

*Annotation:—Held, Veley v. Burder* (1841), 12 Ad. & El. 265.

**3795.** **Incidence of rate—As between districts—Customary apportionment—Whether valid.**—*In prohibition, plff. stated that M. was an ancient parish, having an old parish church & consisted of one vill called A. & three other vills, & set forth a custom to make a general rate to reimburse the churchwardens their expenses; & for the inhabitants of A. by a particular levy to raise two-thirds of such rates, & the inhabitants of the three other vills, by a particular levy, the other one-third. That a rate was made by the parishioners for reimbursing the sum of £19 laid out by defts. (the churchwardens) in repairing the church; & the three vills were rated at the above one-third:—Held: the custom was well alleged & a reasonable one, for the word "inhabitant" was to be construed according to the subject matter, & included all such persons, & those only, as by law were liable to the payment of church rates. The custom might be or might have been a reasonable one, & though the reason assigned by plff., viz. that A. had more inhabitants, was not sufficient, it should not therefore be overturned.*—*BURTON v. WILEDAY* (1737), Andr. 32; 95 E. R. 284.

**3796.** **Inspection of parish books by parishioners—Mandamus.**—*ANON.* (1814), No. 1058, *ante*.

**3797.** — **Comparisons of church rate with poor rate.**—*RANSON & KNOTT v. CAMPKIN*, No. 4413, *ante*.

**3798.** **Basils of assessment Whether poor rate.**—(1) Though a church rate is often made according to the assessment for the poor rate it acquires no validity from that circumstance, & the poor rate may be void & yet the church rate good. A church rate does not require to be upon the full rateable value, it merely requires to be just & equal. Yet the acquiescence of a parish in the poor rate is presumptive evidence that a church rate made upon the same basis is just & equal. The substantial inequality which will render a church rate invalid may be either the omission of property that ought to be rated or the under-rating some & the over-rating others.

(2) A church rate differs from the poor rate in three things: it need not be upon the net annual value if just & equal; it cannot be compounded for; & the landlords of small tenements cannot be rated for part thereof in lieu of the occupiers.

(3) The churchwardens in making a church rate need not follow the poor rate, & should not do so unless satisfied it is just & equal; & to make it a mere copy of the poor rate, may make the rates bad. *ATTENBOROUGH v. KEMP* (1861), 14 Moo. P. C. C. 351; 5 L. T. 67; 25 J. P. 627; 7 Jur. N. S. 695; 9 W. R. 771; 15 E. R. 338, P. C.

*Annotation:—Generally, Mentd. Richards v. Birley* (1864), 2 Moo. P. C. C. N. S. 96.

**3799.** — **In making a church rate, the parishioners are not bound to adopt the valuation made by an assessment committee, under the Union Assessment Committee Act, 1862 (c. 103). Where a church rate was made upon the basis of an old valuation originally made for the purposes of poor rate & in accordance with Parochial Assessments Act, 1836 (c. 96), & which had been since from time to time corrected, & acted upon, & acquiesced in for a great number of years, the ct. refused to disturb the rate, merely on the ground that a new valuation made under the 1862 Act differed from the old one.—*BARNES v. GRANT* (1866), 1 L. R. 1 A. & E. 37; 35 L. J. Eccl. 9; 13 L. T. 686; 30 J. P. 277; 12 Jur. N. S. 168.**

**3800.** **Validity of rate—Onus of proof.**—*FAULKNER v. HUMFREY* (1840), 4 J. P. 478, 493.

*Annotation:—Consd. R v. Bidwell* (1845), 10 J. P. 264.

Sect. 14.—Church rates: Sub-sects. 1 & 2, A.]

**3801. — Objections to.]**—A chapel rate was laid on the landholders of the chapelry only, exclusively of the holders & occupiers of mills & houses:—*Held*: an occupier of land within the chapelry, who did not object to the rate before the justices when summoned for non-payment, could not question its validity in an action of replevin, after distress on his goods under the justices' warrant. A chapel rate, duly made, but objected to from extrinsic circumstances, can only be questioned in the ecclesiastical ct. An order of justices for payment of chapel rate need not state that the proceedings were taken "on oath."

I will only add one observation, with regard to the words "duly made." A rate is duly made if made in such a manner that the magistrates are bound to act (ROFFE, B.).—*RAMSBOTTOM v. DUCKWORTH* (1847), 1 Exch. 506; 19 L. J. M. C. 74; 10 L. T. O. S. 166.

**3802. Grounds for revision—Persons liable omitted to be assessed.]**—*RANSON & KNOTT v. CAMPKIN*, No. 443, *ante*.

**3803. — Whether that rate based on super-added poor rate assessment.]**—*BARNES v. GRANT*, No. 3799, *ante*.

**3804. Recovery—Jurisdiction of Ecclesiastical Court.]**—*RICKETTS v. BODENHAM*, No. 1069, *ante*.

**3805. — .]**—If a church-rate under £10 be disputed in the Ecclesiastical Ct., it is not necessary to plead that the party had been summoned before the magistrates.—*WHITE & JACKSON v. BEARD* (1840), 2 Curt. 480; 4 J. P. 604; 163 E. R. 481.

*Annotations:—Reid. Ramsbottom v. Duckworth* (1847), 1 Exch. 506; *R. v. Byrom* (1848), 12 Q. B. 321; *R. v. Crook*, etc. *Lancashire JJ.* (1857), 21 J. P. 627; *Asterley v. Adams* (1871), L. R. 3 A. & E. 361.

**3806. — .]**—*Re BAINES*, No. 1155, *ante*.

**3807. — .]** A prohibition will go to the ecclesiastical ct. in a suit to enforce the payment of a sum under £10, due upon a church rate, where neither the validity thereof nor the liability of the party to pay it is disputed.

A declaration in prohibition sufficiently discloses that they are not disputed, which alleges that deft. appeared in the ecclesiastical ct. under protest against the jurisdiction, & afterwards protested against it, on the ground that the amount to be recovered was under £10, & that the validity had not been disputed by plff., as after such a proceeding in the ecclesiastical ct. he would be unable to contest the jurisdiction of the justices, by denying the validity of the rate or his liability to pay it.—*RICHARDS v. DYKE* (1842), 3 Q. B. 256; 2 Gal. & Dav. 493; 11 L. J. Q. B. 275; 6 Jur. 1035; 114 E. R. 505.

*Annotation:—Reid. R. v. Colling* (1852), 17 Q. B. 816.

**3808. — Jurisdiction of magistrates—Bond side objection to validity of rate.]**—If upon an application to justices for a warrant to levy the amount of a church rate, deft. makes it appear that he *bond fide* disputes the validity of the rate, though he does not in express terms object to their jurisdiction, the justices ought to forbear to give judgment.—*R. v. LEICESTER JJ. & COMPTON* (1860), 29 L. J. M. C. 203; 8 W. R. 503; *sub nom. R. v. LEICESTERSHIRE JJ., Ex p. COMPTON*, 2 L. T. 436; 24 J. P. 391.

*Annotation:—Distd. R. v. Knox* (1863), 39 L. J. M. C. 357.

**3809. — By Quaker.]**—It is a general rule that the summary jurisdiction of justices of the peace gives way when a matter of title comes *bond fide* into question before them. Hence when under 7 & 8 Will. 3, c. 34, s. 4, a

Quaker is summoned before justices for non-payment of church rates if he *bond fide* disputes the title to enforce the rates, their jurisdiction ceases & the ecclesiastical ct. is the proper tribunal to decide the matter. 5 & 6 Will. 4, c. 74, seems to intend to confine the summary jurisdiction of justices over church rates to cases where title is not in question.—*BACKHOUSE v. BISHOPSWEAR-MOUTH (CHURCHWARDENS)* (1860), 9 C. B. N. S. 315; 30 L. J. M. C. 118; 3 L. T. 626; 25 J. P. 70; 7 Jur. N. S. 338; 9 W. R. 162; 142 E. R. 123.

*Annotation:—Reid. Pease v. Chaytor* (1861), 1 B. & S. 658.

**3810. — .]**—Where a Quaker, on refusal to pay a church-rate under £50, is summoned before magistrates, & there takes *bond fide* objections to the legality of the rate, the jurisdiction of the magistrate ceases, & that of the Ecclesiastical Ct. attaches.—*BISHOPSWEAR-MOUTH (CHURCHWARDENS) v. BACKHOUSE* (1862), 7 L. T. 438; 27 J. P. 167.

**3811. — Whether objection bonâ fide.]**—*R. v. CINQUE PORTS JJ.* (1862), 1 New Rep. 105; 26 J. P. Jo. 757.

*See, also*, No. 3823, *post*.

**3812. — Whether prohibition lies—Rate unequal.]**—No prohibition will be granted to a suit for church rates because they are unequal.—*ANON.* (1677), 1 Freem. K. B. 289; 1 Vent. 308; 89 E. R. 209.

**3813. — Where case before court having jurisdiction.]**—In a suit by C. & H., churchwardens, against F. for non-payment of church-rate, a libel, answer, & reply were put in & certain articles were exhibited by the churchwardens with, & in support of the reply. The articles were rejected in the Consistory Ct., but on appeal to the Arches Ct., they were admitted. F. then appealed to the Privy Council & his appeal was referred to the Judicial Committee. While the appeal was depending but before any proceedings had been taken in that ct., F. moved for a prohibition on the ground that the rate was bad, & appeared to be so from facts stated on the pleadings:—*Held*: a prohibition could not be granted on this ground, the cause being before a ct. the jurisdiction of which was not denied, no erroneous proceedings having been taken there, & this ct. refusing to presume that the Judicial Committee would act incorrectly.—*CHESTERTON v. FAHLAR* (1838), 7 Ad. & El. 713; 7 L. J. Q. B. 66; 112 E. R. 638; *sub nom. R. v. PRIVY COUNCIL JUDICIAL COMMITTEE*, 3 Nev. & P. K. B. 15; 2 Jur. 394; *sub nom. R. v. CHESTERTON*, 1 Will. Woll. & H. 19; 2 J. P. 21.

*Annotations:—Reid. R. v. Poole Corp.* (1838), 2 J. P. 84; *Jones v. Johnson* (1850), 5 Exch. 862; *Wadsworth v. Spain (Queen)* (1851), 17 Q. B. 171.

**3814. — After death of parishioner.]**—The repair of the parish church is a personal obligation, & church rate is a personal claim upon the party assessed. *Semble*: an exor. is not liable in any shape whatever for a church rate due from his testator; & if he is liable, if it is a debt, such debt cannot be recovered in these cts.; if it be a debt, it is recoverable in another ct.—*WILLIAMS v. GEORGE & NUNN* (1843), 3 Curt. 343; 2 Notes of Cases, 85; 7 Jur. 241; 163 E. R. 751.

**3815. — Practice & procedure in ecclesiastical court — Letters of request — Form.]**—*RIPPIN v. BASTIN*, No. 1092, *ante*.

**3816. — Pleading.]**—In a suit for subtraction of a church rate, made in virtue of the Church Building Acts, 1818 (c. 45), & 1819 (c. 134), the libel ought to show upon the face of it that the conditions required by the Acts have been com-

plied with.—**BLUNT & FULLER v. HARWOOD** (1837), 1 Curt. 648; 1 J. P. 371; 163 E. R. 227.

*Annotations*.—**Reid**. Williams v. George (1843), 2 Notes of Cases, 85. **Mentd.** Hawes & Vleat v. Pellatt (1839), 2 Curt. 473.

**3817.** — **Costs of proceedings—Liability for.**—Where a party has been sued for subtraction of church-rates, for less than £5, & has been committed to prison for contempt of ct., & has made various unsuccessful efforts to set aside the proceedings against him in a ct. of common law, whereby great costs have been incurred in opposing the same, he is nevertheless entitled to his discharge under 3 & 4 Vict., c. 93, on payment only of the taxed costs incurred in the ecclesiastical ct. alone, & of the amount of church-rate originally sued for.—**BAKER, JEPPE & MOSS v. THOROGOOD** (1840), 2 Curt. 632; 4 J. P. 779; 163 E. R. 532.

*Annotation*.—**Apprvd.** *Ex p. Cox* (1887), 20 Q. B. D. 1.

**3818.** — **Delay by parish in enforcing payment.**—A parish permitting a long accumulation of arrears of church rates & then suing, will for such neglect be left to payment of its own costs.—**BLOUNT v. PIPE** (1845), 5 L. T. O. S. 154.

**3819.** — **By distress—Form of warrant.**—A warrant of distress for church rate, which does not specify the time at which the distress is to be sold, is bad, & the rescue of a distress taken under such a warrant is no offence.—**R. v. WILLIAMS** (1850), 2 Car. & Kir. 1001; 1 Den. 529; T. & M. 235; 1 New Sess. Cas. 137; 10 L. J. M. C. 120; 14 L. T. O. S. 552; 14 J. P. 75; 14 Jur. 115; 4 Cox, C. C. 87, C. C. R.

*Annotation*.—**Reid**. Jones v. Johnson (1850), 5 Exch. 862.

**3820. Application.**—**RAND & GRIMWADE v. GREEN & GREEN**, No. 905, *ante*.

#### SUB-SECT. 2.—FOR REPAYMENT OF CHARGES SECURED ON RATES.

##### A. In General.

**3821. Security by way of annuity charged on rates—Whether valid—Construction of statutes.**—An Act of Parliament was passed in 1816 for the purpose of raising £5,000 for the repair of one of the parish churches in London. The Act appointed certain persons to be trustees, & gave them the power of levying rates & authorised them to raise the money required by the granting of life annuities, by way of simple annuity, or for the lives of two persons or the survivor, with this restriction, that no annuity should be granted for any single life at a higher rate than £8 3s. per cent., when the life of the annuitant should be under 35 years. In 1817, in consideration of £2,500 paid by A. the trustees granted an annuity of £225 to A. & B. & the survivor. B. was then 33 years of age. Another Act was passed in 1819, which recited that the trustees had raised £5,000 & granted annuities to the extent of £297, which included the above-mentioned sum of £2,500 & the annuity of £225, & enacted that the annuities already granted should be paid in the first place out of the rates. The annuity was paid up to 1848, when the trustees resisted further payment, on the ground that the grant had been void under the Act of 1816:—**Held**: if the grant had been void under the Act of 1816, the defect was cured by the Act of 1819. **Seemle**: the restriction contained in the Act of 1816 was directory & not prohibitory.—**DELARUE v. CHURCH** (1851), 20 L. J. Ch. 183; 17 L. T. O. S. 102; 15 Jur. 455.

**3822. Validity of rate—Whole sum borrowed exceeding borrowing powers.**—Trustees, under a local Act of Parliament, were authorised to borrow by annuity, or at common interest, a sum not exceeding £30,000, for the purpose of building a chapel, & for other purposes in the Act mentioned, & the moneys so borrowed & the interest thereof were to be made payable out of the burial fees, & out of the rates & assessments to be made in pursuance of the Act. The trustees in fact borrowed a sum of £32,036, & made a rate to pay the interest of that sum:—**Held**: on demurrer, in an action of replevin by an inhabitant, upon whom an aliquot proportion of the rate was levied, the trustees had exceeded their power, & the rate was bad *in toto*, although the defect did not appear on the face of it.—**RICHTER v. HUGHES** (1824), 2 B. & C. 499; 3 Dow. & Ry. K. B. 788; 2 L. J. O. S. K. B. 61, 119; 107 E. R. 400.

*Annotation*.—**Mentd.** A.-G. v. De Winton, [1906] 2 Ch. 106.

**3823.** — **Signature by trustees.**—Under a local Act of Parliament, seven or more trustees were empowered to raise a sum of £7,000 & to make church rates for paying the principal & interest. No act of the trustees was to be deemed valid, unless done at some meeting of the trustees, to be held under the Act. A *mandamus* to levy & collect rates made by the trustees, was granted against the churchwardens. Issues of fact were raised upon their return, & it appeared, that none of the rates were signed at any meeting by all the seven trustees, but all of them signed subsequently by some trustees, & also, that all the seven trustees signing the rates, were in no case parties present at the meeting when the rates were made:—**Held**: the rates were bad.—**R. v. RODMALL** (1838), 2 J. P. 182.

**3824. Rate levied insufficient—Power to make further rate—By leave of court.**—By 14 Geo. 3, c. 12, & 53 Geo. 3, c. 80, trustees were empowered to borrow two sums of £6,000, & £4,000, to be applied respectively in rebuilding the parish church of C. & in erecting a chapel of ease in the same parish. They were also empowered by the latter Act to raise £2,000 for the repairs of the chapel. Power was given to levy rates in the said parish for the payment of the principal & interest. The trustees had continued to levy rates since the passing of the above Acts. £2,000 had been applied in repairing the chapel of ease, but such sum had not been raised under the special powers for the purpose in the Act contained. An information was filed against the trustees charging that they had already levied sufficient to pay off the moneys borrowed, & interest thereon; that the application of the £2,000 part thereof in the repairs of the chapel of ease was a breach of trust, & that such payment ought not to be allowed & that the power to raise such sum was at end. The information prayed an account accordingly, & that the trustees might be restrained from levying additional rates. It was decreed that the power to raise the £2,000 was at end, & ought not to be exercised. It appearing by affidavit that a portion of the sums borrowed, with interest, was still due, it was further decreed that the rates already levied but not collected be got in, & that if such rates should not be sufficient, either party to be at liberty to apply in chambers to levy such further rates as occasion might require.—**A.-G. v. THORNTON** (1856), 20 J. P. 803.

**3825. Incidence of rate—Whether on tithes—Power to charge on tenements and hereditaments.**—**R. v. BARKER**, No. 3359, *ante*.

**3826. Auditing accounts—Provision in local Act**

*Sect. 14.—Church rates: Sub-sect. 3, A., B. & C.*  
*Sect. 15: Sub-sect. 1, A.]*

59; 2 J. P. 359; 2 Jur. 132, 565; 112 E. R. 718.

*Annotation:—Held. R. v. West Riding of Yorkshire JJ.,*  
*Crich v. Sheffield (1844), 1 New Sess. Cas. 98.*

**3838. Assessment**—“Full annual rent or value.”—By a local Act, the churchwardens of a parish were required to make a rate “on the full annual rent or value” of all houses rateable to the relief of the poor:—*Held*: “full annual rent or value” meant full net annual value, & the rate could not be made on the gross estimated rental.—*ROSE v. WATSON*, [1894] 2 Q. B. 90; 63 L. J. M. C. 108; 70 L. T. 906; 58 J. P. 589; 42 W. R. 523; 10 T. L. R. 404; 38 Sol. Jo. 386; 10 R. 255, D. C.

*B. Whether Enforceable under Compulsory Church Rates Abolition Act, 1868, s. 5.*

**3839. Church rate—Whether confined to rate for ecclesiastical purposes.**—By a local Act, it was provided that the churchwardens of the parish should pay to the rector for the time being a fixed annual sum in lieu of all tithes, or payments in lieu of tithes, to which the rector was entitled within the parish. Sect. 7 abolished such tithes & payments in lieu of tithes; & sect. 14 required the churchwardens & inhabitants in each year to make & sign a sufficient assessment, to be called “the church rate,” upon all occupiers of lands & tenements within the parish for raising the said annual sum & such further sum as should be necessary for repairing & keeping in repair the parish church & churchyard, & for the payment of all necessary & proper salaries & disbursements relative to the parish church & churchyard, & the costs of collecting the rate.

By Compulsory Church Rate Abolition Act, 1868 (c. 109), s. 1, no proceedings shall be taken to enforce payment of any church rate made in any parish or place. By sect. 2, where under a general or local Act a rate may be made & levied partly for ecclesiastical & partly for other purposes, such rate shall be made, levied, & applied for such last mentioned purposes only. By sect. 5, “This Act shall not affect any enactment in any private or local Act of Parliament under the authority of which church rates may be made or levied in lieu of, or in consideration of the extinguishment or of the appropriation to any other purpose of, any tithes customary payments, or other property or charge upon property, which tithes, payments, property or charge, previously to the passing of such Act, had been appropriated by law to ecclesiastical purposes as defined by this Act, or in consideration of the abolition of tithes in any place, or upon any contract made, or for good or valuable consideration given, & every such enactment shall continue in force in the same manner as if this Act had not passed.” By sect. 10, “In this Act ‘ecclesiastical purposes’ shall mean the building, rebuilding, enlargement, & repair of any church or chapel, & any purpose to which by common or ecclesiastical law a church rate is applicable, or any of such purposes, & ‘church rate’ shall mean any rate for ecclesiastical purposes as hereinbefore defined”:—*Held*: (1) the “church rate” specified in sect. 5 of the Act of 1868 was not limited to a church rate for ecclesiastical purposes as defined in sect. 10, but meant the church rate as made or levied under the local Act; (2) the church rate under the local Act, which was a church rate not only for ecclesiastical purposes but also for other purposes, namely, the rector’s stipend, was authorised to be made &

levied “in consideration of the abolition of tithes”; (3) the whole rate was preserved from abolition by sect. 5, & not merely that part of it which was applicable to payment of the rector’s stipend.—*LONDON COUNTY COUNCIL v. ST. BOTOLPH, BISHOPSGATE (CHURCHWARDENS)*, [1914] 2 K. B. 680; 83 L. J. K. B. 953; 110 L. T. 737; 78 J. P. 161; 12 L. G. R. 168, C. A.

**3840. In lieu or in consideration of the extinguishment or abolition of tithes—Exemption from tithes—Authority to raise rate—Divided parish.**—By a local Act, the hamlet of P. was taken from the parish of S. & formed into a separate parish, with a separate church & incumbent, & by sect. 12 the inhabitants of the parish of P. were discharged & exempt from the payment of small tithes, & the rector ceased to have the cure of souls over the new parish. By sect. 61 of the local Act it was provided that for the purposes of the Act it should be lawful for the vestry to make a rate upon the occupiers of all lands, houses . . . tenements, & hereditaments within the parish. There was also a clause in the Act by which the rate was to be applicable to other purposes besides the payment of the incumbent, namely, purposes connected with the repair of the church & the celebration of divine service.

By sect. 2 of Compulsory Church Rates Abolition Act, 1868 (c. 109), “Where in pursuance of any general or local Act any rate may be made & levied which is applicable partly to ecclesiastical & partly to other purposes, such rate shall be levied & applied to such last mentioned purposes, & so far as is applicable shall be deemed a separate & not a church rate & shall not be affected by the Act,” & by sect. 5, “This Act shall not affect any enactment in any private or local Act of Parliament under the authority of which church rates may be made or levied in lieu of, or in consideration of the extinguishment, or the appropriation to any other purposes of any tithes . . . which previously to the passing of the Act had been appropriated to ecclesiastical purposes . . . or in consideration of the abolition of tithes in any place or upon any contract made or for good or valuable consideration given.”

The vestry of P. made a rate which they applied to eighteen different purposes, of which four were non-ecclesiastical, & fourteen were ecclesiastical purposes within the meaning of Compulsory Church Rates Abolition Act, 1868 (c. 109), s. 10:—*Held*: (1) the rate was not made in lieu or in consideration of the extinguishment or abolition of tithes within the meaning of sect. 5 of the Compulsory Church Abolition Act, 1868 (c. 109), & therefore it came within sect. 2; (2) the rate might be treated as a valid rate, only as a separate rate & not a church rate, & it was consequently good for non-ecclesiastical purposes, but bad for ecclesiastical purposes, & could not be enforced in respect of the latter.—*WATSON v. ALL SAINTS, POPLAR VESTRY* (1882), 46 L. T. 201; 46 J. P. 454, D. C.

*Annotations:—As to (1) Distd. Bell v. Bassett (1882), 47 L. T. 19; L. C. C. v. St. Botolph, Bishopsgate, [1914] 2 K. B. 680.*

**3841. ——— In lieu of small tithes.**—By a local Act in M. certain small tithes had been abolished, & in lieu thereof the churchwardens were directed to make a composition rate on property in the parish to pay the rector’s stipend, & any deficiency in the church rates:—*Held*: this was a rate levied in lieu of the extinguishment of small tithes & other payments, & as such was saved by Church Rate Abolition Act, 1868 (c. 109), s. 5, from abolition, though partly appropriated to

ecclesiastical purposes.—*St. MATTHEW, BETHNAL GREEN VESTRY v. PERKINS* (1885), 53 L. T. 634; 1 T. L. R. 621, H. L.

*Annotation*.—*Consol. L. C. C. v. St. Botolph, Bishopsgate*, [1914] 2 K. B. 660.

**3842. Contract for good consideration—Endowment raised by mutual agreement of parishioners.]**

—By a private Act, reciting that the Earl of B. had erected the church & rectory house of St. P., & charged his property with the perpetual payment of £100 a year to the rector, it was enacted that St. P. be a parish, & that the yearly sum of £250 be charged upon the houses of the inhabitants of the parish, except B. House, for the support & benefit of the rector, curate, clerk, & sextons of the parish, & that the said sum be collected by a rate made by the churchwardens. By a local Act, reciting that it was expedient that the said sum of £250 should be increased, it was enacted that the yearly sum of £520, in lieu of £250, be charged upon all the houses in the parish, not excepting B. House, & the rentcharge upon the Duke of B.'s property be increased to £180 a year. On action brought to recover the amount of a rate made under the above statutes against an inhabitant of the parish:—*Held*: although, being made partly for ecclesiastical purposes, it was a church rate within Compulsory Church Rate Abolition Act, 1868 (c. 109), s. 1, yet it was enforceable by virtue of sect. 5 of the same Act as being on a contract made for good consideration between the Duke of B. & the parishioners of St. P.—*BELL v. BASSETT* (1882), 52 L. J. Q. B. 22; 47 L. T. 19.

*Annotation*.—*Distd. R. v. St. Marylebone Vestry* (1894), 10 T. L. R. 598.

**3843. — How ascertained.]**—The “contract made” or good consideration given mentioned in sect. 5 of Compulsory Church Rate Abolition Act, 1868 (c. 109), must be found in or gathered from the local Act.—*R. v. St. MARYLEBONE VESTRY*, [1895] 1 Q. B. 771; 61 L. J. Q. B. 622; 72 L. T. 11; 11 T. L. R. 120; 14 R. 172, C. A.

**3844. Effect of non-residence of rector.]** A rate was made under a local Act for the purpose of making better provision for the maintenance of the rector of the parish of St. O., Southwark, & which relieved the inhabitants of the parish from the obligation of paying tithe. The appts. objected to pay on the ground that the rector did not reside in the parish, & was not capable by reason of his employment as diocesan missionary of duly discharging his parochial duties, & they appealed to quarter sessions against an order for the payment of the rate: *Held*: it was no objection to the rate that the rector was not living at the rectory, & it was not open to appts. to raise by way of appeal the contention that the rector was not performing his parochial duties.—*HAY'S WHARF, LTD. (PROPRIETORS) v. ST. OLAVE'S, SOUTHWARK TRUSTEES* (1909), 73 J. P. 375; 25 T. L. R. 648; 9 L. G. R. 1022, D. C.

#### C. Incidence.

**3845. Whether house occupied by day only.]**—The Treasurer of the London Missionary Society was rated to the relief of the poor, in respect of a house taken by the society, under a lease, for religious & charitable purposes. The treasurer attended at the house one day in the week to superintend the society's affairs, but no person ever slept there. The treasurer received no remuneration for his services, & neither did he nor any other person connected with the society derive any profit from the occupation of the premises:—*Held*: he was properly assessed to a

church rate, under an Act extinguishing tithes in the parish, & authorising a yearly church rate to be made, in order to raise money for the payment of compensation to the parson in lieu of tithes, & for the repairs of the church, upon all inhabitants & occupiers, because beneficial occupation was not material.—*R. v. WILSON* (1840), 12 Ad. & El. 94; 4 Per. & Dav. 130; 9 L. J. M. C. 100, 102; 4 Jur. 1128; 113 E. R. 740.

*Annotations*.—*Consol. R. v. Baptist Missionary Soc.* (1849), 10 Q. B. 884. *Reid. Hodgson v. Carlisle L. B. of Health* (1857), 8 E. & B. 116; *R. v. Licensed Victuallers' Soc.* (1861), 1 B. & S. 71; *Sheppard v. Bradford Overseers, etc.* (1864), 16 C. B. N. S. 369.

**3846. “House”.—Parish of St. Paul, Covent Garden.—Whether Covent Garden Theatre included.]**—By a local Act, 51 Geo 3, c. cl., after reciting a former Act, whereby a yearly sum of £250 was charged upon the houses of the inhabitants of St. Paul's, Covent Garden, except B. house, for the support & benefit of the rector, curate, clerk, & sextons for the time being of that parish, that charge of £250 was repealed, & in lieu thereof a yearly sum of £520 was charged upon all houses within the parish, to be assessed by the churchwardens, & paid by the occupiers of such houses respectively, & recoverable, in case of refusal to pay the sums assessed on the house or houses in their occupation, by distress:—*Held*: the word “houses” in this Act meant houses intended for human habitation, & Covent Garden Theatre was not ratable under the Act.—*SURMAN v. DARLEY* (1845), 14 M. & W. 181; 14 L. J. M. C. 145; 5 L. T. O. S. 178; 9 J. P. 702; 153 E. R. 440.

*Annotations*.—*Consol. Lewin v. Newnes, Lewin v. Warno* (1904), 90 L. T. 160; *Lewin v. End*, [1906] A. C. 299. *Reid. B. Aerodrome v. Dell*, [1917] 2 K. B. 380.

**3847. — Whether offices, etc., included**

**—Resident caretaker.]**—*Held*: houses consisting of the offices, ware-houses, store-rooms, & counting-houses of publishers, some rooms in which were occupied by caretakers & their families, such caretakers having internal access to the whole of the premises, were chargeable under 51 Geo. 3, c. cl.—*LEWIN v. NEWNES, LTD., LEWIN v. WARNE & CO.* (1904), 90 L. T. 160; 68 J. P. 164; 20 T. L. R. 206; 48 Sol. Jo. 223, D. C.

*Annotation*.—*Reid. Lewin v. Civil Service Supply Assn.* (1904), 68 J. P. Jo. 339.

**3848. — Whether houses converted into offices, etc., included—No resident caretaker.]**—

Houses in the parish of St. Paul, Covent Garden, were used as warehouses, counting-houses & offices. They had formerly been used for residence, but no longer contained bedrooms, kitchens, or fireplaces, & no person slept there. They could readily be fitted for use as dwelling-houses:—*Held*: they were liable to the rector's rate as “houses” within 51 Geo. 3, c. cl.—*LEWIN v. END*, [1906] A. C. 299; 75 L. J. K. B. 473; 94 L. T. 649; 70 J. P. 208; 54 W. R. 606; 22 T. L. R. 504; 4 L. G. R. 618; *reversy. S. C. sub nom. LEWIN v. END, LEWIN v. CIVIL SERVICE SUPPLY ASSN.*, [1905] 1 K. B. 669, C. A.

*Annotations*.—*Reid. B. Aerodrome v. Dell*, [1917] 2 K. B. 380. *Mentd. Morgan v. Kenyon* (1913), 78 J. P. 66.

## SECT. 15.—CHAPELS, MISSION ROOMS, SUNDAY SCHOOLS AND OTHER BUILDINGS.

### SUB-SECT. 1.—CHAPELS.

#### A. In General.

**3849. Chapel—Formerly synonymous with church.]**—Before the distribution of parishes, as they are now fixed, the terms church & chapel



**Sect. 15.—Chapels, mission rooms, Sunday schools and other buildings: Sub-sect. 1, A., B., C. & D.]**

were synonymous; & before 1285, a *quare impedit* lay for a chapel as well as a church. A church may be presented to as a chapel, & yet remain in right of a church; & a chapel may commence a church, by being presented, and instituted to as such.—*YATEMAN v. COX* (1774), 2 Bro. Parl. Cas. 191; 1 E. R. 870, II. L.

**3850. — Conversion into church—By presentation & institution.]—***YATEMAN v. COX*, No. 3849, *ante*.

**3851. "Chapelry"—Within Church Building Act, 1831 (c. 38), s. 14—What is.]—***CARR v. MOSTYN*, No. 1860, *ante*.

**3852. Memorial chapel—With stained glass & mosaic decoration—Right to easement of light—Amount of light.]—***Held*: a memorial chapel, unconsecrated, used for Church of England & Presbyterian services & for confirmation & other classes, & decorated with stained windows & mural mosaics, was a "building" within Prescription Act, 1832 (c. 71), s. 3, entitled to protection with regard to the light necessary not only for conducting the services & classes, but also for the designed illumination of the works of art.—*A.-G. v. QUEEN ANNE GARDEN & MANSIONS CO.* (1880), 60 L. T. 759; 37 W. R. 572; 5 T. L. R. 430.

*Annotations:—***Reid.** *Clifford v. Ford*, [1899] 1 Ch. 698. **Mentd.** *Corbett v. Jonas*, [1892] 3 Ch. 137; *Lazarus v. Artistic Photographic Co.*, [1897] 2 Ch. 214.

*See, generally, EASEMENTS*, pp. 123–125, *ante*.

**Whether "private house" within Canon LXXI. — Proprietary chapel.]—***See* No. 3876, *post*.

**Private chapel of almshouse.]—***See* No. 3860, *post*.

**B. Public Chapels.**

**3853. Distinguished from rectory.]—***GRUBHAM v. GRATE* (1620), 2 Roll. Rep. 150; 1 Eng. & Y. 313; 81 E. R. 718; *sub nom.* *GRABHAM v. GEALES*, Palm. 94.

*Annotation:—***Reid.** *Chapman v. Gatecombe* (1836), 2 Bing. N. C. 516.

**3854. Whether formerly distinguished from church.]—***YATEMAN v. COX*, No. 3849, *ante*.

**3855. Whether independent of parish.]—**A chapel's having sacramentals only, makes it not independent of the parish, but it must have all other badges, as sepulchres, etc. (*per Cur.*).—*ANON.* (1701), 12 Mod. Rep. 504; 88 E. R. 1478.

**3856. —.]—***Re* *SANDBACH SCHOOL & ALMSHOUSE FOUNDATION*, *A.-G. v. CREWE* (EARL), No. 377, *ante*.

**3857. Conversion into church—By presentation & institution.]—***YATEMAN v. COX*, No. 3849, *ante*.

**3858. Chapel of ease—Whether parish—Within Poor Relief Act, 1601 (c. 2).]**—A parish for the purposes of the above Act, need not be a legal parish, but may be a parish in fact, or reputed parish. A chapel of ease does not come under the Statute.—*HILTON v. PAUL* (1627), Litt. 73; Cro. Car. 92; Hut. 93; 124 E. R. 143.

*Annotations:—***Reid.** *R. v. Severn & Arnold* (1756), Say. 278; *R. v. Marriott* (1838), 7 L. J. M. C. 95; *R. v. Clayton* (1849), 13 Q. B. 354. **Mentd.** *Nichols v. Walker & Carter* (1634), Cro. Car. 394; *R. v. Sharpley* (1854), 23 L. T. O. S. 172.

**3859. — Evidence of—Contribution to repairs of parish church.]—**There is nothing illegal in the supposition that, in ancient times, a chapel & chapelry existed, to the curate or chaplain of which the rector of the parish, with the consent of all proper parties, may have assigned a portion of the tithes by way of endowment, reserving to the rector the right of patronage of the curacy.

Where parishioners, dwelling within a chapelry, contribute to the repairs of the parish church, it is strong, but not conclusive, evidence that the chapel is a chapel of ease to the inhabitants of the parish, & not a separate & distinct chapelry.

It does not of necessity follow that there cannot be a parochial chapel because there has not been a union of parishes in ancient times, nor any vicarage or mother church with which the chapel can be supposed to have been anciently united. The circumstance that there is no vicarage may be accounted for by the fact of the rectory having been conveyed to a monastery prior to the statutes 15 Rich. 2, & 4 Hen. 4.—*DENT v. ROB* (1834), 1 Y. & C. Ex. 1; 160 E. R. 1.

*Annotation:—***Mentd.** *Wynniett v. Lindon* (1839), 8 L. J. Ch. 121.

**3860. Ancient parochial chapelry—Nature & origin.]—***DENT v. ROB*, No. 3859, *ante*.

**3861. — Evidence of—Cemetery, communion table, appropriated pews, etc.]—**There is no clear account of what was the nature of this Chapel. It had a public cemetery belonging to it, a Communion Table, pews in right of houses, & there were Christenings there, circumstances which, in addition to the rector's objection to repairing the chapel, on account of a diminution of his Easter dues, strongly show it was a parochial chapel. In the absence of other evidence this must be taken to be a parochial chapel (*PLUMER, V.-C.*).—*Ex p. GREENHOUSE* (1815), 1 Madd. 92; 50 E. R. 36; *affd.* (1821), 1 Bli. N. S. at p. 41, L. C.; *reversd.* on other grounds, *sub nom.* *LUDLOW CORPN. v. GREENHOUSE* (1827), 1 Bli. N. S. 17, H. L.

*Annotations:—***Mentd.** *A.-G. v. Dublin Corp.* (1827), 1 Bli. N. S. 312; *Re* *Upton Warren* (1833), 1 My. & K. 410; *Re* *Dean Clarke's Charity* (1836), 8 Sim. 34; *A.-G. v. Fishmongers' Co.* (1837), Coop. Tr. Cas. 85; *Re* *Phillipotts' Charity* (1837), 8 Sim. 381; *Re* *West Retford Church Lands* (1839), 10 Sim. 101; *A.-G. v. Stamford* (1841), 10 L. J. Ch. 172; *A.-G. v. Haberdashers' Co.* (1852), 15 Beav. 397; *Re* *Harden Wesleyan Chapel* (1853), 1 W. R. 212; *A.-G. v. Magdalen College, Oxford* (1854), 18 Beav. 223.

**3862. — What evidence is admissible.]—***CARR v. MOSTYN*, No. 1860, *ante*.

**Ministers of public chapels.]—***See* Part V., Sect. 12, sub-sect. 5, *ante*.

**C. Private Chapels.**

**3863. Right of public to enter.]—**No person can intrude into a private chapel against the will of the owner in the absence of such a dedication as would give the public a legal right to go there.

The building in question is a private chapel belonging to the trustees of the L. hospital. It has never been consecrated, though the trustees allowed the public to worship there from time to time, & there has been no dedication of the chapel, so as to give the public any legal right to go there. That being so, *pltf.* has no right to enter the chapel after she has been warned not to do so (*SWINFEN EADY, L.J.*).—*HANCOCK v. STEPHENS* (1915), 31 T. L. R. 434, C. A.

**3864. Attached to mansion house—Faculty for—Form.]—***KILMOREY (VISCOUNT) v. CORBETT* (1834), Return of Appeals before the High Court of Delegates No. 35 (Parliamentary Papers 199, April 3, 1868).

**3865. — Mansion house pulled down & rebuilt elsewhere—Rights of incumbent of parish.]—**A chapel which originally was part of the fabric of a mansion house, but which became a separate building owing to the mansion house being pulled down & rebuilt on a different site, had Divine service & baptisms of the children of the owners of the mansion house performed in it by the vicar of the parish. In an action by the vicar for a

declaration that he & his successors was & were entitled to the possession & control of the chapel & to perform Divine Service & celebrate the Sacraments in the chapel according to the rights of the Church of England:—*Held*: that the chapel was not a consecrated public building, & had never been more than a domestic oratory.—*NEVILL v. STUDDY* (1906), 94 L. T. 391; 22 T. L. R. 340.

**3866. Chapel of ancient almshouse—Strangers not admitted.—Whether private house within Canon LXXI.**—Sackville College had attached to it a building called The Chapel, which did not appear to have been consecrated, & in which the warden, a clergyman, read prayers, & performed other divine offices, according to the forms prescribed in the Book of Common Prayer, & the rites & ceremonies of the United Church of England & Ireland, without the licence, & subsequently, contrary to the inhibition of the bishop of the diocese. The inmates of the college attended, & sometimes their friends, but strangers were not allowed to be present at the services:—*Held*: (1) such chapel was not a private house; (2) officiating there was a public officiating; & (3) the warden had committed an ecclesiastical offence, for which he was liable to ecclesiastical censure.—*FREELAND v. NEALE* (1818), 1 Rob. Eccl. 613; 6 Notes of Cases, 252; 11 L. T. O. S. 535; 12 Jur. 635.

*Annotations*:—*As to* (1) *Apld.* Nesbitt v. Wallace, [1901] P. 354. *As to* (3) *Foll.* Nesbitt v. Wallace, [1901] P. 354. *Generally, Rejd.* Down, Connor & Dromore, Bp. v. Miller, Same v. Potter (1861), 5 L. T. 30; Taylor v. Timson (1888), 20 Q. B. D. 671.

*Compare* No. 3876, *post*.

**3867. — Rectory Improprate to almshouse Chapel used as parish church—Whether almshouse & parish united.**—(1) By a deed of 1446 a rectory was granted as part of an endowment for an almshouse within the precinct of a hospital, already endowed & having a chapel attached to it, reserving to the grantor a right, which was never exercised, of instituting a perpetual vicar of the rectory. By a private Act of 18 Elizabeth it was enacted, that the master of the hospital should not *alien* the hospital nor the tithes of the rectory, which was described as adjoining the hospital, but that the church, house & hereditaments belonging to the hospital should be held by the master & brethren thereof for charitable uses. The parish church of the rectory had been pulled down at a time which could not be ascertained, & the parishioners had used the chapel of the hospital, in which the baptisms, marriages & burials of the parishioners had been for a long series of years performed. In a suit to carry into effect the trusts of the hospital a receiver had been appointed. Upon a motion of the churchwarden of the parish, that he might, notwithstanding the appointment of a receiver, be at liberty to perform the duties of churchwarden in the chapel as the church of the parish, or might be examined *pro interesse suo*:—*Held*: a union of the parish with the hospital could not be presumed, & the churchwarden had no right to interfere with the chapel.

(2) A churchwarden, as such, has no authority to perform or provide for the performance of divine service during a vacancy.—*A-G. v. ST. CROSS HOSPITAL* (1856), 8 De G. M. & G. 38; 44 E. R. 303; *sub nom.* *A-G. v. ST. CROSS HOSPITAL, Ex p. HOLLOWAY*, 25 L. J. Ch. 202; 27 L. T. O. S. 4; 2 Jur. N. S. 336; 4 W. R. 310, L. J.

*Annotation*:—*Generally, Mntd.* *A-G. v. Durham* (1852), 46 L. T. 16.

**3868. Chapel of charitable foundation Authority**

of trustee to convey to church building commissioners.]—*A-G. v. MANCHESTER* (BP.), No. 3048, *ante*.

**3869. Chapel of hospital—Public admitted to services—Whether legal right conferred.**—*HANCOCK v. STEPHENS*, No. 3863, *ante*.

**3870. Built for convenience of owner & neighbours—Rights of incumbent of parish.**—*HERBERT v. WESTMINSTER* (DEAN & CHAPTER), No. 1924, *ante*.

**Private chapels & aisles in churches.**—*See* Sect. 3, sub-sect. 10, *ante*.

**3871. Chapel of infirmary—Whether held on trust for general purposes of charity.**—*SUTTON v. BOWDEN*, No. 1737, *ante*.

#### *D. Proprietary Chapels.*

**3872. Whether recognised in ecclesiastical law.**—*MOYSEY v. HILLCOAT*, No. 438, *ante*.

**3873. Rights in—Chapel built by lessee on land of lessor—Lessor not object[ing].**—A person's building a chapel on lands of which he had a lease, & the owner standing by & seeing it built, without obstructing it, does not give the former a right to the chapel, or to nominate.—*A-G. v. FOLEY* (LORD) (1753), 1 Dick. 363; 21 E. R. 310.

**3874. — Licensed chapel—Proprietor—Right to restrain admission of public.**—*BOSANQUET v. HEATH*, No. 3875, *post*.

**3875. — Churchwardens of parish.**—The owner of a private chapel, which is licensed by the bishop for the celebration of divine service according to the rites of the Church of England, may admit only those persons whom he pleases, & when admitted may order them to depart or expel them at discretion in a legal way. The churchwarden of the parish, in which the chapel is situated, has no more right to enter than any other person. *BOSANQUET v. HEATH*, *HEATH v. BOSANQUET* (1860), 3 L. T. 290; 25 J. P. 20; 9 W. R. 35. *Annotation*:—*Foll.* Hancock v. Stephens (1915), 31 T. L. R. 431.

**3876. Whether "private house" within Canon LXXI Strangers admitted to services.**—(1) Articles against an ordained minister of the Church of England for officiating in an unconsecrated chapel after the revocation of his licence by the bishop sustained.

(2) An allegation responsive to the articles pleading he had prior to the service of the citation seceded from the Established Church, & had taken certain oaths, etc. prescribed by the Toleration Acts, rejected, on the ground that those Acts do not apply to a minister of the Established Church, & that one in Holy Orders cannot divest himself of such Orders.

(3) An unconsecrated proprietary chapel, into which strangers are admitted, is not a "private house" or "chapel," within the meaning of Canon LXXI; consequently to read the Service of the Church in such a building is publicly to read, etc.

(4) To found a sentence under the general Ecclesiastical law, it is not necessary that all the offences charged be proved.—*BARNES v. SHORR* (1846), 1 Rob. Eccl. 382; Brod. & F. 44; 4 Notes of Cases, 593; 10 Jur. 887; *affd. sub nom.* *SHORR v. BARNES* (1818), Brod. & F. 49, P. C.

*Annotations*:—*As to* (2) *Rejd.* Lang v. Purves (1862), 15 Mo. P. C. C. 389. *As to* (3) *Foll.* Freeland v. Neale (1818), 6 Notes of Cases, 252; Nesbitt v. Wallace, [1901] P. 351. *Generally, Rejd.* Combe v. Edwards (1878), 3 P. D. 103; Mackenzie v. Penzance (1881), 6 App. Cas. 421.

*Compare* No. 3866, *ante*.

**Ministers of proprietary chapels.**—*See* Part V., Sect. 12, sub-sect. 6, *ante*.

**Sect. 15.—Chapels, mission rooms, Sunday schools and other buildings: Sub-sect. 2. Sect. 16: Sub-sects. 1 & 2, A., B. & C.]**

**SUB-SECT. 2.—MISSION ROOMS, SUNDAY SCHOOLS AND OTHER BUILDINGS.**

**3877. Disused school—Disposal of.]—**A building held on trust to carry on a Church of England school was closed in 1882, there being no need for such a school in the parish:—*Held*: on action brought for administration of the trusts, that an inquiry whether the building could be used for the purpose of a Church of England school should be directed & that, if upon inquiry it was found that it was not practicable to so use the building, then a scheme should be settled to carry out the trusts *cy-près*. Such a scheme might properly provide for the letting of the building for a limited period to the local education authority for use for educational purposes.—*A.-G. v. EDALJI* (1907), 97 L. T. 292; 71 J. P. 549; 5 L. G. R. 1085.  
*Annotation*:—*Reid*, A.-G. v. Shadwell, [1910] 1 Ch. 92.

**Assembly hall certified for public worship—Liability for rates.]—**See **RATES & RATING**.

## SECT. 16. ECCLESIASTICAL PERSONS AND CORPORATIONS AS OWNERS OF PROPERTY.

### SUB-SECT. 1.—IN GENERAL.

**3878. Spiritual corporation aggregate—Lease in former name—Whether valid.]—***HAYWARD v. FULCHER* (1628), Palm. 491; W. Jo. 166; 81 E. R. 1186.

*Annotation*:—*Reid*, R. v. London Corp'n. (1690), 12 Mod. Rep. 17.

**3879. — Lease omitting part of corporate name—Whether valid—In pleading lease from.]—***EDGAR & WEIR v. SORRELL*, No. 304, *ante*.

See, generally, **CORPORATIONS**, Vol. XIII., pp. 281 *et seq.*

**— Dean & Chapter—Power of chapter while deanery vacant.]—**See No. 3629, *ante*; **CORPORATIONS**, Vol. XIII., p. 272, No. 12.

**— Vicars choral.]—**See No. 350, *ante*.

**3880. — Whether rector & churchwardens are.]—**Notice to quit to a tenant of lands originally devised to the rector & churchwardens of a parish, & their successors in trust, signed by the rector & churchwardens, requiring him to deliver up the premises to the rector & churchwardens for the time being, is ill.

*Arguendo*, there are no such persons as the rector & churchwardens known to the law as a continuing body, like a body corporate; & so deft. could not know to whom he was to deliver possession.—*DOE d. BROOKS v. FAIRCLOUGH* (1817), 6 M. & S. 40; 105 E. R. 1157.

**— Whether churchwardens are.]—**See **CORPORATIONS**, Vol. XIII., pp. 272, 273, Nos. 13–22.

**Corporation sole—Who are.]—**See **CORPORATIONS**, Vol. XIII., pp. 275, 276, Nos. 48–54, 58–62.

**3881. — Rector.]—***POWER v. BANKS*, No. 3553, *ante*.

**Dissolution.]—**See **CORPORATIONS**, Vol. XIII., p. 434, Nos. 1501, 1500.

**Local clerical society—Gift to—Whether valid.]—**See **CHARITIES**, Vol. VIII., p. 254, No. 160.

### PART VII. SECT. 16, SUB-SECT. 2.—A.

**1. What property vests—Estate of suspended canonry.]—**The parish of K. was appropriated to the deanery & chapter of the cathedral, which consisted of a dean, precentor, chancellor, treasurer, & four canons. The cathedral church was the parish church of K., & divine service had been

from time immemorial regularly performed in the cathedral, & the observance & offices of religion had been performed by the members of the corp'n. or by a stipendiary curate, or one of the canons, without the licence of the bishop, & paid out of the corporate funds. There never had been a vicar of the parish. The dean &

chapter were seized of lands in & of the tithes of the parish, which formed the funds whereby the fabric of the cathedral church was upheld, & all matters requisite for the performance of divine service had been supplied, & the stipendiary curate & servants of the corp'n. had been paid. The earlier records of the corp'n. had been lost, but

### SUB-SECT. 2.—THE ECCLESIASTICAL COMMISSIONERS.

#### A. Vesting of Property.

**3882. What property vests—Whether rectory annexed to deanery—Lichfield.]—**By a private Act it was enacted that the rectory & church of Tatenhill should be united & annexed to the Deanery of Lichfield for ever, & the Dean of Lichfield then in being, upon application made to the Bishop of Lichfield, should receive institution to the same without presentation, & continue possessed thereof in right of his deanery, so long as he should remain Dean of Lichfield, & no longer; it being the intent of that Act that the Dean of Lichfield & his successors for ever should always be rectors & incumbents of that church, on making such allowance to a curate or curates as the bishop should appoint," etc. By Eccles. Comrs. Act, 1840 (c. 113), s. 50, it was enacted that, "subject to the provisions herein contained, all the estate & interest which the holder of any deanery or canonry not suspended by or under the provisions of this Act, & his successors have & would have in any lands, tithes, & other hereditaments or endowments whatsoever annexed or belonging to or usually held or enjoyed with such deanery or canonry, except any right of patronage, or whereof the rents & profits have been usually taken & enjoyed by the holder of such deanery or canonry as such holder separately & in addition to his share of the corporate revenues of such chapter, shall, without any conveyance or assurance in the law other than the provisions of this Act, accrue to & be vested absolutely in the Ecclesiastical Comrs. for England, & their successors, for the purposes of this Act":—*Held*: the general provisions in the above sect. did not repeal the particular provision in the private Act, for annexing the rectory of Tatenhill to the Deanery of Lichfield, so as to re-vest the patronage of the rectory in the Crown, & vest the emoluments thereof in the Ecclesiastical Comrs. for the purposes of the Act.—*R. v. CHAMPNEYS* (1871), L. R. 6 C. P. 384; 40 L. J. C. P. 95; 24 L. T. 181; 36 J. P. 56; 19 W. R. 380.

**3883. — Whether rights under insurance policy—Property vested under Order in Council—No assignment of policy.]—****ECCLESIASTICAL COMRS. FOR ENGLAND v. ROYAL EXCHANGE ASSURANCE CORPN.** (1895), 11 T. L. R. 476; 30 Sol. Jo. 623.

**3884. — Property belonging to bishops in right of his see—Property granted by bishop to canon for life.]—***Re WILTS, SOMERSET & WEYMOUTH RAILWAY ACT*, [1899] 2 Ch. 143, n.

*Annotation*:—*Consd. Re Bath & Wells' (Lord Bp.) S. E.* (1899), 15 T. L. R. 421.

**3885. For what estate—Estate of former owner—Liability to charges.]—**A stipend of £100 had been paid by the Bishop of Durham to the Chancellor of the Palatinate on each of the occasions of his holding a ct.:—*Held*: the Ecclesiastical Comrs. were bound to continue the payment.

*Semble*: all sums paid into the hands of the Ecclesiastical Comrs. under Durham County Palatine Act, 1836 (c. 19), & Ecclesiastical Commissioners' Act, 1836 (c. 77), continue subject to the same fees & stipends in respect of any office

as the same were subject to before the passing of the Acts.—**TEMPLE v. ECCLESIASTICAL COMRS.** (1863), 3 De G. M. & G. 418; 23 L. J. Ch. 673; 22 L. T. O. S. 149; 18 Jur. 45; 2 W. R. 112; 43 E. R. 164, L. C.

**3886. — Suppressed canonries—Wind-**  
**sor.]**—The Ecclesiastical Comrs. were entitled to no greater rights in the suppressed canonries [of St. George's Windsor], under Ecclesiastical Comrs. Act, 1840 (c. 113), than the former canons were, & are subject to the same trusts.—*A.-G. v. WINDSOR (DEAN & CANONS)* (1858), 24 Beav. 679; 27 L. J. Ch. 320; 32 L. T. O. S. 55; 22 J. P. 592; 4 Jur. N. S. 818; 6 W. R. 220; 53 E. R. 520; *affd.* (1860), 8 H. L. Cas. 309, H. L.

**Annotations** :—**Reid**, A.-G. v. Marchant (1866), L. R. 3 Eq. 424; A.-G. v. Wax Chandlers' Co. (1873), L. R. 6 H. L. 1; **Re** Camden Charities (1881), 18 Ch. D. 310. **Mentd.** I. R. Comrs. v. Walker, [1915] A. C. 509; Ushers' Wiltshire Brewery v. Bruce, [1915] A. C. 423; Consett Industrial & Provident Soc. v. Consett Iron Co., [1922] 2 Ch. 135.

**3887. ——— Right to convey with benefit of easements.]**—Where a building in which there were ancient lights has been pulled down, the easement is only suspended if it is not abandoned, & the ct., if satisfied that the owner will re-build, will grant an injunction against a substantial interference with the easement. The Ecclesiastical Comrs. having a church vested in them for the purpose of being pulled down, & the site sold, are entitled to an injunction against interference with the ancient lights of the church.—**ECCLESIASTICAL COMRS. FOR ENGLAND v. KING** (1880), 14 Ch. D. 213; 49 L. J. Ch. 520; 42 L. T. 201; 28 W. R. 514, C. A.

**Annotations.** — **Consol. Re Eccl. Comrs. & New City of London**  
Brewery Co.'s Contract, [1895] 1 Ch. 702. **Reid.** Scott v.  
Pape (1886), 31 Ch. D. 554. **Ment.** Parker v. First  
Avenue Hotel Co. (1883), 24 Ch. D. 282; Colls v. Home  
& Colonial Stores, [1904] A. C. 179; Andrews v. Waite,  
[1907] 2 Ch. 500; Hyman v. Van Den Bergh (1907), 77  
L. J. Ch. 154; Griffith v. Clay, [1912] 2 Ch. 291.

**3888. — Chapel conveyed by trustee in breach of trust.]— A. G. v. MANCHESTER (Br.), No. 3048, ante.**

**3889. — Property in adverse possession.—**  
**Limitation of action for recovery.—How statutory**  
**period calculated.]—**An allotment under an In-  
 closure Act, described as 137 A, was made in  
 respect of premises held by a person under lease  
 from a dean, the property leased being that of the  
 dean in right of his deanery. By Real Property  
 Limitation Act, 1833 (c. 27), s. 29, a dean could  
 recover possession of such land within the term of  
 sixty years from the time when the right of action  
 first accrued. By Ecclesiastical Commissioners  
 Act, 1840 (c. 113), deanery lands, after the death  
 of any dean then in possession, passed to the  
 Ecclesiastical Comrs.; & sect. 57 of that statute  
 declared that "the Ecclesiastical Comrs. shall for  
 the purpose of enforcing payment of all profits &  
 emoluments to be paid to them, & of obtaining  
 possession of all lands, tithes, or other heredita-  
 ments vested in or accruing to them as aforesaid,  
 & of recovering the rents & profits thereof, have &  
 enjoy all rights, powers, & remedies at Law & in  
 Equity which belonged to the holder of the deanery,  
 etc., in respect of which such profits, etc., re-  
 spectively are, by this Act, to be paid or accrue  
 to & be vested in the comrs." Renewals of the  
 original leases had been made, but the allotment  
 137 A was never referred to in them. It had been

it appeared that for 200 years the surplus revenues had been divided among the eight members of the corpn. in particular proportionate shares :—  
Held: the Lord Lieutenant & Privy Council had jurisdiction to order a

suspension of the canonries under the Church Temporalities Acts, & the share of the revenues which the canons had received from time immemorial in common with the rest of the chapter was emolument belonging & appertain-

in 1821 purchased from the representatives of the original allottee, the title of the dean to it had never been asserted, & it was, in that way, held adversely to him. The dean died in 1854, & the comrs. then came into possession, under the statute, of the property of the deanery. In 1877 the comrs. brought an action to recover the allotment:—*Held*: under sect. 57 the comrs. had the same time within which to enforce their claim to the property that the dean would have had under Real Property Limitation Act, 1833 (c. 27), s. 29. There is a legal continuity between the rights, powers, & remedies of the dean, & those of the comrs. His right of action was transferred to them by the statute, & was not barred by the mere fact of the transfer.—*ECCLESIASTICAL COMRS. OF ENGLAND & WALES v. ROWE* (1880), 5 App. Cas. 736; 49 L. J. Q. B. 771; 43 L. T. 353; 45 J. P. 36; 29 W. R. 159, H. 1.

**Annotations:—Consd.** Irish Land Commission v. Grant (1884), 10 App. Cas. 14. **Expld.** Ecol. Comrs. for England v. Treemon, [1893] 1 Ch. 166. **Consd.** East Stonchouse U. C. v. Willoughby, [1902] 2 K. B. 318.

**3890. — Property subject to charge—Whether charge attaches to purchase-money on sale.**—*Re ALMS CORN CHARITY, CHARITY COMRS. v. BODE, No. 3433, ante.*

### ***B. Management of Property.***

**Renewable leaseholds held in trust—Power of trustees under Ecclesiastical Commissioners Act, 1860 (c. 124).—See TRUSTS & TRUSTEES; SETTLEMENTS.**

**Application of revenues.]—***See Ecclesiastical Commissioners Measure, 1921 (No. 2).*

### C. Powers and Duties.

**3891. Closing footpaths in churchyards—Whether order subject to appeal.**—(Church Building Act, 1810 (c. 134), s. 39, empowers the comrs. to order the stopping up of footways, which appear to them unnecessary, in churchyards, provided the same be done with the consent of two justices, & on notice being given in the manner & form prescribed by 55 Geo. 3, c. 68. Schedule (A) of that statute gives a form of notice of an order for stopping up a useless road; & the form states that such order will be enrolled at sessions, unless upon an appeal against the same to be then made, it be otherwise determined. Sect. 3 of the same Act empowers any party aggrieved by such order to appeal to the sessions, upon giving ten days' notice to the surveyor of the highways:—*Held*: (1) sect. 39 of the former Act, though incorporating the form of notice annexed to 55 Geo. 3, c. 68, did not thereby give an appeal against an order of the comrs. for stopping a footway; for an appeal cannot be given by implication only; (2) if such power had been given by reference to 55 Geo. 3, c. 68, the repeal of that statute would not have taken it away.—*R. v. Stock* (1838), 8 Ad. & El. 405; 3 Nev. & P. K. B. 420; 1 Will. Woll. & H. 394; 7 L. J. M. C. 93; 112 E. R. 892.

*Annotations*.—As to (1) **Reid**. R. v. Arkwright (1848), 12 Q. B. 960. Generally, **Mentd.** R. v. Surrey J.J. (1869), 18 W. R. 166.

**3892.** — — — — —.]—An appeal to the sessions is never given except by express words, & therefore, the sessions have no jurisdiction to quash an order made by the Church Comrs. under (Church Building Act, 1819 (c. 134), s. 39, which

ing to the suspended canonries, & as such vested in the Ecclesiastical Commr. under these Acts.—**ECCLESIASTICAL COMMRS. v. KILDARE (DEAN & CHAPTER)** (1858), 7 I. Ch. R. 144; *affd.* (1858), 8 I. Ch. R. 93.—**IR.**

*Sect. 16.—Ecclesiastical persons and corporations as owners of property: Sub-sect. 2, C. & D.; sub-sect. 3. Part VIII. Sect. 1.]*

provides that the comrs. may alter & repair, etc., fences of churchyards & turn footpaths, etc.—*R. v. WARWICKSHIRE JJ.* (1838), 2 Jur. 543.

**3893. — Statutory notice—Time for giving.]—**The notice which by Church Building Act, 1819 (c. 134), is directed to be given after any path in a churchyard has been stopped up by order of the Church Building Comrs., must notwithstanding be given before the order, & if not given until afterwards, the order will be bad.—*R. v. ARKWRIGHT* (1848), 12 Q. B. 960; *Cripps' Church Cas.* 180; 3 New Mag. Cas. 74; 18 L. J. Q. B. 26; 12 L. T. O. S. 271; 13 J. P. 4; 13 Jur. 300; 116 E. R. 1130.

*Annotations:—Refd. R. v. Salford Overseers* (1852), 19 L. T. O. S. 165; *Colonial Bank of Australasia v. Willan* (1874), L. R. 5 P. C. 417; *Scott v. Scott*, [1921] P. 107.

**3894. Land purchased for site for parsonage—Power to sell—When site no longer required.]—**ECCLESIASTICAL COMRS. *TO KING*, No. 3528, *ante*.

**3895. Glebe—Restraint of illegal working of mines.]—**ECCLESIASTICAL COMRS. *v. WODEHOUSE*, No. 3710, *ante*.

**3896. Property agreed to be sold—To enforce payment of purchase-money.]—**ECCLESIASTICAL COMRS. *v. PINNEY*, No. 3558, *ante*.

**3897. Allotment of pews—Insufficient allotment—Time for interference by court.]—**Where the Church Building Comrs. have built a chapel under an Act of Parliament which directs them to allot certain convenient pews to certain parties, if the allotments made by them are insufficient, this ct. can only interfere at the time, & not after a lapse of years.—*R. v. BUILDING CHURCHES COMRS.* (1844), 3 L. T. O. S. 101; 8 J. P. Jo. 310.

**3898. Whether ordinary can disturb.]—**The seats in a new parish church were in 1885 allotted by the Ecclesiastical Comrs. as follows: two pews for the vicar of the parish & his family, 315 sittings to be let to pew renters, 222 sittings as free seats, & 72 sittings as seats for children, in the expectation that the population of the parish would in the main be composed of working men. This expectation was not realised, & in 1898 the vicar & churchwardens of the parish applied to the ordinary to authorise by faculty the substitution of pews for adults in the place of the 72 sittings allotted as children's seats, & the letting of the substituted pews at pew-rents to be expended in church improvements & expenses.—*Held*: the ordinary had no jurisdiction to grant a faculty appropriating to other purposes seats allotted by the Ecclesiastical Comrs. as free seats or authorising the letting of any seats to pew renters, but a faculty might be decreed in his discretion for the substitution of pews for adults in which the churchwardens might seat parishioners in the place of the 72 sittings for children, the allotment of such sittings having been made by the Ecclesiastical Comrs. without statutory authority.—*ST. SAVIOUR, WESTGATE-ON-SEA* (VICAR) *v. ST. SAVIOUR, WESTGATE-ON-SEA* (PARISHIONERS), [1898] P. 217.

**3899. On compulsory sale of property—Application of proceeds.]—**A piece of land having been in

1846, under the authority of Church Building Acts then in force, voluntarily granted in fee to the Church Building Comrs. for ecclesiastical purposes, a church was built thereon. The whole of the land was inclosed, & in 1849 the church was consecrated. So much of the land as was not actually occupied by the church was not consecrated. In 1891 the London County Council, under their statutory powers, purchased part of the unconsecrated inclosure, & the purchase-money was paid into ct. under Lands Clauses Consolidation Act, 1845 (c. 18). The purchased land was afterwards conveyed by the vicar to the county council. Upon a summons by the vicar for payment out:—*Held*: (1) notwithstanding the consecration, the Ecclesiastical Comrs., as the successors of the Church Building Comrs. had power, under Church Building Act, 1840 (c. 134), s. 19, with the consent of the original donor of the land, to direct that the purchase-money should be applied to any of the purposes mentioned in that section; (2) the payment of part of the principal money remaining due upon a mtge. to the Governors of Queen Anne's Bounty of the glebe, profits, & emoluments of the vicarage, made by a former vicar to secure the repayment of a loan made to him by the governors for the purchase of a vicarage house, was an ecclesiastical purpose within the meaning of sect. 19.—*Ex p. LONDON COUNTY COUNCIL, Ex p. CHRIST CHURCH, EAST GREENWICH* (VICAR), [1896] 1 Ch. 520; 65 L. J. Ch. 331; 74 L. T. 18; 44 W. R. 520.

**Payment to commissioners.]—***See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 267, No. 1891.

**Costs of commissioners—On petition of reinvestment.]—***See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 263, No. 1808.

**3900. Compensation for interference with light—Payment to commissioners.]—**CHRIST CHURCH, NEWGATE STREET (1909), *Times*, Nov. 27.

**Liability for paving expenses.]—***See HIGHWAYS; METROPOLIS.*

**Whether subject to Metropolis Management Acts—Building line of new church.]—***See HIGHWAYS; METROPOLIS.*

*D. Actions and Proceedings by and against.*

**3901. Whether necessary parties to action—Enforcement of charge on glebe—By application for sale.]—**SCOTTISH WIDOWS' FUND *v. CRAIG*, No. 3557, *ante*.

*See, generally, PRACTICE.*

**3902. Discovery against—Commissioners appearing as third parties—To defend performance of duties.]—**MACALLISTER *v. ROCHESTER* (BP.), No. 395, *ante*.

*See, generally, DISCOVERY*, Vol. XVIII., pp. 42 *et seq.*

**Right to enforce payment of purchase-money—Of property contracted to be sold.]—***See* No. 3558, *ante*.

SUB-SECT. 3.—LAY RECTORS.

*See* Part III., Sect. 7, sub-sect. 3, *ante*.

## Part VIII.—Religious Bodies other than the Church of England.

### SECT. 1.—PERSONS PROFESSING NON-ANGLICAN OPINIONS GENERALLY.

**3903. Dissenters—Whether confined to protestant dissenters—Construction of will.**—*A.-G. v. HICKMAN* (1732), Kel. W. 34; 2 Eq. Cas. Abr. 193; 25 E. R. 482, L. C.

*Annotations*:—*Reid*. *White v. White* (1778), 1 Bro. C. C. 12; *West v. Shuttleworth* (1835), 2 My. & K. 684. *Mentd.* *A.-G. v. Downing* (1767), Wilk. 1; *Moggridge v. Thackwell* (1803), 7 Ves. 36.

**3904. — Position at common law.**—Non-conformity is no sin at common law (*LORD MANSFIELD, C.J.*).—*HARRISON v. EVANS* (1767), 3 Bro. Parl. Cas. 465; 1 E. R. 1437; *sub nom. EVANS v. LONDON CHAMBERLAIN*, 2 Burn's Eccl. Law, 9th ed. 207, H. L.

*Annotations*:—*Consd.* *Kemp v. Wickes* (1809), 3 Phillim. 264. *Reid*. *Atcheson v. Everitt* (1776), 1 Cowp. 382; *Howman v. Secular Soc.*, [1917] A. C. 406; *Bourne v. Keane*, [1919] A. C. 815. *Mentd.* *A.-G. v. Bradlaugh* (1885), 14 Q. B. D. 667.

**3905. — Evidence of dissent—Whether formal act of separation necessary.**—*BARNES v. SHORE*, No. 1836, *ante*.

**3906. — In Holy Orders of the Church of England—Whether exempt from canonical obedience.**—*BARNES v. SHORE*, No. 1836, *ante*.

**3907. — Whether infant can be—Forfeiture of legacy for being of particular religion.**—*Testatrix* bequeathed a sum of money to the trustees of her will upon trust to pay the income after her nephew should have attained the age of 21 years to him during his life, provided that he should not be a Roman Catholic at her death or being a Roman Catholic at her death should cease to be a Roman Catholic before the expiration of a year after her death. The nephew was an infant at the date of the will, & a year & a half afterwards, when the testatrix died, was nine years of age. He had been baptised in the Roman Catholic Church, & brought up by his father as a Roman Catholic. The testatrix died on July 3, 1915: *Held*: the nephew had not forfeited the legacy by being baptised in the Roman Catholic Church, as the intention of the testatrix was that there was to be a choice on the part of the legatee, & he could not exercise that choice & determine what his religion should be until he reached years of discretion. *Seemle*: an infant is not capable of being a Roman Catholic or not a Roman Catholic in the eye of the ct.—*Re MAY, EGGAR v. MAY*, [1917] 2 Ch. 126; 86 L. J. Ch. 698; 117 L. T. 101; 33 T. L. R. 419; 61 Sol. Jo. 577.

**3908. Formation of synod—Subsequent secession—Right to property of seceding body.**—Certain persons in Sydney, New South Wales, built a church & formed themselves into a congregation under the pastoral care of L., a Presbyterian clergyman ordained in Scotland. They drew up rules whereby they followed the doctrines & mode of worship of the Established Church of Scotland. When several similar congregations arose, the various ministers formed themselves into a synod after the manner of the church in Scotland. L., having disagreed with the other ministers, renounced all connection with them, & afterwards the synod professed to cite him before them & deposed him, & then applied to a ct. of equity to order possession to be delivered up of the church, & to restrain L. & his congregation from using it. The synod sued on their own behalf & on behalf

of the congregation, but the congregation declined to join in the suit:—*Held*: plffs. had no title to sue, & even if they had they were barred by acquiescence for thirteen years from following out their sentence.—*LANG v. PURVES* (1862), 15 Moo. P. C. C. 389; 5 L. T. 809; 8 Jur. N. S. 523; 10 W. R. 408; 15 E. R. 511, P. C.

**3909. Proper parochial church, chapel or other place of religious worship—Whether proper place of worship lying in another parish included.**—Where a Turnpike Act exempted persons from toll in going to & returning from their proper parochial church, chapel, or other place of religious worship on Sundays:—*Held*: the word "parochial" extended over the whole clause; & a dissenter was not within the exemption in going to & returning from his proper place of religious worship, situate out of the parish in which he resided.—*LEWIS v. HAMMOND* (1818), 2 B. & Ald. 206; 106 E. R. 342.

**3910. Usual place of worship—Whether chapel in minister's circuit included.**—Where a nonconformist minister, in obedience to the rules of his connection, travelled to various parishes during a certain season, to preach on certain days in each, & passed through toll gates:—*Held*: he was entitled to exemption from toll under Turnpike Roads Act, 1832 (c. 126), s. 32, as going to his usual place of worship.—*SMITH v. BARNETT* (1870), L. R. 6 Q. B. 31; 40 L. J. M. C. 15; 23 L. T. 716; 31 J. P. Jo. 803.

**3911. Universities Tests Act, 1871 (c. 26) — Application—College founded after Act.**—By the Hertford College Act, 1874, Magdalen Hall in the University of Oxford was dissolved, Hertford College created, & the property of Magdalen Hall transferred to Hertford College. An endowment for a lay fellowship restricted to members of certain specified churches was afterwards accepted by Hertford College. T., who was not a member of any of the specified churches, tendered himself for examination as a candidate, & was informed that he might be examined if he desired it, but he must understand that he would not be elected even if he stood at the head of the list. T. did not present himself for examination, & M., a duly qualified candidate, was elected after examination to the fellowship. After the election T. applied to the Q. B. Div. for a *mandamus*:—*Held*: (1) there was no refusal to examine T.; (2) assuming that T. was refused examination, the office being full of a candidate properly qualified, a *mandamus* would not lie commanding the college to examine T. & to proceed to an election, & T.'s remedy, if any, was by way of appeal to the visitor.

(3) The operation of the Universities Tests Act, 1871 (c. 26), is confined to colleges subsisting before it was passed, & the Act does not prevent the creation in the universities of fresh colleges, the endowments of which are confined to the members of a particular religious community.

(4) The Universities Tests Act, 1871, is not incorporated with the Hertford College Act, 1874, & sect. 13 of the latter Act, which provides that nothing in this Act contained shall be construed to repeal any of the provisions of the Universities Tests Act, 1871, does not render Hertford College a "subsisting college" within the meaning of the former statute.—*R. v. HERTFORD COLLEGE* (1878),

*Sect. 2.—Roman Catholics: Sub-sects. 1. & 2. Sect. 3: Sub-sect. 1.]*

**Gifts for education in & propagation of Roman Catholic doctrine.]—See CHARITIES, Vol. VIII., p. 252.**

**—Circulation of treatise.]—See CHARITIES, Vol. VIII., p. 205, No. 208.**

**Gifts for Roman Catholic monastic orders or societies.]—See CHARITIES, Vol. VIII., pp. 250–252, 296, Nos. 100, 120, 252, 735.**

**Gifts for benefit or support of Roman Catholic priests.]—See CHARITIES, Vol. VIII., pp. 250, 305, Nos. 104, 105, 843.**

**Gifts void as superstitious uses—Gifts for masses, prayers & obits.]—See CHARITIES, Vol. VIII., pp. 250, 251.**

**3923. Effect of subsequent conformity.]—Pltf., whilst a papist, assigned an advowson to deft. for 99 years &, having conformed, brought a bill for a reassignment of the term, suggesting he had only assigned it in trust for himself, & to avoid the penalties of 3 Jac. 1, c. 4, & 1 Will. & Mar. c. 26, which vest the presentation of livings in the gift of papists in the two universities.**

**Benefices Act, 1713 (c. 13), does not in the case of a papist make the whole trust void, but only the turn upon an avoidance which is vested in the universities (Lord HARDWICKE, C.).**

**Papists, on their conformity, are freed from any penalties they might otherwise sustain in respect of their recusancy (Lord HARDWICKE, C.).—COTTINGTON v. FLETCHER (1711), 2 Atk. 155; 26 E. R. 408, L. C.**

**Annotations. Mentd. Whitechurch v. Bevis (1789), 2 Bro. C. C. 559; Muckleston v. Brown (1801), 6 Ves. 52; Podmore v. Gunning (1836), 5 L. J. Ch. 266; Childers v. Childers (1857), 3 K. & J. 310; Gascoigne v. Gascoigne, [1918] 1 K. B. 223.**

*See, also, No. 3924, post.*

#### SUB-SECT. 2.—AS PATRONS OF ADVOWSONS.

**3924. Operation of 3 Jac. 1, c. 5—How far retrospective.]—By above Act "Every person that shall be a popish recusant convict, during the time that he shall be or remain a recusant, shall be disabled from the beginning of the present session of Parliament to grant any avoidance, etc."; & afterwards by the Act it was enacted, that the chancellor & scholars of the University of Oxford should have the presentation, etc. A. was indicted of recusancy & afterwards such proceedings were had, that A. became a popish recusant convict. Before conviction, but after indictment, A. granted the next avoidance of the church of D. appendant to the manor of D. of which A. was seised in fee: the church being void, the grantee presented & the presentee was admitted & instituted, etc. Upon *quare impedit* by the chancellor, masters & scholars of the University of Oxford, in which the Act was pleaded as if the Act had given the presentation to the chancellor, master & scholars, & upon plea by the grantee of**

**A. & demurrer to it:—Held: (1) The Act had a retrospective operation, & disabled the recusant to make the grant from the beginning of the session of Parliament, during the time of his recusancy; (2) fraud shall not be presumed, but must be expressly averred; (3) misnomer of a corpn., in an Act of Parliament, when the express intention appears, shall not avoid the Act; (4) if plffs. in the *quare impedit* had omitted to aver that A. at the time of the avoidance was a recusant convict, the declaration would have been bad; but plffs. need not aver that he yet continues & remains a recusant, for the presentation being vested in the university, subsequent conformity shall not divest it.—OXFORD UNIVERSITY (CHANCELLOR, MASTERS & SCHOLARS) CASE (1613), 10 Co. Rep. 53 b; 77 E. R. 1006.**

**Annotations.—As to (1) *Refd.* Needler v. Winchester, Bp. (1615), Hob. 220; Case of Comendams, Woodley v. Exeter, Bp. & Manning (1624), Win. 94. As to (3) *Refd.* Conden v. Clerke (1613), Hob. 29; Crisp v. Pratt (1639), Cro. Car. 549. Generally, *Mentd.* Isaack v. Clark (1615), 2 Bulst. 306; A.-G. v. Andrew (1655), Harl. 23; Manby v. Scott (1663), 1 Sid. 109; Mires v. Solebay (1678), 2 Mod. Rep. 242; Thurston v. Slatford (1700), 1 Salk. 284; Anon. (1704), 2 Salk. 655; R. v. De Haughton (1718), 1 Stra. 83; A.-G. v. Rye Corpn. (1817), 7 Taunt. 546; Balme v. Hutton (1833), 9 Bing. 471; Finch v. Brook (1834), 4 L. J. C. P. 1; Crunch v. White (1835), 1 Bing. N. C. 411; Dalton v. Angus (1881), 6 App. Cas. 740.**

**3925. —Avoidance before conviction of patron as recusant.]—FITZHERBERT v. OXFORD UNIVERSITY (CHANCELLOR & SCHOLARS) & REEVES (1709), 1 Com. 181; 92 E. R. 1018.**

**3926. —Whether university has power or interest.]—3 Jac. c. 5 gives the University of Oxford a power only & not an interest (HOBART, C.J.). DUNCOMBE v. OXFORD UNIVERSITY (1621), Win. 11; 121 E. R. 10.**

**Annotation.—*Refd.* Edwards v. Exeter, Bp. (1839), 5 Bing. N. C. 652.**

**3927. Operation of Benefices Act, 1713 (c. 13).... Assignment by patron to trustee. —COTTINGTON v. FLETCHER, No. 3923, *ante*.**

**3928. —Advowson vested in college.—Right of nomination vested in Roman Catholic.] —BOYER v. NORWICH (Bp.), No. 2313, *ante*.**

**3929. Effect of patron subsequently conforming.] —OXFORD UNIVERSITY (CHANCELLOR, MASTERS & SCHOLARS) CASE, No. 3924, *ante*.**

*See, also, No. 3923, ante.*

**Advowson vested in Roman Catholic & Protestant as co-owners.]—See Nos. 1959, 2183, *ante*.**

### SECT. 3.—PROTESTANT DISSENTERS.

#### SUB-SECT. 1.—IN GENERAL.

**3930. Object & effect of Toleration Act.]—**

**(1) The object of the above Act was only to repeal certain penal laws therein mentioned, leaving the common law as it stood with respect to all common law offences against religion.**

**(2) Where a trust is created for religious worship & it cannot be discovered from the deed creating the trust what was the nature of the**

**n the services & ceremonies. —PILLAI v. BEATLE (1915), 1 L. R. 39 Mad. 1056.—IND.**

**a. Caste.]—The Canon Law knows no distinction of castes amongst Roman Catholics & no convert to Roman Catholicism can claim any special or exclusive rights in the church on account of any supposed superiority of his caste over that of others. —PILLAI v. BEATLE (1915), 1 L. R. 39 Mad. 1056.—IND.**

**d. Committee of headmen to assist vicar.—Authority of.]—The appoint-**

**ment of a committee of headmen or *dhanakarias* in a Roman Catholic Church by the Bishop to assist the vicar in the secular affairs of the church gives the members of such committee no right to close the church or oust the vicar, & still less to appoint a priest not under the discipline of laud obedience to the Church of Rome. —MARIAN PILLAI v. MYLAPORE (Bp.) (1894), 1 L. R. 17 Mad. 447.—IND.**

**e. Right to *par.*.]—Bare possession, without title, of a pew in a Roman Catholic church, justifies the occupier**

**in defending by force the possession against the entry of a person having no title. —BRETT v. MULLARKEY (1873), 1 R. 7 C. L. 120.—IR.**

#### PART VIII. SECT. 3, SUB-SECT. 1.

**1. Baptist church.—Right of public to enter.]—The question whether a member of the public has a right to enter a Baptist church for worship depends on the rules of the church & its trust deed. —LOXU v. RAWLINS (1874), 4 Q. B. 86.—AUS.**

**g. Dutch Reformed Church.—Juris-**



religious worship intended by it, it must be implied from the usage of the congregation. But, if it appears to have been the founder's intention, although not expressed, that a particular doctrine should be preached, it is not in the power of the designed objects of the institution.

(3) The principle of public policy does not extend to the case of dissenters, so as to prevent the ct. from sanctioning the appointment of a minister to a congregation for a limited period, & not for life, provided such be the usage of the members or the provisions of the original trust.

(4) The question of religious belief is irrelevant, except so far as the ct. is called upon to execute the trust; but if defts. make out that no particular mode of belief was intended, still they must show that the meeting-house was for such purposes as the law can sanction.

(5) A clause enabling the trustees to make orders, etc. upon matters relating to the meeting-house is not to be construed as enabling them to convert the objects of the charity as by introducing a new form of worship & new doctrines, etc.

(6) A clause, in case of the desertion or removal of trustees, directing the remaining trustees within a limited time to elect new trustees in place of the trustees so deserting, etc., does not extend to disabla a trustee, so having deserted, etc. from acting again where no successor had, in the meantime, been appointed, nor to the case of a trustee who had left the object of his trust (a congregation of Protestant dissenters), on account of its having been converted, against his approbation, to purposes distinct from the intention of the founder.

(7) The Act 53 Geo. 3. c. 100, extends only to the repeal of the clause in Toleration Act, 1688 (c. 18), & the other statutes therein referred to, but leaves the common law where it was. It was not intended by the legislature, in passing 53 Geo. 3. c. 150, to make any alteration of the common law respecting the objects of that statute.

(8) The ct. is bound to administer trusts for the benefit of Protestant dissenting congregation.

(9) If land or money be properly given for maintaining "the worship of God" without more, the ct. will execute the trust in favour of the established religion. But, if it be clearly expressed that the purpose is that of maintaining dissenting doctrines, so long as they are not contrary to law, the ct. will execute the trust according to the express intention. Where, as in this case, the intention clearly appears *aliunde*, though not expressed in the instrument creating the trust, the ct. will also carry the manifest design of the founder into execution, so far as it is consistent with law.

It is incumbent on persons meaning to create a trust for charitable purposes, to make their intention clear by the deed creating the trust, & if it is not so, the ct. has no other means of carrying it into execution than by collecting the intention from inference & fair presumption. —A-G. v. PEARSON (1817), 3 Mer. 353; 30 E. R. 135, L. C.

*Annotations*: —As to (1) *Reid*. Bowman v. Secular Soc., [1917] A. C. 406; Bourne v. Keane, [1919] A. C. 815. As to (2) *Apprvd*. Shore v. Wilson (1812), 9 Cl. & Fin. 355; *Consid.* A-G. v. Murdoch (1852), 1 De G. M. & G. 86; A-G. v.

*dictum in hersey*.]—A colonial ordinance or statute, in 1843, directed that the general assembly of the Dutch Reformed Church should have the immediate management of charges against the performance of duty & the doctrine or conduct of ministers.

No cases were to be brought before the higher ct. which first ought to have been decided in the inferior etc., unless in the meantime no inferior ct. had been held, & the nature of the case required a speedier settlement; but all this was not to affect the right of the

St. John's Hospital, Bath (1876), 2 Ch. D. 554; Free Church of Scotland (General Assembly) v. Overtoun, Macalister v. Young, [1904] A. C. 515. *Reid*. A-G. v. Etheridge (1862), 32 L. J. Ch. 161; A-G. v. Bunco (1868), L. R. 6 Eq. 563. As to (3) *Reid*. A-G. v. Murdoch (1852), 1 De G. M. & G. 86; Collier v. King (1861), 11 C. B. N. S. 14. As to (5) *Reid*. Milligan v. Mitchell (1837), 3 My. & Cr. 72; A-G. v. Murdoch (1852), 1 De G. M. & G. 86; A-G. v. Anderson (1888), 57 L. J. Ch. 543. As to (7) *Reid*. R. v. Ramsey (1883), 48 Ch. & El. 126. As to (9) *Reid*. West v. Shuttleworth (1835), 2 My. & K. 684; A-G. v. Murdoch (1852), 1 De G. M. & G. 86; Grimsd. (or Macdutyre) v. Grimsd., [1905] A. C. 603.

**3931. Whom term includes.**—(1) Distinction between a trust created for the use of Protestant dissenters generally, & for the use of an existing congregation of Protestant dissenters belonging to a particular minister; in the former case Presbyterians, Baptists & Independents are included; in the latter the terms of the trust open an inquiry into the particular character of the congregation which is the object of the trust.

(2) It is not necessary, in order that the ct. may be enabled to enforce a trust for a certain congregation of dissenters, that the trust should be declared by any deed or writing; the ct. may ascertain, from evidence of usage or otherwise, the particular trusts to which the property is dedicated.

(3) Where trusts of a meeting-house in England are created for the use of a congregation, to be in as strict connection as is practicable with the Established Church of Scotland, no person is entitled to be a minister of the meeting-house whose opinions or acts constitutes a disqualification for the ministry of that Church; & the fact that the meeting-house is locally situated beyond the jurisdiction of that Church is immaterial. In determining the question whether a particular minister was disqualified as a minister of the Established Church of Scotland the ct. considered whether the acts of such minister had brought him within the predicament which, according to the terms of a declaration of the General Assembly of that Church, constituted a dissolution of his connection with it, without determining whether the sentence of a particular presbytery, depriving him of his licence, was or was not conclusive as a disqualification. —A-G. v. Murdoch (1852), 1 De G. M. & G. 86; 21 L. J. Ch. 691; 19 L. T. O. S. 173; 42 E. R. 481, L. J.

*Annotations*: —As to (1) *Reid*. A-G. v. Clapham (1853), 10 Harc. 519; A-G. v. Anderson (1888), 57 L. J. Ch. 543.

**3932. — Whether unitarians.** — DRUMMOND v. A-G., No. 1049, *post*.

— "Protestant dissenters of Presbyterian or Independent denomination." — *Sec* No. 4021, *post*.

**3933. Right to worship peaceably—Enforced by information.**—Information will lie for disturbing a dissenting congregation. —R. v. WILKINSON (1705), 3 Burr. 1683; 97 E. R. 1015.

**3934. — Indictment—Removal by certiorari—Indictment under Toleration Act.**—An indictment found at quarter sessions upon Toleration Act, 1688 (c. 18), for disturbing a dissenting congregation, may be removed into this ct. by *certiorari* before verdict; & upon conviction of several defts. upon such indictment each is liable to the penalty of £20 imposed by that statute. —R. v. HUBE (1791), 5 Term Rep. 512; 101 E. R. 305.

*Annotation*: —*Fold*. R. v. Wadley (1816), 4 M. & S. 508.

higher etc. to take notice of cases even without appeal which concerned the welfare of the Church in general, & came under its jurisdiction. In 1817 the ordinance was altered so as to give the primary jurisdiction in matters of heresy to the arch-bishop.

*Sect. 3.—Protestant Dissenters: Sub-sects. 1 & 2, A. & B. (a) & (b) i.]*

**3935.** ——— **Indictment under Places of Religious Worship Act, 1812 (c. 155), s. 12.**—An indictment found at quarter sessions upon the above sect. for disturbing a religious assembly may be removed into this ct. by *certiorari* before trial.—*R. v. WADLEY* (1816), 4 M. & S. 508; 105 E. R. 922.

*Annotation:—Mentd. Ex p. Napton Overseers* (1856), 20 J. P. 581.

**3936. How far courts will assist—Where doctrines not illegal.**—*DAVIS v. JENKINS*, No. 4029, *post*.

**3937.** ——— **Trust for maintaining dissenting doctrines.**—*A.-G. v. PEARSON*, No. 3930, *ante*.

**3938.** ——— **Benefit of trusts for congregations—Duty of court to administer.**—*A.-G. v. PEARSON*, No. 3930, *ante*.

**3939. Particular Baptists—Fundamental principles of faith.**—(1) It is not a fundamental principle of the faith of Particular Baptists that no person shall be allowed to participate in the Lord's Supper unless & until he has been baptised by immersion after profession of faith.

(2) Although in all essential & fundamental doctrines all churches & congregations of Particular Baptists concur, yet in other matters each church & congregation is separate & distinct, & none are at liberty to dictate to the rest as to any such matters in respect of which they may differ:—*Held*: it is a part of the constitution of each church or congregation of Particular Baptists that they shall be at liberty to regulate their practice of free or strict communion as they think fit; & where it had become the practice of a particular church or congregation to permit free communion, the ct. refused to restrain by injunction the continuance of the practice.

(3) Although the practice of strict communion had been adopted up to a very recent period, yet, the deed of endowment not providing for either strict or free communion:—*Held*: the majority of the full members of the congregation were entitled to alter its practice, & to adopt free communion.—*A.-G. v. GORDON* (1860), 28 Beav. 485; 30 L. J. Ch. 77; 2 L. T. 404; 24 J. P. 356; 7 Jur. N. S. 31; 8 W. R. 514; 51 E. R. 452.

*Annotations:—As to (1) Follid. A.-G. v. Etheridge* (1862), 32 L. J. Ch. 161. *As to (2) Follid. A.-G. v. Etheridge* (1862), 32 L. J. Ch. 161. *Appl. A.-G. v. Aust* (1865), 13 L. T. 235. *As to (3) Follid. A.-G. v. Etheridge* (1862), 32 L. J. Ch. 161. *Generally, Mentd. Camden v. I. R. Comrs.*, [1914] 1 K. R. 611.

**3940.** ——— **The doctrine of strict communion is not an essential doctrine of every Particular Baptist church; it is a matter of order & practice which each church had an inherent right to vary.**—*A.-G. v. ETHERIDGE* (1862), 32 L. J. Ch. 161; 11 W. R. 109; 8 L. T. 14.

**3941. Presbyterian Church of England—Distinguished from Independents.**—*A.-G. v. ANDERSON*, No. 4021, *post*.

**3942.** ——— **Distinguished from Unitarians.**—*A.-G. v. SHORE*, No. 4045, *post*.

**Right to institute proceedings in respect of charity property—In name of Attorney-General.**—*See CHARITIES*, Vol. VIII., p. 395, No. 2186.

**Baptised child of dissenter—Right to burial by minister of Established Church.**—*See BURIAL*, Vol. VII., p. 531, Nos. 113–115.

**SUB-SECT. 2.—MINISTERS.**

**A. In General.**

**3943. Right to title "Reverend."**—*KEET v. SMITH*, No. 1808, *ante*.

**Baptism by—Whether valid.**—*See* Nos. 24, 2985, *ante*.

**Election as churchwarden—Whether qualified.**—*See* No. 645, *ante*.

**B. Appointment.**

**(a) In General.**

**3944. Who may appoint—Whether congregation or heir of last trustee of chapel.**—*DAVIS v. JENKINS*, No. 4029, *post*.

**3945. Who may be appointed—Minister not duly licensed by particular church.**—*MILLIGAN v. MITCHELL*, No. 3947, *post*.

**3946.** ——— **—**—(1) Upon a bill filed by two persons, pew-holders in a chapel, & members of the congregation, & in virtue of certain offices which they held, entitled to be trustees of the chapel, on behalf of themselves, & all other persons interested as such pew-holders & members except depts., against the other persons entitled to be such trustees, & against the person in whom the legal interest in the lease was vested, alleging that the lease of the chapel was held upon an exclusive trust for religious service according to the doctrines & discipline of the Church of Scotland, charging depts. with introducing preachers into the pulpit who were not ministers of the Church of Scotland, & with other acts in violation of the trusts, & praying that depts. might be compelled to perform the trust, the ct. granted the relief prayed, holding, that, upon the evidence in the cause, the alleged trust was sufficiently made out, & that the acts complained of amounted to a breach of trust.

(2) The majority of members of a chapel can only pass rules consistent with the original trusts under which the chapel was constituted & have no power to destroy fundamental principles. Pew-owners may sue on behalf of themselves & other pew-holders.—*MILLIGAN v. MITCHELL* (1837), 3 My. & Cr. 72; 7 L. J. Ch. 37; 1 Jur. 888; 40 E. R. 852.

*Annotation:—Mentd. Free Church of Scotland (General Assembly) v. Overton, Macalister v. Young*, [1904] A. C. 515.

**3947.** ——— **Temporary appointment pending election—Whether person not licensed by particular church.**—Injunction granted upon affidavit, before answer, to restrain depts., trustees of a chapel erected by a Presbyterian congregation for religious worship, according to the usages, discipline, & doctrine of the Church of Scotland, from electing as minister a person not duly licensed by that church; but an injunction to restrain them from allowing persons not so licensed, to officiate, & from preventing persons so licensed & otherwise duly authorised from officiating during the intermediate period prior to such election, was refused. *MILLIGAN v. MITCHELL* (1833), 1 My. & K. 446; 39 E. R. 750.

**3948. Mode of appointment—Where mode uncertain—How ascertained.**—*DAVIS v. JENKINS*, No. 4029, *post*.

**3949.** ——— **By election—Who may vote—Whether non-communicant seat-holders.**—Where persons, who were merely hirers & occupiers of seats or pews in a dissenting meeting-house, which was held in trust for the use of the congregation,

from which an appeal lay to the synod:—*Held*: the jurisdiction in heresy of the general assembly was entirely

taken away by the ordinance of 1847, even though the case could not be tried so speedily before the presbytery,

or no presbytery were in the meantime held.—*MURRAY v. BURGESS* (1867), 16 L. T. 40.—S. AF.

but who did not take the sacrament there, had been excluded from voting at the election of a minister to officiate in the meeting-house, an application for an injunction to restrain the individual so elected from acting as minister, or receiving the emoluments attached to his office, was refused.—*LESLIE v. BIRNIE* (1826), 2 Russ. 114; 38 E. R. 279.

*Annotation* :—*Mentd.* Milligan v. Mitchell (1835), 4 L. J. Ch. 281.

**3950.** ——— **Of majority of congregation—Where no provision in trust deed.**—*A.-G. v. JONES* (1835), Shelford's Mortmain, p. 765, n.

**3951.** ——— **Notice of election—Whether sufficient.**—The trustees of a chapel of dissenters, which, for want of a pastor, had been without a congregation, engaged with a new pastor for a year, at a salary; he gave notice in the papers of opening the chapel, &, on the first day of opening, gave notice to the congregation there, that they should proceed to an election of a pastor after divine service that day, & accordingly took votes. Upon being dispossessed by the trustees after the year, he applied for a *mandamus*, to be restored, alleging that he was elected by the congregation for life. The ct. refused to grant it, on the ground that, supposing there was a competent body to elect, there was not sufficient notice given of the election; &, therefore, they left the party to try his right in an action. To found such an application there must be a probable colour of an election laid before the court. — *R. v. DAGGER LANE CHAPEL TRUSTEES* (1801), 2 Smith, K. B. 20.

**3952.** ——— **Trustees & class leaders of Wesleyan Methodist Chapel—Under provision in trust deed—Though contrary to rules of Methodist conference.**—Several persons subscribed for, & purchased, a house & land, at a town which was one of the places within a particular circuit of the Wesleyan Methodist connection. A chapel was erected, & trusts were declared of the property, vesting the appointment, of preachers in the founder of Methodism, John Wesley, for his life, & afterwards in two other persons in succession for their lives; John Wesley appointed preachers during his life, & before his death, on the event of a further purchase of land, at the same place, a deed was executed appointing new trustees, & vesting in the trustees & class-leaders the power of appointing preachers. By the rules of the Methodist body, that power was in the Conference. Upon an information filed by some of the members of the Wesleyans :—*Held*: the trustees & class-leaders had the power of appointing the preachers in question; & parol evidence was inadmissible to show that, according to the paramount intention of the founders, the right of appointment was vested in the Wesleyan Conference, & not in the trustees of the deed for the time being.—*A.-G. v. CLAPHAM* (1855), 4 De G. M. & G. 591; 3 Eq. Rep. 702; 24 L. J. Ch. 177; 21 L. T. O. S. 245; 19 J. P. 54; 1 Jur. N. S. 505; 3 W. R. 158; 43 E. R. 638, L. O.

*Annotation* :—*Mentd.* G. W. Ry. & Mid. Ry. v. Bristol Corpn. (1918), 87 L. J. Ch. 411.

**3953.** **For what term.**—*A.-G. v. PEARSON*, No. 3930, *ante*.

#### (b) Nature and Effect of Appointment.

##### i. In General.

**3954.** **Whether contract of service—Within National Insurance Act, 1911 (c. 55).**—(1) Non-conformist ministers of religion, appointed by the conference of the Church to which they belong, which has power of appointment of ministers & dismissal in cases of immorality, honesty, or in-

suitability, & paid by the circuits or the churches to which they are attached, are not employed under a "contract of service" within Part I. of the above Act.

(2) The employment of ministers of the United Methodist Church & the employment of minister under probation, of the Wesleyan Methodist Church, by the Conference of each of those Churches, or by the circuits to which the ministers are attached, is not an employment within Part I. of the above Act.—*Re EMPLOYMENT OF MINISTERS OF UNITED METHODIST CHURCH, Re EMPLOYMENT OF MINISTERS (UNDER PROBATION) OF WESLEYAN METHODIST CHURCH* (1912), 107 L. T. 143; 56 Sol. Jo. 687; 28 T. L. R. 539; 6 B. W. C. C. N. 1.

**3955.** ——— **United Methodist Church.**—*Re EMPLOYMENT OF MINISTERS OF UNITED METHODIST CHURCH, Re EMPLOYMENT OF MINISTERS (UNDER PROBATION) OF WESLEYAN METHODIST CHURCH*, No. 3954, *ante*.

**3956.** ——— **Minister under probation—Wesleyan Methodist Church.**—*Re EMPLOYMENT OF MINISTERS OF UNITED METHODIST CHURCH, Re EMPLOYMENT OF MINISTERS (UNDER PROBATION) OF WESLEYAN METHODIST CHURCH*, No. 3954, *ante*.

**3957.** **Whether minister occupier—Of place of worship—For poor-rate.**—*R. v. REED* (1727), 2 Sess. Cas. K. B. 58; Portes. Rep. 306; 93 E. R. 141.

*See, generally, RATES & RATING.*

**Whether appointed minister "regular minister"**—*Under Municipal Corporations Act, 1838 (c. 76)*, s. 28.—*See* No. 3967, *post*.

— *Under Military Service Acts.*—*See* Nos. 3972-3974, 3976, *post*.

**3958.** **Right to title "Reverend."**—*KEET v. SMITH*, No. 1808, *ante*.

**3959.** **Tenure of residence—Whether estate for life—Construction of appointment.**—The minister of a dissenting chapel was invited to become pastor by letter from the deacons, & upon this invitation entered upon the office of minister, & took possession of a house & premises vested in trustees, to permit the minister of the chapel, "during his life, if he should so long continue pastor," to occupy the same without paying any rent :—*Held*: the minister had an equitable estate for life under the trusts of the deed in the house & premises, & was entitled to vote in respect thereof. — *BURTON v. BROOKS* (1851), 11 C. B. 11; 2 Lat. Reg. Cas. 197; 21 L. J. C. P. 7; 18 L. T. O. S. 171; 16 J. P. 73; 16 Jur. 569; 138 E. R. 380.

*Annotations* :—*Appld.* Collier v. King (1861), 11 C. B. N. S. 11.

*Mentd.* Sherwin v. Whyman (1873), L. R. 9 C. P. 213.

**3960.** ——— **Evidence.**—A minister of a congregation of Particular Baptists occupied a house & garden attached to the chapel of the congregation, which premises were vested in trustees, in trust that they, etc., would for ever permit the dwelling-house & premises to be held, etc., by the minister of the said congregation for the time being. The minister (claimant) was appointed by means of a call or invitation in writing, signed by three deacons of the congregation, which he obeyed. This, & his own statement that he considered his appointment to be for life, & the evidence of one of the deacons, for 35 years a member of the congregation, to the effect, that the appointment was made in the usual mode, & in his opinion was for life, was all that was brought forward to show what was the duration of his holding. The revising barrister did not infer from the above that there was an office or holding for life, & disallowed the claim :—



him to justify his conduct, because, it did not appear he had complied with all the requisites necessary to give him a *prima facie* title.—*R. v. JOTHAM* (1790), 3 Term Rep. 575; 100 E. R. 741. *Annotation*.—*Mentd.* *R. v. Saddlers' Co.* (1863), 10 H. L. Cas. 404.

**3989.** ———.]—*R. v. DAGGER LANE CHAPEL TRUSTEES*, No. 3951, *ante*.

*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 283, 284.

#### D. Salary.

**3990. Who are liable for—Whether all trustees of chapel—Appointment by part only.**—If a dissenting minister be appointed minister of the chapel by a part of the trustees of it, he cannot maintain an action against all the trustees for his salary, & the fact of all of them having signed a notice to him, demanding the possession of the chapel, will not make any difference.—*COOPER v. WHITEHOUSE* (1834), 6 C. & P. 545.

**3991.** ——— **Whether deacons as agents of congregation—Effect of provision in document of appointment.**—*Ptff.* was appointed the minister of a Baptist church by a document signed by defts. who were four deacons of the church. The document stated that defts. as deacons of the church, "do now invite you to the pastorate, authorised by a unanimous vote at our last church meeting, also at our finance committee meeting a unanimous vote was recorded & a good majority of the congregation, at a present salary of 25s. per week. We regret to state that our present income will not warrant anything higher now, but we hereby promise that if the dear Lord shall prosper us financially, you shall be benefited thereby." The pastorate was determinable on three months' notice. *Ptff.* acted as treasurer & paid himself his salary out of the funds in his hands. Upon notice being given to terminate the pastorate, *ptff.* sued defts. to recover the last quarter's salary, upon the ground that they had contracted as agents for an undisclosed principal. —*Held*: defts. were not personally liable.—*MORLEY v. MAKIN* (1905), 51 W. R. 395; 22 T. L. R. 7, D. C.

**Augmentation of stipend—Whether subject to income tax.**—*See* INCOME TAX.

#### E. Restraint from Officiating.

**3992. By injunction—Grounds for stay.**—Where the effect of the execution of an injunction to restrain a minister from officiating in a chapel where he had long performed the duties would be to break up the congregation, the ct. will stay such execution pending an appeal.—*A. G. v. MUNRO* (1818), 11 L. T. O. S. 197; 12 Jur. 318, L. C.

**Preaching sermon—Likely to prejudice fair**

#### PART VIII. SECT. 3, SUB-SECT. 2.—D.

**h. Who are liable for—Church committee—Evidence of membership.**—*Ptff.* sued five defts., describing them as the committee of the Presbyterian church at P., for his salary as minister from Jan. 1857, to Aug. 1858. The committee usually consisted of eight persons chosen annually; & a record of their proceedings was kept: at a meeting of the congregation in 1856, it was agreed to give *ptff.* a call, & afterwards, at another meeting, that he should receive £100. a year, to be paid to him from the pew rents, which it was customary for the committee to collect half-yearly. It was not shown who composed the committee in 1856, or that all defts. were members of it in 1857 or 1858.—*Held*: the action could not be maintained.—*STEWART v. MARTIN* (1859), 18 U. C. R.

#### 177. CAN.

**k. — Withdrawal of members from congregation.**—The members of a dissenting congregation, who had called a minister, were not bound to pay the stipend after they ceased to be members of that congregation.—*HYSLER v. SAIRNS* (1825), 21 Eng. Coll. 816.—*SCOT.*

**l. Promise of "suitable maintenance"—Whether binding.**—On an enquiry into the practice & understanding of the United Secession Church in the matter:—*Held*: a promise of "suitable maintenance" in the call of a congregation to their pastor together with certain procedure taken by them in inviting him to the charge, did not constitute a civil obligation for the payment of stipend.—*ARNKIL v. ROBERTSON* (1843), 5 Dunt. (Cl. of Sess.)

**trial of action.**—*See* CONTEMPT OF COURT, Vol. XVI., p. 23, No. 183.

#### F. Change of Doctrine or Allegiance.

**3993. As ground for removal.**—The trusts of a deed, by which a church in Manchester was endowed, declared in distinct terms that the minister was to be in full communication with the Church of Scotland, & any of the congregation, whether a majority or minority, were held to have a right to insist on the strict performance of the trusts of that deed; consequently, that the minister having become a free churchman, & thereby dissented from the Church of Scotland, as it was governed at the time of the creation of the trust, ought to be removed from his office.—*A. G. v. MUNRO* (1818), 2 De G. & Sm. 122; 13 L. T. O. S. 521; 61 E. R. 55, L. C.

*Annotations*.—*Foll.* *A. G. v. Murdoch* (1819), 7 Hare, 445. *Reid.* *A. G. v. Murdoch* (1852), 1 De G. M. & G. 86. *Mentd.* *A. G. v. Murdoch* (1856), 2 K. & J. 571; Westwood v. McKie (1869), 21 L. T. 165.

**3994.** ———.]—*A. G. v. MURDOCH*, No. 3931, *ante*. **Exclusion from denominational trust—Secession of minister & part of congregation.**—*See* CHARITIES, Vol. VIII., p. 314, No. 952.

#### G. Resignation.

**3995. What amounts to—Whether expression of intention to resign.**—A Baptist minister, who expresses his intention to resign his ministry on or before a certain date, at a formal meeting of the communicants of his church, does not thereby terminate his employment. If a Baptist minister does definitely resign his appointment, as from a future date, he may, before that date arrives, withdraw his resignation at a formal meeting of the communicants of the church, although the meeting is not such as would have power to appoint a new minister.—*NICKSON v. DOLPHIN* (1911), 56 Sol. Jo. 123.

**3996. Right to withdraw—Before resignation effective.**—*NICKSON v. DOLPHIN*, No. 3995, *ante*.

#### H. Removal from Office.

**3997. Power to remove—Wesleyan Methodist district committee.**—*WARREN'S CASE* (1835), *Grindrod's Compendium*, 8th ed., 371, L. C.

*Annotations*.—*Reid.* *Natal. Bp. v. Gladstone* (1866), L. R. 3 Eq. 1. *Mentd.* *A. G. v. Clapham* (1853), 10 Hare, 540; Long v. Cape Town, Bp. (1863), 1 Moo. P. C. C. N. S. 411.

**3998.** ——— **Majority of communicants—Management vested in communicants.**—The management of the affairs of a dissenting chapel, was vested in the communicants. The congregation being dissatisfied with their minister, held a meeting, at which they resolved that he should be recommended to resign. Neither the minister, nor a majority of the communicants was present at the

#### 100. SCOT.

#### PART VIII. SECT. 3, SUB-SECT. 2.—E.

**m. Action to restrain administration of Holy Communion.—Not maintainable in civil court.**—Where A. & others, members of the Dutch Reformed Church instituted an action in which they asked for an order interdicting ministers of that church from continuing to administer Holy Communion to persons who had been in rebellion & from using the church property for this purpose on the ground that such administration & use were opposed to the rules of the church or in the alternative for a declaration of rights:—*Held*: the reception or rejection of any person at the Lord's Supper was a purely spiritual matter & was not cognisable by a civil court.—*NELT v. DONOVS* (1919), O. P. D. 7.—*5. AF.*

**Sect. 3.—Protestant Dissenters: Sub-sect. 2, H.; sub-sect. 3, A. & B.]**

meeting; but the resolution was afterwards signed by a majority of them, & communicated to the minister:—*Held*: the resolution was tantamount to a dismissal, although it was not come to at a meeting, at which a majority of the communicants was present.—*A.-G. v. AKED* (1835), 7 Sim. 321; 58 E. R. 861.

*Annotation*:—*Consd. Cooper v. Gordon* (1869), L. R. 8 Eq. 249.

**3999. — In majority of trustees.]—PERRY v. SHIPWAY, No. 3903, ante.**

**4000. — & congregation—No provision in trust deed.]—**By the trust deeds of a congregation of Independents, a chapel, a house, & other property, were vested in trustees for the use of the congregation, & to permit the minister for the time being to occupy the house. The deeds contained no express provision for the appointment or removal of a minister. In 1866, G. was invited by a resolution of the church members of the congregation to become co-pastor with the then minister. In 1868 a majority of the church members resolved that G. be dismissed, & the majority of the trustees concurred in this resolution. G. claimed to hold his office for life, in the absence of immorality, or preaching contrary to the tenets of the denomination, which was not charged:—*Held*: G. was duly dismissed, & injunction accordingly. *COOPER v. GORDON* (1869), L. R. 8 Eq. 249; 38 L. J. Ch. 489; 20 L. T. 732; 33 J. P. 761; 17 W. R. 908.

**Grounds for removal—Change of doctrine or allegiance.]—***See Nos. 3931, 3993, ante.*

**4001. How effected Where minister tenant at will—Demand of possession of chapel sufficient.]—DOE d. NICHOLL v. M'KAEG, No. 3902, ante.**

**4002. — ]—DOE d. JONES v. JONES, No. 3901, ante.**

**4003. — Resolution signed out of meeting.]—A.-G. v. AKED, No. 3998, ante.**

**4004. — By resolution under trust deed—Sufficiency of notice of meeting.]—**By the deed of settlement of a Baptist chapel it was provided that every minister should be liable to be forthwith removed by the decision of the church made at one meeting & confirmed at a second meeting called by a notice which should expressly state the object of such meeting. A meeting was called, the notice expressing that it was called for the purpose of bringing charges against, & considering the dismissal of, the minister. The minister did not attend the meeting & it did not appear that evidence was produced in support of any charges, but the meeting passed a resolution that, in consequence of the minister having done certain specified things, he was not a fit & proper person for the office, & that his office should cease. A second meeting was called, the notice expressing that it was to be for the purpose of confirming & ratifying the resolution passed at the former meeting:—*Held*: (1) to summon a meeting for the purpose of bringing charges generally, was improper; if no reason had been given for the dismissal, it might have held good; but, under the circumstances, it was clear that the meeting had not had the opportunity of exercising

a sound discretion in the matter, & the dismissal was invalid; (2) as the notice for the second meeting did not specify the resolution which was to be confirmed, that meeting was unable effectually to confirm the resolution passed at the first meeting.

(3) Where the proceedings by which the minister of a religious congregation had been dismissed had not in the opinion of the ct. been fairly & properly conducted, the ct. refused to restrain him from officiating.—*DEAN v. BENNETT* (1870), 6 Ch. App. 489; 40 L. J. Ch. 452; 24 L. T. 169; 19 W. R. 363, L. C.

*Annotations*:—*As to* (1) & (3) *Consd. Hayman v. Rugby School* (1874), L. R. 18 Eq. 28. *Refd. R. v. L. C. C.* *Ex p. Edwards* (1894), 15 R. 66; *Wood v. Prestwich* (1911), 104 L. T. 388.

**4005. — Confirmatory meeting.]—DEAN v. BENNETT, No. 4004, ante.**

**4006. Jurisdiction of court to interfere.]—WARREN'S CASE** (1835), Grindrod's Compendium, 8th ed. App. III. 371, L. C.

*Annotations*:—*Consd. Long v. Cape Town, Bp.* (1863), 1 Moo. P. C. C. N. S. 411. *Refd. Natal, Bp. v. Gladstone* (1866), L. R. 3 Eq. 1. *Mentd. A.-G. v. Clapham* (1853), 10 Har. 510.

**4007. — Though Crown visitor of church.]—DAUGAIS v. RIVAZ, No. 86, ante.**

**4008. When court will interfere—No provision in trust deed of chapel.]—**The ct. will not interfere to prevent the removal of a minister of a dissenting chapel vested in trustees, when the deed is silent as to the mode of electing the minister & his continuance in office & contains no provision for his support, but he is dependent for it on the voluntary contributions of his flock.—*PORTER v. CLARKE* (1820), 2 Sim. 520; 57 E. R. 882.

*Annotation*:—*Mentd. Collier v. King* (1861), 11 C. B. N. S. 11.

**4009. When court will enforce removal—Proceedings for removal unfairly conducted.]—DEAN v. BENNETT, No. 4004, ante.**

**4010. Effect of removal—Right to remove property.]—DOE d. NICHOLL v. M'KAEG, No. 3902, ante.**

**4011. Proceedings for removal—Whether certificate of Charity Commissioners necessary.]—**An action for removing the minister of a building registered as a place of meeting for religious worship & for administering the trusts of the deed relating to such building can be prosecuted without the certificate of the Charity Comrs.—*GLEN v. GREGG* (1882), 21 Ch. D. 513; 51 L. J. Ch. 783; 47 L. T. 285; 31 W. R. 149, C. A.

*Annotation*:—*Refd. Rendall v. Blair* (1890), 45 Ch. D. 139.

**4012. While suit for regulation of meeting-house pending.]—FOLEY v. WONTNER, No. 4030, post.**

**SUB-SECT. 3.—PROPERTY.**

**A. In General.**

**4013. Chapel—Registration & certification of—How enforced.]—Mandamus to register & certify a dissenting meeting house.—R. v. DERBY J.J.** (1766), 4 Burr. 1901; 1 Wm. Bl. 606; 98 E. R. 38. *Annotation*:—*Refd. R. v. Gloucestershire J.J.* (1812), 15 East, 377.

**For marriages.]—See HUSBAND & WIFE.**

**Evidence of—On indictment for**

**PART VIII. SECT. 3, SUB-SECT. 2. H.**

**4006 I. Jurisdiction of court to interfere.]—**Where an appeal raised the question of the proper or improper exercise of disciplinary powers of the Conference of the Methodist church, with reference to the expulsion of a minister, the Supreme ct. refused to

interfere, the matter complained of being within the jurisdiction of the Conference.—*ASH v. METHODIST CHURCH* (1901), 22 C. L. T. Occ. N. 3; 31 S. C. R. 497.—**CAN.**

**PART VIII. SECT. 3, SUB-SECT. 3.—A.**

**n. Dissolution of religious body—Right of continuing adherents to retain**

**property.]—**The owner of land agreed to sell a site for a burial ground & church, in connection with the Free Church of Scotland, if a congregation thereof could be gotten together. A church was built thereon, & a congregation in connection with the Free Church assembled & performed divine service therein. Several years after-

**bigamy.**]—See CRIMINAL LAW, Vol. XVI., p. 736, No. 7954.

— **Estate of minister in.**]—See Nos. 3961–3963, *ante*.

**4014.** — **Rights of former owner—Title of present owner of doubtful validity—Possession of key obtained by former owner.**]—Pltf., who had built a chapel, conveyed it to deft. by a deed the validity of which was questionable. Deft. took possession, & gave the key to a gardener, who, with his permission, lent it to pltf. to preach in the chapel. Pltf. thereupon locked the chapel, & refused to re-deliver the key:—*Held*: he had not sufficient possession to maintain trespass.—REYETT v. BROWN (1828), 5 Bing. 7; 2 Moo. & P. 12; 6 L. J. O. S. C. P. 194; 130 E. R. 901.

*Annotation*:—*Mentd.* Humphrey v. Nowland (1862), 15 Moo. P. C. C. 343.

— **Rights of trustees.**]—See No. 4040, *post*.

**4015.** — **Compulsory acquisition—Investment of proceeds.**]—Where a railway co. had taken under their powers a freehold chapel & paid the purchase money into *ct.*, the *ct.* allowed part of the money to be paid out to the trustees of the chapel for the purpose of investment in a leasehold chapel, to be used in the place of that taken by the co.—*Re* REHOOTH CHAPEL (1874), 1 L. R. 19 Eq. 180; 44 L. J. Ch. 375; 31 L. T. 571; 23 W. R. 405.

**4016.** — **Acquisition of adjoining premises & conversion into residence.**]—*Re* LYMINGTON BAPTIST CHAPEL TRUSTEES, [1877] W. N. 226.

*See, generally*, COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 236 *et seq.*

— **Lease of—Whether within Statutes of Mortmain.**]—See CHARITIES, Vol. VIII., p. 252, Nos. 137, 138.

— **Gift of provision of—Whether valid.**]—See CHARITIES, Vol. VIII., pp. 275, 278, Nos. 429, 430, 445, 447, 466, 467, 470, 473, 479, 497.

— **Whether breaking into amounts to sacrilege.**]—See CRIMINAL LAW, Vol. XV., p. 950, Nos. 10716–10718.

— **Suit relating to—Whether Attorney-General necessary party.**]—See CHARITIES, Vol. VIII., p. 398, No. 2230.

— **Service of dangerous structure notice in respect of.**]—See METROPOLIS; PUBLIC HEALTH.

— **Liability for paving expenses in respect of.**]—See HIGHWAYS; METROPOLIS.

— **Liability to rates.**]—See RATES & RATING.

wards the great body of the congregation abandoned their connection with the Free Church; & they, in conjunction with the vendor, assumed to hold possession of the church to the exclusion of such of the members as continued to adhere to the Free Church. On an information filed in the name of the A.-G.:—*Held*: although at first conditional, the contract, by reason of a congregation having assembled in the church, had become absolute, & that so long as even one member remained to claim the site & church on behalf of the Free Church, the right of that body continued, notwithstanding the change of opinion in the body of the members; & in the circumstances, an injunction was decreed restraining any further interference with such right, & also a specific performance of the contract, with costs.—A.-G. v. CHRISTIE (1867), 13 Gr. 495.—*CAN.*

**o.** — *See* — *See* — A congregation of seceders possessed a chapel which was vested in trustees for behoof of a congregation in connection with the body that afterwards became the "United Associate Synod of Original Seceders." A majority of the synod

joined the Free Church: the minority met & constituted themselves the synod, adhering to their former principles. The congregation was divided, but a majority was in favour of the Union. In an action of declarator by the minority to vindicate their right to the chapel:—*Held*: having regard to the trust title under which the property was held, the chapel belonged to the part of the congregation which adhered to the principles maintained by the church for whose behoof it was vested in trustees.—COOPER v. BURNS (1859), 22 Dind. (Cl. of Sess.) 129; 32 Sc. Jur. 46.—*SCOT.*

**p.** — *See* — *See* — Where by a majority of the members of a religious body a resolution was passed to dissolve & amalgamate with another religious body & to transfer its property to such body & a minority objected:—*Held*: the original religious body had not been dissolved, & the minority were entitled as constituting such body to the property registered in its name.—NEDERDUTSCH HERVOORDE CONGREGATION of STANDERTON v. NEDERDUTSCH H. G. CONGREGATION of

**4017.** — **Dissenting Chapels Act, 1844 (c. 45), s. 2—Application of.**]—A.-G. v. ANDERSON, No. 4021, *post*.

**Residence—Estate of ministers in.**]—See Nos. 3959, 3960, *ante*.

**Burial ground—Position of.**]—See BURIAL, Vol. VII., p. 548, No. 271.

— **Removal of corpse.**]—See BURIAL, Vol. VII., p. 559, No. 352.

**Management of charity trust property.**]—See CHARITIES, Vol. VII., pp. 355 *et seq.*

### B. Evidence of Trusts.

**4018.** **Ascertainment—From usage of congregation.**]—A.-G. v. PEARSON, No. 3930, *ante*.

**4019.** — *See* — *See* — A.-G. v. MURDOCH, No. 3931, *ante*.

**Ascertainment of objects of charitable trusts.**]—*See, generally*, CHARITIES, Vol. VIII., pp. 303 *et seq.*

**How far trust denominational.**]—See CHARITIES, Vol. VIII., pp. 314 *et seq.*

**4020.** **Construction of trust deed—By usages of denomination.**]—WARREN'S CASE (1835), Grindrod's Compendium, 8th ed. 371, L. C.

*Annotations*:—*Consd.* A.-G. v. Clapham (1853), 10 Haro. 540. *Mentd.* Long v. Cape Town, Bp. (1863), 1 Moo. P. C. C. N. S. 411; Natal, Bp. v. Gladstone (1866), L. R. 3 Eq. 1.

**4021.** — **Protestant dissenters of Presbyterian or Independent denomination—Conveyance in 1766.**]—By deed in 1766, M. conveyed a messuage to trustees on trust to permit the same to be used as a meeting-house for Protestant dissenters of the Presbyterian or Independent denomination, "to worship in as long as the law should permit Protestant dissenters to worship there. For eighty years previous to 1879, the chapel was used as an Independent chapel, but in 1881, a meeting of the congregation was convened by the pastor, the result being that a resolution was carried by a large majority, approving a memorial to the Presbyterian Church of England, asking that the congregation might be received into the church. The Presbyterian Church of England purported to receive the congregation accordingly. It did not appear that the meeting had been called by any formal written notice, nor was there any record of the proceedings, or proof that care was taken that the meeting was not attended by strangers. Pltf. & his wife, being members of the congregation, voted against the resolution:—

STANDERTON (1893), II. 69.—*S. AF.*

**q.** — *See* — The spiritual head of a religious congregation endowed as such with church property, who leads a secession & with a majority of his followers, joins another religious connexion, is not entitled to the possession of such church property as against those members of the congregation who do not join in or consent to the secession; but the latter, even though in a minority, are the true congregation & as such, entitled to the church property.—DWANE v. GOZA (1902), 17 E. D. C. 8.—*S. AF.*

### PART VIII. SECT. 3, SUB-SECT. 3.—B.

**r.** **Construction of trust deed—Reference to contemporary theological works.**]—In 1719, some members of a Presbyterian congregation in Dublin set on foot a subscription to form a fund for charitable purposes. A deed of trust declared this fund to be for the support of religion in & about Dublin & the South of Ireland, by assisting & supporting the Protestant Dissenting interest:—*Held*: the phrase "Protestant Dissenters" had



**Sect. 3.—Protestant Dissenters: Sub-sect. 3, B., C., D. & E.]**

**Held:** (1) on the construction of the deed, the trust was in favour of either or both of the denominations known as Presbyterian or Independent at the date of the deed, the differences of doctrine or worship between the two at that time not being regarded by the settlor as sufficient to exclude either from the trust; (2) whether the Presbyterian Church of England now existing, does or does not represent the Presbyterian body existing in 1700, its rules, as now observed, conflict entirely with the essential character of the Independent denomination, both as formerly & as at present existing.

(3) Dissenting Chapels Act, 1844 (c. 45), s. 2, as to 25 years user, was intended as a shield for those in possession, & not as a weapon of attack, but in the present case the Act did not apply, as the question was not a question of "doctrines or opinions or mode of worship."—*A.-G. v. ANDERSON* (1888), 57 L. J. Ch. 543; 58 L. T. 720; 36 W. R. 714; 4 T. L. R. 370.

*See, also, No. 3931, ante.*

**C. Enforcement of Proper Trusts.**

*See, generally, CHARITIES, Vol. VIII., pp. 395 et seq.*

**4022. Must be for lawful purpose.]—A.-G. v. PEARSON, No. 3930, ante.**

**4023. Alteration of trusts—By change of administration of doctrine—Power of congregation—Or trustees.]—A.-G. v. PEARSON, No. 3930, ante.**

**4024. ———.]—FOLLEY v. WONTNER, No. 4030, post.**

**4025. ———.]—Under the deed of endowment, a certain chapel was "to be used & enjoyed as a place of public religious worship for the service of God by the society of Protestant Dissenters of the denomination of Independents, & professing the doctrine contained in the Catechism of the Assembly of Divines held at Westminster, & commonly called the "Assembly's Catechism," & also by such other persons as should thereafter be united to the said society, & attend the worship of God in the said meeting-house." Several years after the date of the deed the surviving trustee & the congregation of the chapel converted the**

nature of their religious worship into that of the "Particular Baptists":—**Held:** the use of the chapel must be restored to those professing the original Independent doctrines.—*A.-G. v. AUST* (1865), 13 L. T. 235.

**4026. — Powers of members.]—MILLIGAN v. MITCHELL, No. 3946, ante.**

**4027. — Effect of acquiescence by dissenting minority.]—In 1827 some members of a dissenting congregation acquired a piece of ground, upon which they built a chapel which was conveyed to trustees, to be held by them "in trust & for behoof of the Associate Congregation of Original Seceders, at C. to whom solely & those who shall in time coming accede to them, & continue in adherence to the original principles of the secession, the subjects shall belong." All questions of adherence to such principles were to be determined in a certain manner. The congregation continued to use the chapel until 1852, when a large majority, including the minister, joined another dissenting body, which was considered to hold the same doctrines. In 1856, certain members, forming part of the minority of the original congregation, instituted a suit to have it declared that the chapel, etc., belonged to, & was to be held for the use of, those only who adhered to the original doctrine:—**Held:** plffs. had acquiesced in the proceedings & the suit should be dismissed.**

It is a universal law, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, & that he will offer no opposition to it, although it could not have been lawfully done without his consent, & he thereby induces others to do that from which they otherwise might have abstained he cannot question the legality of the act he had so sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct (LORD CAMPBELL, C.).—*CAIRNCROSS v. LORIMER* (1800), 3 L. T. 130; 7 Jur. N. S. 149, H. L.

*Annotation:—Folld. Lang v. Purvis* (1862), 5 L. T. 809.

**4028. Whether deed condition precedent.]—A.-G. v. MURDOCH, No. 3931, ante.**

**4029. Mode of enforcement—Chapel supported by voluntary contributions.]—(1) Joint purchase, to hold to the purchasers, their heirs, successors, & assigns for ever, in trust for erecting a Protestant**

not such a known legal meaning as to prevent the admission of evidence as to its meaning; & theological works of the period might be admitted in evidence to show the meaning of those words as understood & used by the author of the trust.—*DRUMMOND v. A.-G.* (1849), 2 H. L. Cas. 837; 14 Jur. 137.—**IR.**

**PART VIII. SECT. 3, SUB-SECT. 3.—C.**

**4026 I. Alteration of trusts—Powers of members.]—Where a church organisation is formed for the purpose of promoting certain defined doctrines of religious faith which are set forth in its incorporate articles or constitution, the church property which it acquires is impressed with a trust to carry out that purpose, & a majority of the congregation cannot divert the property to inconsistent uses against the protest of a minority however small.—*ANDERSON v. GIBLSON* (1920), 3 W. W. R. 301; 53 D. L. R. 491; 30 Man. L. R. 536.—**CAN.****

**a. Effect of internal dissensions—Trust bound to original institution.]—Where it appeared on the facts that a congregation had been brought together on a certain denominational basis, & trust property acquired & afterwards internal dissensions arose:—**Held:** the trustees were bound to**

the original institution.—*STUART v. CAMBON* (1849), 3 Nfld. L. R. 58.—**NFLD.**

**t. Original church abandoned—Removal to new site.]—An action by plffs. for a mandatory order compelling defts. to reopen an old church for worship & to allow plff. H. to conduct worship therein according to the ritual & regulations of the Evangelical Lutheran denomination, for a declaration that plffs. were entitled to have the trusts of the deed of the church carried into execution, for an injunction restraining defts. from leasing or selling said church or lands & from using or allowing same to be used for purposes other than declared in the trust deed, etc. The original society built & took possession of a meeting house on the said land & occupied the place for religious uses down to Dec. 13, 1908, when the premises were vacated. The building became too small for the congregation, & it was resolved almost unanimously in 1908 to sell the old site & buy a new one:—**Held:** the question involved no question of doctrine, but only of property; the legal title was in defts. & no breach of trust had arisen in regard to which plffs. had a right or interest to complain, but it was a legal breach of trust to remove from the site, which should be investigated**

by another method.—*HUEGLI v. PATLI* (1912), 21 O. W. R. 776; 3 O. W. N. 915; 26 O. L. R. 94; 4 D. L. R. 319.—**CAN.**

**a. Trust vested in member of denomination—Membership relinquished—Necessity for conveyance to new trustee.]—In a deed conveying land to trustees for a dwelling house for the use of the Methodist minister for the time being, there was provision made for a new appointment in the case of a trustee ceasing to belong to the Methodist Episcopal Church:—**Held:** upon the happening of that event in the case of the last surviving trustee, the estate did not *ipso facto* become divested, but the intention of the grantor plainly being that it should go over to new trustees, this could only be effected by the surviving grantee conveying to them.—*HAMBLY v. FULLER* (1870), 22 C. P. 141; *approved*. *FERGUSON v. GIBSON*, 22 Gr. 36; *conad*. *IL. v. GUTHRIE*, 41 U. C. R. 148; *WHITBY v. LISCOMBE*, 23 Gr. 1.—**CAN.****

**b. Trust temporarily withheld from original purpose.]—Part of a congregation connected with the United Original Secession Church separated from that church with their minister & formed a new congregation. In 1871 the congregation bought a place of worship, & a minister's house, taking the title**

dissenting chapel: the regulation of such an establishment, with no fixed revenue, but supported only by voluntary contribution, is the proper subject of a bill, not an information.

(2) The appointment of a minister is in the congregation generally, not in the heir of the surviving trustee.

(3) The number of trustees is to be kept up, but the mode of appointing them & the minister, whether by the majority simply or in any more limited way, being uncertain, an inquiry was directed, who according to the nature of the establishment are entitled to propose trustees, & elect & approve a minister.

(4) Dissenting establishments will be supported if the doctrine preached is tolerated by law.—*DAVIS v. JENKINS* (1814), 3 Ves. & B. 151; 35 E. R. 436.

*Annotations*:—As to (1) *Reid*. *Milligan v. Mitchell* (1837), 3 My. & Cr. 72; *Prestney v. Colchester Corpn. & A.G.* (1882), 21 Ch. D. 111.

**4030. Exercise of Chancery jurisdiction.**—(1) Jurisdiction for execution of a trust for supporting a dissenting meeting-house, difficult to exercise.

(2) Pending a suit for the regulation of a dissenting meeting-house, the minister, if performing his duty, will in general be continued, whether duly appointed or not.

(3) A dissenting meeting-house must continue devoted to the doctrines, originally agreed on at the foundation of the trust, though some of the congregation may change their opinions.—*FOLEY v. WONTNER* (1820), 2 Jac. & W. 245; 37 E. R. 621.

*Annotations*:—As to (1) *Reid*. *Milligan v. Mitchell* (1837), 3 My. & Cr. 72. As to (3) *Reid*. *Milligan v. Mitchell* (1837), 3 My. & Cr. 72.

**By action—Whether consent of Charity Commissioners necessary.**—See CHARITIES, Vol. VIII., p. 395, No. 2179.

**Parties to action—Whether Attorney-General necessary.**—See CHARITIES, Vol. VIII., p. 398, No. 2230.

#### D. Recovery of Trust Property.

**Notice to quit—Whether necessary—Whether minister tenant at will of trustees.**—See Nos. 3901, 3902, *ante*.

In favour of certain members of the congregation & such other persons as might thereafter be appointed by male members of the congregation, on condition that any trustee or member leaving the congregation & "worshipping elsewhere not in harmony with the principles contained in the testimony (United Original Secession)," should be disqualified from acting or voting. In consequence of the minister falling into bad health the church was closed in 1878 & the trustees were authorised to sell the church. The church was not sold, but the premises were let & the rents applied in reduction of debt. In 1886 a petition was presented by the Synod of the United Original Seceders, with the concurrence & consent of four persons describing themselves as members of the congregation "at the time of its dissolution," against the two surviving trustees, praying the ct. to ordain the trustees to pay over the trust funds & to convey the trust property to the petitioners for behoof of certain funds of the Synod, or to pay & convey the same for such purposes as the ct. should deem most in accordance with the purposes of the trust, on the ground that the purposes of the trust had failed:—*Held*: it had not been proved that the purposes of the trust had failed & petition dismissed.—*THOMSON v. ANDERSON* (1887), 14 R. (Ct. of Sess.) 1026; 24 Sc. L. R. 731.—*CCOT*

**e. Land vested in trustees for minister.**—*Not for congregation.*—Land vested in trustees for the use of, & as a place of residence for, a minister of a religious body, & for such other purposes as the ministers of such body, at their general conference, might from time to time appoint, is not "land held by trustees for the use of a congregation or religious body" within C. S. C., c. 69.—*Re CHURCHVILLE METHODIST EPISCOPAL CHURCH PROPERTY* (circa 1865), 1 Ch. Ch. 305.—*CAN.*

**d. Intention of grantor.** By deed May 12, 1736, the trust of a meeting house was declared to be "for the sole benefit of the Protestant dissenting congregation of C. for the time being; & for all & every succeeding congregation of Protestant Dissenters or Presbyterians whom from time to time shall meet at the said meeting house in order to worship God for ever." Such trust will be executed in favour of that class of Presbyterians whose religious principles it was the grantor's intention to endow, provided such endowment were legal at the time it were made.—*DILL v. WATSON* (1836), 2 Jo. Ex. Tr. 48.—*IR.*

**e. Form of trust deed.** 7 & 8 Vict., c. 45.—To bring a case within the exception in sect. 2 of the above Act, the instrument declaring the trust, or some part of other document

**4031. Service of process in ejectment—On whom served—Surviving lessees & sexton.**—In ejectment to recover possession of a dissenting chapel service on the surviving lessees & the sextonness is sufficient.—*DOE d. KIRSCHNER v. ROE* (1838), 1 Dowl. 97.

**4032. — Sexton holding keys.**—Service upon the sexton who holds the keys of a dissenting chapel is sufficient to found a motion for judgment against the casual ejector.—*DOE d. SCOTT v. ROE* (1838), 6 Scott, 732.

**4033. — Where tenant has left country—Holder of key, wife & servant of tenant.**—In ejectment to recover possession of a chapel, the tenant in possession having quitted the country & not being likely to return, service having been effected on the person in whose custody the keys of the chapel were placed, on the wife of the tenant & on his servant, the ct. granted a rule absolute for judgment against the casual ejector.—*DOE d. DICKENS v. ROE* (1838), 7 Dowl. 121; 1 Scott, 751.

*Annotation*:—*Fold*. *Doe d. Scott v. Roe* (1840), 8 Scott 408.

**4034. — Trustees & at meeting house.**—In an ejectment to recover a dissenting meeting house, service on the trustees & at the house is sufficient for a rule nisi, & service of the rule on the trustees for a rule absolute.—*DOE d. GRAY v. ROE* (1839), 7 Dowl. 700.

See, generally, LANDLORD & TENANT.

#### E. Trustees.

**Appointment—Whether Trustee Appointment Act, 1850 (c. 28) applicable.**—See CHARITIES, Vol. VIII., p. 372, No. 1787.

**4035. — Application of Trustee Appointment Act, 1850 (c. 28).**—Where a deed contained power for the appointment of eight new trustees for a chapel:—*Held*: (1) eight, & neither more nor less than that, ought to be the number; (2) above Act applied only where the power to appoint new trustees has lapsed.—*A.-G. v. BLACKBURN* (1853), 21 L. T. O. S. 201.

**4036. — Mode of appointment—How ascertained.**—*DAVIS v. JENKINS*, No. 4029, *ante*.

referred to in it, must contain in express terms the particular religious doctrines or opinions, or mode of worship required or forbidden.—*A.-G. v. HUTTON* (1841), 7 L. Eq. R. 612.—*IR.*

#### PART VIII. SECT. 3, SUB-SECT. 3.—E.

**1. Informal appointment of trustees—Subsequent confirmation by congregation.** In 1909 land was conveyed to six persons named & described as the trustees of a certain church. They took as joint tenants, but the conveyance did not define the trust or make provision for new trustees. There was no formal appointment of trustees, two of whom resigned. In 1915, the congregation at a meeting, passed a resolution, confirming the appointment of the six original trustees & providing for a mode of appointment of successors:—*Held*: having regard to Religious Institutions Act, R. S. O. 1911, ss. 7, 8, 10 & 18, that all technical requirements of the Act as to notices of meeting, etc. having been complied with the congregation had ample power to appoint trustees & to determine the manner in which their successors should be appointed & that upon this being done the land without conveyance vested in the trustees so appointed, & they had power to mortgage the land for the purposes mentioned in sect. 6.—*Re HUTTON LUTHERAN CHURCH* (1915)

*Sect. 3.—Protestant Dissenters: Sub-sect. 3, E.*  
*Sects. 4, 5 & 6.]*

**4037. — Who may be appointed—Whether former trustee.]—***A.-G. v. PEARSON, No. 3930, ante.*

**4038. — Number—Construction of deed.]—***A.-G. v. BLACKBURN, No. 4035, ante.*

**Petition for—Who may join.]—***See CHARITIES, Vol. VIII., p. 405, No. 2371.*

**Whether accountable to Charity Commissioners.]—***See CHARITIES, Vol. VIII., p. 380, No. 1936.*

**4039. Power to mortgage—Restraint of exercise of power by court.]—**Where the trustees of a chapel were proceeding to mortgage it for a small sum, without any apparent necessity for such a course, the ct. granted an injunction to restrain them from executing such mtge., plff. undertaking to abide any order which the ct. might make as to the payment of the debt proposed to be secured.—*RIGALL v. FOSTER (1853), 18 Jur. 39.*

**4040. Lien on title deeds—For money advanced to pay off mortgage.]—**The rebuilding of a dissenting chapel was entrusted to three of the several trustees in whom the estate was vested. There being a deficiency of money, they borrowed, on a deposit of the title-deeds of the chapel, £500, which they personally engaged to pay. Interest was, for a long time, paid out of the chapel funds, but ultimately, the representatives of the trustees were compelled to pay the money. The legal estate was vested in new trustees:—*Held*: the representatives of the persons who had paid the £500 had a lien on the deeds, but that they were not entitled to a decree for foreclosure or sale, as by granting such relief the trust would be altogether destroyed. *DARKE v. WILLIAMSON (1858), 25 Beav. 622; 32 L. T. O. S. 89; 22 J. P. 705; 4 Jur. N. S. 1009; 6 W. R. 824; 53 E. R. 774.*  
*Annotation:—Distd. Gissell v. Money (1869), 38 L. J. Ch. 312.*

Charity trustees generally, *see CHARITIES, Vol. VIII., pp. 360 et seq.*

8 O. W. N. 556; 24 D. L. R. 879; 34 O. L. R. 228. **CAN.**

**g. Expulsion of trustee from church.]—**Land was conveyed to five persons as trustees of the Coloured Wesleyan Methodist Church in Canada, to hold to them & their successors according to the rules & discipline of the said church. The deed provided that when any of the trustees should die or cease to be a member of said church, a successor should be nominated by the Coloured Wesleyan minister or preacher having charge of the station in which the land was, & thereupon appointed by the surviving trustee or trustees, if they should think proper to appoint the person so nominated; & that if it should happen at any time that there should be no surviving trustee, then it should be lawful for the coloured minister in charge of the station to nominate, & for the quarterly meeting of the station, if they should approve of the nomination, to appoint, the requisite number of trustees; & the persons so appointed should be the legal successors of those named in the deed. The Wesleyan Methodist Church assumed control over this church, alleging that the deed was intended for the coloured members of their church, there being no such body as the Coloured Wesleyan Methodist Church. Four of the original trustees were living, but two were absent, having left this congregation, by which, according to the rules of the Wesleyan Methodist Church, they ceased to be trustees; one had joined another body; & the

fourth, one of defts., had been expelled from that church. Plffs. were then nominated as trustees by W., a minister appointed by the Wesleyan Church to take charge of this chapel, but not a coloured man, & their appointment was confirmed at a quarterly meeting. They thereupon brought ejectment against A., one of the original trustees named in the deed, & a person who had taken possession under him:—*Held*: they could not recover, for the expulsion of A. from the Wesleyan Methodist Church could not deprive him of his character of trustee under the deed; & plffs. were not properly appointed, not having been nominated by the coloured minister in charge of the church, as required by the deed. *SMALLWOOD v. ABBOTT (1859), 18 U. C. R. 364.—CAN.*

**h. Withdrawal of trustee from denomination.—Failure of qualification as trustee—Rights of co-trustees.]—**Trespass was held to be maintainable by the trustees of a Methodist chapel against a person who was a trustee, but having ceased to be a member of the society could not hold the trust under the provisions of the deed which created it; & some of plffs., who were not the original trustees, but had been elected as their successors under the same provisions, were properly joined in the action.—*EVERETT v. HOWELL (1837), 5 O. S. 592.—CAN.*

**k. Corporate capacity.]—**Plffs. sued as "The trustees of the Toronto Berkeley Street Congregation of the

## SECT. 4.—QUAKERS.

**Election as churchwarden—Whether compelled to serve.]—***See No. 657, ante.*

**Evidence on affirmation—Whether admissible.]—***See EVIDENCE.*

**Records of Society of Friends—Births, deaths & marriages—As evidence.]—***See EVIDENCE.*

**Meeting house—Whether ratable to poor rate.]—***See RATES & RATING.*

## SECT. 5.—UNITARIANS.

**4041. Operation of 53 Geo. 3, c. 160.]—***A.-G. v. PEARSON, No. 3930, ante.*

**4042. —**—Above Act did not give any positive liberties to Unitarians, but merely put them on the footing of other dissenters, by releasing them from disabilities which had been removed from other dissenters.—*R. v. WADDINGTON (1822), 1 B. & C. 26; 1 State Tr. N. S. 1339; 1 L. J. O. S. K. B. 37; 107 E. R. 11.*

*Annotations:—Bedd. R. v. Ramsey (1883), Cab. & El. 126; R. v. Boulter (1908), 72 J. P. 188; Bowman v. Secular Soc., [1917] A. C. 406.*

**4043. — As regards common law.]—***A.-G. v. PEARSON, No. 3930, ante.*

**4044. Right to participate in charities.]—**By deeds, executed in 1704, Lady H. conveyed estates to trustees, upon trust to pay out of the rents such sums, yearly or otherwise, to such poor & godly preachers for the time being of Christ's Holy Gospel, & to such poor & godly widows for the time being of poor & godly preachers of Christ's Holy Gospel, as the trustees for the time being should think fit; & to dispose of such sums, & in such manner, for promoting the preaching of Christ's Holy Gospel in such poor places as the trustees for the time being should think fit; & also to dispose of such sums as exhibitions for educating such young men designed for the ministry of Christ's Holy Gospel as the trustees for the time being should approve & think fit; & to dispose of the remainder of the rents in

Wesleyan Methodist Church in Canada in connection with the English Conference," alleging that in consideration that they would take down or remove the church held by them for the purposes connected with the trusts set out in the deed conveying the land to them on which it stood, & would rebuild it so as better to answer the purposes of said deed, deft. promised to pay them \$160 to assist them in so doing:—*Held*: plffs. being entitled to sue in their corporate or quasi-corporate capacity their individuality was merged therein, & the objection that deft., being a trustee, was also one of plffs. could not arise.—*TORONTO BERKELEY STREET CHURCH TRUSTEES v. STEVENS (1875), 37 U. C. R. 9.—CAN.*

**l. —**—The duly appointed trustees of a religious congregation, to whom by that description the site for a church has been conveyed, & who by that description give to the vendor to secure part of the purchase money a mtge. with the ordinary covenant for payment, are a corp. & are not personally liable upon the mtge. although it is signed & sealed by them individually.—*BEATY v. GAGORY (1897), 24 A. R. 325.—CAN.*

**m. Borrowing powers.]—**Under the circumstances of this case, the trustees of a congregation of the Methodist Church had power to borrow money & secure it by chattel mtge.—*BROWN v. SWEET (1882), 7 A. R. 725; distd. SMITH v. FAIR, 11 A. R. 755.—CAN.*

relieving such godly persons in distress, being fit objects of her & the trustees' charity, as the trustees for the time being should think fit; & she directed, that when any one of the trustees should die, the survivors should elect in his place such a person as they in their judgments & consciences should think fit to be a trustee.

By other deeds, executed in 1707, Lady H. conveyed other estates to the same trustees, partly for the support of poor old people in an almshouse, for the management of which she appointed other trustees; & after directing that the trustees & managers should observe the rules which she should leave for the selection & government of the poor people therein, she ordered the residue of the rents to be applied upon trusts, which were the same as those contained in the deeds of 1704. By the rules left by her for the selection of the old people for the almshouse, she ordered that none be admitted but such as should be poor & piously disposed, & of the Protestant religion; & able to repeat by heart the Lord's Prayer, the Creed, the Ten Commandments, & Bowles's Catechism. *Semble*: Unitarians, in the present state of the law, are capable of partaking of such charities founded for their benefit.—*SHORE v. WILSON* (1812), 9 Cl. & Fin. 355; 4 State Tr. N. S. App. 1370; 5 Scott, N. R. 958; 8 E. R. 450, H. L.

*Annotations*.—*Consd.* Bowman v. Secular Soc., [1917] A. C. 406. *Refd.* Scarborough Corpn. (1837), 1 J. P. 19; Drummond v. A.-G. (1849), 2 H. L. Cas. 837; *Re* Perry Almshouses, *Re* Ross' Charity, [1899] 1 Ch. 21. *Mentd.* A.-G. v. Wilson (1848), 16 Sim. 210; A.-G. v. Lawes, (1849), 11 Jur. 77; A.-G. v. Murdoch (1849), 7 Hare, 415; A.-G. v. Sherborne Grammar School (1854), 18 Beav. 256; A.-G. v. Clapham (1855), 4 De G. M. & G. 591; A.-G. v. Calvert (1857), 23 Beav. 218; A.-G. v. Etheridge (1862), 32 L. J. Ch. 161; Natal, Bp. v. Gladstone (1866), L. R. 3 Eq. 1; A.-G. v. Bunce (1868), L. R. 6 Eq. 563; A.-G. v. Limerick, Bp. (1870), 18 W. R. 1192; Menzies v. Lightfoot (1871), L. R. 11 Eq. 459; A.-G. v. St. John's Hospital, Bath (1876), 2 Ch. D. 554; Neale v. Neale (1898), 79 L. T. 629; *Re* Johnson, Greenwood v. Greenwood & Robinson (1903), 89 L. T. 520; *Re* Church Patronage Trust, Laurie v. A.-G., [1904] 2 Ch. 613; *Re* Rayner, Rayner v. Rayner, [1904] 1 Ch. 176; Camden v. L. R. Comrs., [1911] 1 K. B. 611; G. W. Ry. & Mid. Ry. v. Bristol Corpn. (1918), 87 L. J. Ch. 414.

#### 4045. Whether within term of charitable trust—For godly preachers of Christ's Holy Gospel—Only Trinitarian doctrines tolerated when trust created.]

In 1704, Lady H., a Protestant Nonconformist, conveyed estates to trustees for the benefit of Christ's Holy Gospel, & for such poor & godly widows for the time being, of poor & godly preachers of Christ's Holy Gospel, as the trustees for the time being should think fit; for promoting the preaching of Christ's Holy Gospel, in such manner "in such poor places as the trustees for the time being should think fit; for educating such young men designed for the ministry of Christ's Holy Gospel as the trustees for the time being should approve & think fit; & for relieving such godly persons in distress, being fit objects of her own & the trustees' charity, as the trustees for the time being should think fit." At the date of the deed, all religious sects tolerated by law believed in the Trinity, but, in the course of time, the estates became vested in trustees, of whom the majority, though called Presbyterians, were Unitarians, & one was a member of the Church of England; & they applied the rents for the benefit of Unitarians. At the hearing of an information filed against the trustees:—*Held*: (1) neither

Unitarians nor members of the Church of England were entitled to administer or participate in the benefits of the charity; (2) the trustees were ordered to be removed; (3) members of three different sects of Trinitarian dissenters should be appointed in their place, some of whom were Independents, others Presbyterians in connection with the Established Church of Scotland, & the rest, Presbyterians in connection with the Secession Church of that country.

"English Presbyterians do not cease to be English Presbyterians merely because they are in amity with the Established Church of Scotland, or with the Secession or Relief Church. Presbyterians in amity with the Secession Church & with the Established Church of Scotland have participated in Lady H.'s charities. Of the orthodoxy of both there is no doubt. It appears from the affidavits that they hold the Westminster Confession, which substantially agrees with the Articles of the Church of England" (SHADWELL, V.C.).—A.-G. v. SHORE (1843), 11 Sim. 592; 1 L. T. O. S. 106; 7 J. P. 302; 7 Jur. 781; 59 E. R. 1002.

*Annotations*.—As to (1) *Consd.* A.-G. v. Murdoch (1849), 19 L. J. Ch. 3; A.-G. v. Sherborne Grammar School (1854), 21 L. J. Ch. 71; A.-G. v. Calvert (1857), 26 L. J. Ch. 682; A.-G. v. Bunce (1868), 37 L. J. Ch. 697. *Generally, Mentd.* A.-G. v. Etheridge (1862), 32 L. J. Ch. 161.

4046. — For Protestant dissenters.]—In 1710 certain members of Protestant dissenting congregations in Ireland subscribed sums of money for charitable purposes, & for the management of the fund executed a deed, which recited that the objects of the trusts thereof were to support the Protestant dissenting interests against unreasonable prosecutions; to educate youths designed for the ministry among Protestant dissenters; to assist poor Protestant dissenting congregations; & for such other pious & religious ends, & by such means as the subscribers should think proper for promoting these objects:—*Held*: unitarian Protestant dissenters were not within the trusts of the deed. DRUMMOND v. A.-G. (1849), 2 H. L. Cas. 837; 14 Jur. 137; 9 E. R. 1312, H. L.

*Annotations*.—*Refd.* A.-G. v. Clapham (1855), 4 De G. M. & G. 591. *Mentd.* Watcham v. East Africa Protectorate, [1919] A. C. 533.

### SECT. 6. -JEWS.

4047. Civil rights—Right of action.] ANON. (1684), Lilly's Practical Register, p. 4.

4048. Evidence of—How sworn.] A Jew ordered to be sworn to his answer upon the Pentateuch.—ANON. (1684), 1 Vern. 203; 23 E. R. 459.

*Annotation*.—*Refd.* Omychund v. Barker (1744), 1 Atk. 21.

4049. — — — — — Jews are allowed to cover when they swear.—GOMEZ SERRA v. MUNEZ (1720), 2 Stra. 821; 93 E. R. 872.

*See, generally, EVIDENCE.*

Custody of infant child of Jewish parents—On mother turning Christian.]—*See* INFANTS & CHILDREN.

Marriage Validity of.]—*See* CONFLICT OF LAWS, Vol. XI., p. 416, No. 822; HUSBAND & WIFE.

4050. Synagogue—Whether legal.]—(1) Where several persons rented premises to be used as a Jewish synagogue, the seats in which were let out

corp'n. incorporated under Ontario Cos. Act, from leasing the basement of the synagogue & from selling pews without the consent of the pews owners. By the constitution of the corp'n. only pew-owning members could

vote on property matters:—*Held*: *prima facie* the action of the president in permitting the whole membership to vote on the proposed lease was invalid & he should be enjoined from carrying out the lease, but the selling

PART VIII. SECT. 6.  
n. Synagogue—Sale of pews.]—Motion to continue to trial an interim injunction restraining deft., the President of a Hebrew Congregation, a

*Sect. 6.—Jews. Sects. 7 & 8. Part IX. Sects. 1 & 2.]*

by an officer appointed annually, who received the rents & applied them partly in the payment of the rent for the premises & partly for general purposes connected with the Jewish religion:—*Held*: the lessees might maintain an action for the rent due from an occupier of a seat.

(2) A Jewish synagogue is not an illegal establishment.—*ISRAEL v. SIMMONS* (1818), 2 Stark. 356, N. P.

*See, now, Places of Worship Registration Act, 1855*, c. (81), s. 2.

4051. — *Recovery of rents for seats.*—*ISRAEL v. SIMMONS*, No. 4050, *ante*.

4052. *Whether entitled to participate in charity*—*Bedford charity.*—*Jews* are not entitled to the

benefit of the Bedford charity.—*Re BEDFORD CHARITY (MASTERS, ETC.)* (1819), 2 Swan. 470; 36 E. R. 696, L. C.

*Annotations*:—*Reid*, *Bowman v. Secular Soc.*, [1917] A. C. 406. *Mentd.* *Re Woodburn's Will* (1857), 1 De G. & J. 333.

*As owners of advowson.*—*See* No. 70, *ante*.

*Gifts & bequests for Jewish charitable or religious purposes—Where valid.*—*See* CHARITIES, Vol. VIII., pp. 244, 253, 265, Nos. 30, 141–146, 271.

*Employment in factory on Sundays.*—*See* FACTORIES.

## SECT. 7.—PRESBYTERIAN CHURCH OF SCOTLAND.

*See Cases infra.*

of pews was a matter wholly for the executive to deal with & the pew-owners had no right to interfere with their discretion.—*GOLD v. MALDAVER* (1912), 23 O. W. R. 75; 4 O. W. N. 106; 6 D. L. R. 333.—*CAN.*

### PART VIII. SECT. 7.

*a. Whether ministers of royal burgh with landward district annexed have claim to a manse & office-hours.*—*AULD v. HAMILTON* (1827), 1 Dow. & Cl. 43; 6 E. R. 441.—*SCOT.*

*p. Rebuilding of ruinous church—Assessment of heritors for necessary sums.*—(On refusal of the heritors of a parish to take the proper steps to rebuild the parish church found by the Presbytery to be ruinous, the Presbytery themselves advertise for & adopt a plan & estimate, & contract for the rebuilding, & assess the heritors for the necessary sums, but neglect to assess some feuvers of a part of a small village included in the parish. Suspension presented by the adverse heritors against the charge for the sums, on the ground of irregularity in the proceedings of the Presbytery, but all objection abandoned as to the jurisdiction of the Presbytery to assess, in case of refusal by the heritors. Suspension refused by the Ct. of Session, & the judgment affirmed by the House of Lords, with a remit as to the feuvers.—*MAXWELL v. GORDON* (1810), 4 Pow. 270; 3 E. R. 1165.—*SCOT.*

*q. Civil rights of patronage—Power of presbytery to repudiate.*—10 Anne, c. 12, establishes the civil rights of patronage in the Church of Scotland, & the General Assembly of that Church has no authority to make any acts or regulations which may prevent the exercise of those rights.

An Act of Assembly, therefore, which permitted the male heads of families in a parish to dissent, without reason assigned, from the induction of a presenter, and declared that if the dissenters formed the majority, the Presbytery should not proceed to the trials & settlement of the presentee, was contrary to the statute, & consequently illegal.

The Ct. of Session is competent to entertain under such circumstances a suit by the presenter against the Presbytery for trials & settlement according to the presentation.—*ARCHERARDER PRESBYTERY v. KINNOULL* (EARL) (1839), 6 Cl. & Fin. 646; 7 E. R. 841.—*SCOT.*

*r. Refusal to accept presentee of patron—Liability of presbytery.*—Taking a presentee to a church in Scotland on his trials is a ministerial act which the Presbytery is bound to perform, & members of the Presbytery refusing or neglecting to perform it are liable, jointly, & severally, to make compensation in damages to the

parties injured.—*FERGUSON v. KINNOULL* (1842), 4 State Tr. N. S. 785.—*SCOT.*

*a. Secession of minister & trustees—Right of presbytery to replace.*—A chapel was disposed to trustees with reference to certain rules: & in order to participate in the advantages offered to chapels in connection with the Establishment by Act of the General Assembly, they obtained an Act of Parliament authorising them to revise the rules & to make such alterations thereon as should enable them by making the rules in conformity with the Rules of the Established Church, to keep the chapel at all times in full communion with the Established Church; & provided "that all persons nominated to be ministers of the chapel" shall be duly qualified according to Scottish law & the form of government established. The trustees drew up a new set of rules in conformity with the Act. The minister appointed by the trustees & they themselves having seceded from the Established Church, & become members of the Free Church after which the Chapel Act was repealed:—*Held*: the presbytery had a sufficient title to sue & the Ct. of Session a jurisdiction to try the question: the minister had ceased to be qualified to officiate & was not entitled to possession of the chapel & that the trustees were bound to present, within a reasonable time, another minister qualified according to the laws of the Established Church.—*EDINBURGH PRESBYTERY v. LADY GLENORCHY'S CHURCH TRUSTEES* (1846), 18 Sc. Jur. 305.—*SCOT.*

*t. Parliamentary church—Minister's control over structure.*—Under 5 Geo. IV., c. 90, the minister of a parliamentary church has no control over repairs on the church buildings carried out by the bantors at their own expense.—*BROOK v. KELLY* (1893), 20 R. (Cl. of Sess.) 104; 30 Sc. L. R. 472.—*SCOT.*

*a. Dismissal of minister—Powers of Synod of Australia.*—A church, in connection with the Church of Scotland, under the denomination of "The Scots Church," was formed in N. S. Wales & its constitution defined by Articles. In 1826 a grant of land at Sydney was made by the Colonial Govt., under the seal of the colony, to appt., an ordained minister of the Church of Scotland, & others, for the erection of a church. The appt. was appointed minister of the church. In 1842 an ecclesiastical body, called the "Synod of Australia" in connection with the Church of Scotland, of which appt. was a member, formed of Presbyterian congregations in Australia, & recognised by N. S. W. Act, 4 Vict., No. 18, in consequence of charges brought against appt., dismissed him from his office of minister & declared his church vacant. Appt. refused to recognise the juris-

diction & authority of the Synod, & with the concurrence of the other trustees of the church, continued to officiate as minister. In 1855, the members of the Synod filed a bill in the supreme ct. at N. S. W., praying that appt. & other trustees might be removed from the trust connected with the grant of land & the church erected there, & that appt. might be restrained from exercising the duties of minister of that church, & be decreed to deliver up possession on the ground that he had been deposed therefrom by the Synod of Australia:—*Held*: dismissing the bill, that the suit was improperly framed, by reason: (1) that the members of the Synod of Australia were strangers to the trust, & had no interest to maintain such a suit: (2) that as the sentence of the Synod deposing appt. having been pronounced in 1842, & the suit in question not brought till 1855, & no satisfactory explanation given for the delay, the Synod were by their acquiescence precluded by lapse of time from sustaining such suit.—*LANG v. PURVES* (1862), 15 Moo. P. C. C. 389; 15 E. R. 541.—*AUS.*

*b. Marriage—Proclamation of banns—Parish quoad sacra.*—Regular marriages in *facie ecclesie* must be preceded by banns; the proclamation thereof being *inter sacra*, & forming part of the Church discipline; the civil power in this matter supporting the ecclesiastical authority. Where a severed district has been constituted a parish *quoad sacra*, the proclamation of banns for those who reside in it must be pronounced in the church of the parish *quoad sacra*.—*HUTTON v. HARPER* (1876), 1 App. Cas. 464.—*SCOT.*

*c. "Heritors"—Repair of manse.*—A conduit of the Glasgow Waterworks Comrs. was carried underground through lauds in a parish in virtue of grants of way-leave in perpetuity, obtained from the proprietors of the land:—*Held*: the Comrs. were liable under Scottish Act, 1663 (c. 21 or 31) to assessment in respect of their conduit as "heritors" of the parish for the repair of the manse.—*GLASGOW CORP. v. M'EWAN*, [1900] A. C. 91.—*SCOT.*

*d. Identity of church—What constitutes—Power to modify fundamental doctrines.*—The identity of a religious community described as a Church consists in the identity of its doctrines, creeds, confessions, formularies, & tests.

The bond of union of a Christian assocn. may contain a power in some recognised body to control, alter, or modify the tenets or principles, at one time professed by the assocn.; but the existence of such a power must be proved.—*FREE CHURCH OF SCOTLAND (GENERAL ASSEMBLY) v. OVERTON (LORD)*, *MACALISTER v. YOUNG*, [1904] A. C. 515.—*SCOT.*

## SECT. 8.—ATHEISTS, RATIONALISTS, ETC.

**4053. Denial of Christianity—Bequest for essay on "Natural Theology" as a science—Whether valid.]**—Testator gave a legacy for the best essay on the subject of "Natural Theology," treating it as a science, & demonstrating the truth of the evidence upon which it was founded, & the perfect accordance of such evidence with reason, also demonstrating the adequacy & sufficiency of natural theology when so treated as a science to constitute a true, perfect, & philosophical system of universal religion:—*Held*: bequest was void, as being inconsistent with Christianity.—*BRIGGS v. HARTLEY* (1850), 19 L. J. Ch. 416; 15 L. T. O. S. 273; 14 Jur. 683.

*Annotation*:—*Overd.* *Powman v. Secular Soc.*, [1917] A. C. 406.

— **Whether criminal per se—As blasphemy.]**—*See, generally*, CRIMINAL LAW, Vol. XV., pp. 734, 735, Nos. 7944–7946.

**4054. Atheist—Whether within statutes relieving nonconformists—From taking oaths.]**—Deft was sued under the Parliamentary Oaths Act, 1866 (c. 19), for a penalty for sitting & voting in the House of Commons without having made & subscribed the oath appointed by that Act, as amended by the Promissory Oaths Act, 1868 (c. 72), to be taken by members. Sect. 4 of the Act of 1866 provides that "Quakers & every other person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath" may, instead of taking & subscribing the oath, make an affirmation in the form given by the Act. Deft. pleaded that he was a person who by reason of the Evidence Further Amendment Act, 1869 (c. 68), & the Evidence Amendment Act, 1870 (c. 49), was by law permitted to make a solemn affirmation, instead of taking an oath, because an oath would have no binding effect on his conscience, & that he came within the exemption of the Parliamentary Oaths Act, 1866 (c. 19), & that he had duly made an affirmation in conformity with that Act before sitting & voting. On demurrer:—*Held*: (1) Parliamentary Oaths Act, 1866 (c. 19), s. 4, exempted only persons having a general right to affirm on all occasions on which otherwise they would take an oath; (2) the defence was therefore bad, as the Evidence

Further Amendment Act, 1869 (c. 68), & the Evidence Amendment Act, 1870 (c. 49), applied only to persons called to give evidence as witnesses.

(3) Pltf. replied that deft. was a person who, by want of religious belief, was not entitled by the Parliamentary Oaths Act, 1866 (c. 19), or the Promissory Oaths Act, 1868 (c. 72), to make & subscribe a solemn affirmation. On demurrer:—*Held*: the reply was bad, as the statute contains no proviso that none but persons of religious belief were or could be entitled to the benefit of the exemption in sect. 4 from taking the oath.—*CLARKE v. BRADLAUGH* (1881), 7 Q. B. D. 38; 50 L. J. Q. B. 342; 44 L. T. 607; 45 J. P. 484; 29 W. R. 516, C. A.; *reversd.* on other grounds, *sub nom.* *BRADLAUGH v. CLARKE* (1883), 8 App. Cas. 351, H. L.

*Annotations*:—*As to* (1) *Refd.* *Bradlaugh v. Gossett* (1884), 12 Q. B. D. 271. *Generally*, *Mentd.* *Bradlaugh v. Newdegate* (1883), 11 Q. B. D. 1; *A.-G. v. Bradlaugh* (1885), 14 Q. B. D. 667; *Dixon v. Farrer* (1886), 17 Q. B. D. 658; *Charrington, Sells, Dale v. Mid. Ry.* (1901), 11 Ry. & Can. Tr. Cas. 222; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Neville v. London Express Newspaper* (1918), 88 L. J. K. B. 282.

— **Oath of allegiance by.]**—*See* CONSTITUTIONAL LAW, Vol. XI., pp. 498, 499, Nos. 20, 21.

— **As witness.]**—*See* EVIDENCE.

**4055. —Evidence of opinions.]**—The fact that a man of full age holds certain views on religious subjects at one time is evidence that he holds the same views four years later.

A young man at school or college in the heat of argument maintains atheism, therefore is it to be supposed that the same man at the age of eighty, nothing being shown in the meanwhile, maintains the same opinions? Why, obviously, it is absurd. But, on the other hand, if a man maintains an opinion to-day, & goes into the witness box, or does not go into the witness box to-morrow to show that he has changed his opinions, the fact that he has expressed an opinion one way at one o'clock the day before, would be very cogent evidence to show that he entertained the same opinion upon the following day (*LORD COLERIDGE, C.J.*):—*A.-G. v. BRADLAUGH* (1884), 1 Q. B. D. 440; *on appeal* (1885), 14 Q. B. D. 667.

*Annotations*:—*Mentd.* *Dixon v. Board of Trade Secretary* (1886), 3 T. L. R. 35; *R. v. Hausman* (1909), 73 J. P. 516; *Clifford & O'Sullivan*, [1921] 2 A. C. 570.

## Part IX.—Chaplains.

## SECT. 1.—ROYAL CHAPLAINS.

**4056. Appointment—May be by parol.]** The King's chaplain, though appointed by parol only, is enabled to hold pluralities.—*WHETSTONE v. HIGFORD* (1596), Cro. Eliz. 424; 78 E. R. 665.

*Annotation*:—*Refd.* *Owen v. Saunders* (1697), 1 Ld. Raym. 158.

**4057. —On demise of Sovereign—No fresh appointment necessary.]**—The appointment of a priest in ordinary to Her Majesty's Chapels Royal continues after the demise of the Sovereign, & no fresh appointment is necessary; & the fact of a party having performed the duties of such office during the present reign, of his being in the receipt of the salary affixed thereto, & of his name appearing in the books of the household, are sufficient evidence of his holding the office to satisfy this et. in discharging him from the custody of the sheriff.—*HARVEY v. DAKINS* (1849), 3 Exch. 266; 6

Dow. & L. 437; 18 L. J. Ex. 156; 12 L. T. O. S. 406; 154 E. R. 843.

*Annotation*:—*Refd.* *Swan v. Dakins* (1855), 16 C. B. 77.

**4058. Whether enabled to hold pluralities.]**—*WHETSTONE v. HIGFORD*, No. 4056, *ante*.

**4059. —Chaplain extraordinary.]**—*BROWN v. MUGG*, No. 2426, *ante*.

**Immunity from arrest.]**—*See* CONSTITUTIONAL LAW, Vol. XI., p. 521, Nos. 266–268.

## SECT. 2.—CHAPLAINS TO ROYAL FORCES.

**Army chaplains.]**—*See* The King's Regulations & Orders for the Army.

**Naval chaplains.]**—*See* The King's Regulations & Admiralty Instructions.

**Territorial force chaplains.]**—*See* Regulations for the Territorial Force & for County Associations.

**Royal Air Force chaplains.]**—*See* The King's Regulations & Orders for the Royal Air Force.

## SECT. 3.—CHAPLAINS OF ASYLUMS.

**4060. Dismissal—Power of justices to dismiss—Refusal of bishop to revoke first licence or licence new appointee.**—Under 9 Geo. 4, c. 40, s. 30, the visiting justices of county lunatic asylums have the power of appointing & dismissing the chaplain at their discretion, though, by sect. 32, the chaplain appointed must be licensed by the bishop of the diocese, & though the bishop has power to revoke such licence. Therefore, where a chaplain, appointed by the visiting justices, & afterwards licensed by the bishop, was dismissed by the justices, & another appointed in his stead, but the bishop refused to revoke his first licence, or to license the new appointee, this ct. refused to issue a *mandamus* commanding them to admit the first appointee to perform the duties of chaplain in the asylum.—*R. v. MIDDLESEX PAUPER LUNATIC ASYLUM (VISITING J.J.)* (1842), 2 Q. B. 433; 2 Gal. & Dav. 300; 11 L. J. M. C. 30; 6 J. P. 71; 6 Jur. 682; 114 E. R. 171.

**4061. Superannuation allowance—When entitled to—Chaplain not resident in asylum—Duties not occupying whole time.**—A chaplain of a lunatic asylum, who did not reside in the asylum, & who held a benefice two miles off, applied for a superannuation allowance, being of the age & service required. The visiting justices agreed to grant the allowance, but the county council, thinking he was not an officer in the asylum & was not sick, but merely desirous to give his whole time to his benefice, refused to pay the allowance:—*Held*: though not resident, the chaplain was an officer of or in the asylum within 16 & 17 Vict. c. 97, s. 57, & a *mandamus* should be granted to enforce payment accordingly.—*R. v. HEREFORD COUNTY COUNCIL* (1890), 63 L. T. 245; 55 J. P. 72; 38 W. R. 775, D. C.

*See, generally, LUNATICS.*

## SECT. 4.—CHAPLAINS OF PRISONS.

**4062. Appointment—Who may appoint—Whether town council or justices.**—By charter of Queen Elizabeth the corp. of Bath elected annually from its own body two persons to be bailiffs for one whole year. The charter also gave to the corp. the franchise of a gaol, & directed that the bailiffs should be keepers of it.

Since Municipal Corporation Act, 1835 (c. 75), the town council had only appointed one bailiff: a separate ct. of quarter sessions had been granted by the Crown, & a separate commission of the peace had issued for the borough. A new gaol had been built under 1 Vict. c. 78, s. 40. Prisons Act, 1839 (c. 50), s. 15 enacts, "that in every borough gaol & house of correction a clergyman of the Church of England shall be appointed to be chaplain thereof, by the same authority by which the keeper is appointed." On application for a *mandamus* to the bishop to license the appointee of the town council:—*Held*: a single bailiff was well appointed by the town council; such bailiff was the keeper of the gaol within the last-

mentioned Act; & the appointment of the chaplain vested in the town council.—*R. v. BATH & WELLS (BP.)* (1843), 5 Q. B. 147; 1 Dav. & Mer. 173; 12 L. J. Q. B. 324; 1 L. T. O. S. 337; 7 J. P. 178; 7 Jur. 766; 114 E. R. 1204.

*Annotations*: *Mentd. Hammond v. Peacock* (1847), 1 Exch. 41; *R. v. Lancaster* (1847), 10 Q. B. 962.

*See, generally, PRISONS.*

## SECT. 5.—CHAPLAINS OF WORKHOUSES.

**4063. Appointment—Power of poor law commissioners to compel guardians to appoint.**—The poor law comrs. may order the guardians of a union to appoint a chaplain for the union workhouse, with a salary; such chaplain being an officer within Poor Law Amendment Act, 1834 (c. 76), s. 46, interpreted by sect. 109. It is no objection to such order that, by a previous order, not expressly altered or rescinded, the comrs. have authorised the guardians to appoint such chaplain if they shall deem it necessary, & have specified his duties in case it shall have been deemed necessary to appoint him.—*R. v. BRAINTREE UNION GUARDIANS* (1841), 1 Q. B. 130; Arn. & H. 314; 4 Per. & Dav. 593; 10 L. J. M. C. 76; 5 J. P. 431; 5 Jur. 265; 113 E. R. 1079.

*Annotations*: *Folld. Molyneux v. Bagshawe* (1863), 2 New Rep. 196; *Re Sudbury Union Chaplain* (1863), 1 New Rep. 235. *Apld. R. v. Haslehurst* (1884), 13 Q. B. D. 253. *Refd. R. v. Middlesex Asylum (Visitors)* (1842), 2 Q. B. 433; *R. v. Oldham Union Overseers* (1847), 2 New Mag. Cas. 207.

—Who may be appointed—Roman Catholic.]

—*See No. 3922, ante.*

**4064. Powers & duties—Right to officiate in workhouse chapel—Without consent of incumbent.]**

A workhouse chaplain, appointed under Poor Law Amendment Act, 1834 (c. 76), s. 46, does not trench upon the rights of the incumbent of the parish in which the workhouse is situated, by reading Divine Service to the inmates in the workhouse chapel.—*MOLYNEUX v. BAGSHAWE* (1863), 2 New Rep. 196; 8 L. T. 331; 27 J. P. 420; 9 Jur. N. S. 553; 11 W. R. 687.

*Annotation*:—*Refd. Richards v. Fincher* (1873), L. R. 4 A. & E. 107.

**4065. Tenure of office—Under local Act.]**

Under the provisions of a local Act, the chaplain of the workhouse of a parish was elected annually. By an order of the Poor-law Board, addressed to the governors of the poor of that parish, they were required to appoint certain officers, one being the chaplain; & it was provided that the officers so appointed should perform the duties required of them by the regulations of the Poor-law Board, & that any regulation applying to officers appointed under that order should apply to any other officer of the like denomination appointed by the governors before that order came into force. By a subsequent art. it was directed that every officer appointed or holding office under that order should continue to hold the same until he should die or resign, or be removed by the Poor-law Board:—

## PART IX. SECT. 3.

*a. Appointment—Necessity for bishop's licence & incumbent's consent.*—A chaplain to a lunatic asylum is not included under the word "officers" in the statutes authorising the Lord Lieutenant to appoint such; & a chaplain so appointed has no right to officiate in such asylum without the

incumbent's consent, & the bishop's licence.—*NELLIGAN v. JONES* (1861), 14 Ir. Jur. 39.—*IR.*

## PART IX. SECT. 4.

*f. Appointment—Who may be appointed—Vicar-choral.*—A vicar-choral is not, in right of that office, a clergyman ordinarily official within

the parish, & the Board of Superintendence are not warranted, in appointing a vicar-choral to be chaplain of the county jail, to the exclusion of the incumbent of the parish & his curates, having actual cure of souls.—*WADE v. STRANGWAYS* (1863), 16 Ir. Jur. 179.—*IR.*



*Held*: by the operation of that order the chaplain who had been previously elected for a year was not entitled to retain his office for life or until he should be removed by the Poor-law Board.—*R. v. ST. JAMES', WESTMINSTER (GOVERNORS)* (1852), 21 L. J. M. C. 97; 18 L. T. O. S. 253; 16 J. P. 70; 16 Jur. 406.

**4066. — Dismissal—Power of poor-law commissioners to order.**—The poor-law comrs. may order the dismissal of the chaplain of a union workhouse, he being an officer under Poor Law Amendment Act, 1834 (c. 76), ss. 46, 48, as interpreted by sect. 109 of that Act.—*Re SUDBURY UNION (CHAPLAIN)* (1863), 1 New Rep. 235; *sub nom. Ex p. MOLINEUX*, 7 L. T. 599; *sub nom. Ex p. MOLYNEUX*, 27 J. P. 56; 11 W. R. 233.

**4067. Salary—Liability of churchwardens—Under local Act.**—The Ct. of Q. B., under the power given it by a local Act, granted a *mandamus* to compel the churchwardens of the parish of Lambeth to pay M., who had been appointed chaplain to the workhouse by the rector of the parish, a reasonable & proportionate salary for discharging the duties attached to that office.—*R. v. LAMBETH (CHURCHWARDENS)* (1840), 4 J. P. 253.

**4068. — Right to charge.** A chaplain to a workhouse appointed by the guardians & paid out of the rates, but liable to dismissal only by the Local Govt. Board, is not a public officer so as to render a charge by him on his salary invalid against his trustee in bkpy. To make an office a public office, the pay must come out of national & not local funds, & the office must be public in the strict sense of the term: it is not enough that the due discharge of the duties of the office should be for the public benefit in a secondary & remote sense. *Re MIRAMS*, [1891] 1 Q. B. 591; 39 W. R. 161; 7 T. L. R. 309; 8 Morr. 59; *sub nom. Re MIRAMS, Ex p. OFFICIAL RECEIVER*, 60 L. J. Q. B. 397; *sub nom. Re MIRAMS, Ex p. SPECIAL CASE*, 64 L. T. 117.

*Annotations*:—*Mentd.* Mogul S.S. Co. v. McGregor, Gow, [1892] A. C. 25; Hyams v. Stuart King (1908), 77 L. J. K. B. 794; Horwood v. Millar's Timber & Trading Co., [1916] 2 K. B. 11.

*See, generally*, POOR LAW.

#### SECT. 6.—PRIVATE CHAPLAINS.

**4069. Appointment—Mode of.**—*R. v. SAVACRE* (1586), Godb. 41; 1 And. 200; 78 E. R. 25.

*Annotation*:—*Mentd.* Drury's Case (1601), 4 Co. Rep. 89 b.

**4070. Status—Effect of removal from office.**—*R. v. SAVACRE* (1586), Godb. 41; 1 And. 200; 78 E. R. 25.

*Annotation*:—*Refd.* Drury's Case (1601), 4 Co. Rep. 89 b.

**4071. Retainer of two chaplains—Appointment of additional chaplain—Power to appoint—After removal of one chaplain.**—*R. v. SAVACRE* (1586), Godb. 41; 1 And. 200; 78 E. R. 25.

*Annotation*:—*Refd.* Drury's Case (1601), 4 Co. Rep. 89 b.

**4072. — Right of additional chaplain to hold pluralities.**—If a countess retains two chaplains, & the two being alive, afterwards retains a third, such third chaplain is not capable of having dispensation to hold two benefices with cure.—*DRURY'S CASE* (1601), 4 Co. Rep. 89 b; Jenk. 272; 76 E. R. 1070; *sub nom. R. v. DRURY, Cro. Eliz.* 723; *sub nom. DRURY v. R., Cro. Eliz.* 830; *sub nom. R. v. LINCOLN (Bp.) & DREWRY, Moore, K. B.* 561.

*Annotations*:—*Refd.* Acton's Case (1603), 4 Co. Rep. 117 a; *R. v. Harman* (1740), 7 Mod. Rep. 402.

**4073. Termination of retainer.**—(1) If a baroness widow retains two chaplains according to 21 Hen. 8, c. 13, s. 18, & afterwards takes one of the nobility to husband, by the marriage the retainer is not countermanded; but the retainer of these two chaplains remains, & they without a new retainer may take two benefices.

(2) If any officer allowed by the statute to have one, two, or more chaplains retains a chaplain, & afterwards is removed from his office, in that case the retainer by the common law remains; but the retainer upon the statute is determined.

(3) So if an earl or baron retains a chaplain, & before his advancement is attainted of treason, the retainer, according to the statute, is determined.

(4) If a baroness widow retains two chaplains, according to the statute, & afterwards marries one of the nobility, & afterwards the husband dies, the retainer remains.—*ACTON'S CASE* (1603), 4 Co. Rep. 117 a; 76 E. R. 1107.

*Annotation*:—*As to* (1) & (4) *Refd.* Cowley v. Cowley, [1900] P. 118.

# EDUCATION.

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<i>Rating of School Buildings, etc.</i> . . . .	<i>„ RATES AND RATING.</i>

## Part I.—In General.

**1. Duty of parent—Liability for expenses.]—**If a husband treats his wife cruelly & A. takes her into his house & provides her with necessaries, he may maintain an action against the husband, but cannot maintain any action for the education of the children.

A father is bound by every social tie to give his children an education suitable to their rank, but it is a duty of imperfect obligation & cannot be enforced in a court of law (LORD KENYON, C.J.). — *HODGES v. HODGES* (1796), Peake, Add. Cas. 79; 1 Esp. 441, N. P.

*Annotations:—*Consd. *Woolston v. Smith* (1825), 3 L. J. O. S. C. P. 200. *N.F. Collins v. Cory* (1901), 17 T. L. R. 242. At the present day education of the children was a necessary, & *pltf.* was entitled to recover (PHILLIMORE, J.). *Reid, Houllston v. Smyth* (1825), 2 C. & P. 22.

**2. ———.]—**A wife who by her husband's conduct is forced to live separate from him has implied authority to pledge his credit for the education of the children, who are in her custody, as a "necessary." — *COLLINS v. CORY* (1901), 17 T. L. R. 242.

**3. Rights of parent.]—**The father has the control over the person, education, & conduct of his children until they are 21 years of age (BIHETT, M.R.). — *Re AGAR-ELLIS, AGAR-ELLIS v. LASCELLES* (1883), 24 Ch. D. 317; 53 L. J. Ch. 10; 50 L. T. 161; 32 W. R. 1, C. A.

*Annotations:—*Consd. *Re Scanlan* (1888), 40 Ch. D. 200; *Re Newton*, [1896] 1 Ch. 740. *Reid, Thomasset v. Thomasset*, [1891] P. 295; *Re Mathieson* (1918), 87 L. J. Ch. 445. *Mentd. Re McGrath*, [1893] 1 Ch. 143; *Re Gyngall*, [1893] 2 Q. B. 232.

**4. Jurisdiction of court.]** Upon what ground is the ct. required to maintain these children out of their own property & not at the expense of the father. It is because that father is an improper person to have the care of these children; & as it is proposed that their maintenance & education should be put out of his control, it is, therefore, as he may refuse to afford them more than will

supply them with their bare maintenance, which the law of the country would require from every person who had the means to maintain his children; it is for that reason that the ct. is to take upon itself, out of the property that those children have, instead of accumulating the income of their property for their benefit, till they should be capable of taking possession of it themselves, to apply a part of it for their maintenance & education (LORD REDESDALE). — *WELLESLEY v. WELLESLEY* (1828), 2 Bll. N. S. 124; 1 Dow. & Cl. 152; 4 E. R. 1078, H. L.; *affg. S. C. sub nom. WELLESLEY v. BEAUFORT* (DUKES) (1827), 2 Russ. 1, L. C.; *subsequent proceedings, sub nom. LONG WELLESLEY'S CASE* (1831), 2 Russ. & M. 630, L. C.

*Annotations:—*Consd. *Ward v. Ward* (1840), 2 Ph. 786. *Reid, Re Spence* (1847), 2 Ph. 247; *Re Goldsworthy* (1876), 2 Q. B. D. 75; *Re A. B.* (1885), 1 T. L. R. 657; *Re v. Barnado, Jones's Case*, [1891] 1 Q. B. 194; *Smart v. Smart*, [1892] A. C. 425. *Mentd. Re n. McClellan* (1831), 1 Dow. 81; *Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42; *Re Fynn* (1848), 2 Do G. & Sm. 457; *Re Hakewill* (1852), 12 C. B. 223; *Swift v. Swift* (1865), 34 Beauv. 266; *Re Meado* (1871), 19 W. R. 313; *Re Agar-Ellis, Agar-Ellis v. Lascelles* (1878), 10 Ch. D. 49.

**5. Jurisdiction of Divorce Court.]—**The ct. has power to make orders respecting the custody, maintenance, & education of children during the whole period of their infancy—that is, till they attain the age of 21 years. — *THOMASSET v. THOMASSET*, [1894] P. 295; 63 L. J. P. 140; 71 L. T. 148; 42 W. R. 658; 10 T. L. R. 591; 38 Sol. Jo. 630; 6 R. 637, C. A.

*Annotations:—*Consd. *Stark v. Stark & Hitchins*, [1910] P. 190; *Mathieson v. Napier* (1918), 119 L. T. 18. *Reid, Bishop v. Bishop, Judkins v. Judkins*, [1897] P. 138. *Mentd. Jeffries v. Jeffries* (1907), 51 Sol. Jo. 468.

**Custody of children.]** See INFANTS.

**Control of religious education of infant.]** — See INFANTS.

**Education of wards of court.]** See INFANTS.

**Education of illegitimate children.]** — See BASTARDY, Vol. III., pp. 383, 384, Nos. 225–228.

## Part II.—Central and Local Education Authorities.

## SECT. 1.—CENTRAL AUTHORITY.

## SUB-SECT. 1.—THE BOARD OF EDUCATION.

*See, generally.* Board of Education Act, 1899 (c. 33); 1921 Act (c. 51), ss. 1, 2.

**Consultative committee to advise Board.** — *See* Board of Education Act, 1899 (c. 33), s. 4, Stat. R. & O. 1900, No. 599; Stat. R. & O. 1907, No. 259; Stat. R. & O. 1920, No. 1582 & 1921 Act (c. 51), s. 2.

**6. Jurisdiction.—To decide questions of law.]** — BOARD OF EDUCATION v. RICE, No. 290, *post*.

**7. ——— To determine legal rights.—Between parent & local education authority.]—**The duties imposed on a local education authority are defined by the Education Acts, 1870 to 1903, & the Code, which has parliamentary sanction. One of them is to provide & maintain efficient public elementary schools in their district. They must also fulfil the conditions of the Code in order to obtain the parliamentary free grant. By art. 53 (a) of the Code no child may be refused admission

to a public elementary school on other than reasonable grounds; & art. 26 (b) provides that if any question arises as to the interpretation of the Code, or as to the fulfilment of any of the conditions specified therein, the decision of the Board for the purposes of the Code shall be final.

By sect. 3 of Elementary Education Act, 1870 (c. 75), the term "parent" includes "guardian & every person who is liable to maintain or has the actual custody of any child"; & the Elementary Education Act, 1900 (c. 53), s. 2, enacts that poor law guardians "may contribute towards such of the expenses of providing, enlarging, or maintaining, any public elementary school as are certified by the Board of Education to have been incurred wholly or partly in respect of scholars taught at the school, who are . . . boarded out by the guardians."

A local education authority, with the sanction of the Board of Education, refused to allow boarded out poor law children resident in their

## PART II. SECT. 1, SUB-SECT. 1.

**a. Superintendent of Education — Extent of authority—Enforcement by mandamus.]—**TREMBLAY v. VALENTIN

(1885), 12 S. C. R. 546.—CAN.

**b. ———.]—**ST. CHARLES D'ECOLE COMMISSAIRES v. CORDEAU (1895), (1875–1908), 1 Cout. Dig. 89–90.—CAN.

**c. ——— Appointment of delegate to conduct inquiry — Rules relating to delegates' duties.]—**THIERRIEN v. MERCIER (1915), Q. R. 24 K. B. 352.—CAN.

**SECT. 1.—Central authority: Sub-sects. 1, 2 & 3.**  
**SECT. 2: Sub-sects. 1, 2 & 3.]**

district to attend their public elementary school unless the poor law guardians made a special payment towards the expenses of maintaining the school in connection with the teaching of the children. The guardians objected that they were under no duty to make a special payment & brought an action against the education authority to restrain it from excluding the children:—*Held*: (1) under Education Acts & the Code the guardians, as the parents of the boarded out poor law children, have a statutory right to have free education given to their children attending the public elementary school, without payment of any fees whatever; (2) neither the Board nor the local education authority has any power either under the Acts or the Code to require the guardians, as parents, to make any special payment towards the expenses of maintaining the school; (3) the Board has no jurisdiction under the Acts or the Code to determine legal rights as between a parent & the local education authority; (4) the exclusive jurisdiction conferred on the Board in the Code is limited to the purposes of the Code, namely, to determine whether the education authority has fulfilled all the conditions of the Code so as to obtain the annual parliamentary grant—*e.g.* whether a child was excluded from attending the school on other than reasonable grounds, such as illness, want of cleanliness, & such like matters.

The obligation to maintain & keep efficient is to maintain & keep the school as a school, that is to say, as a means of giving elementary education to children, & that such education is to be available for children resident in the area without distinction (*WAIRINGTON, L.J.*).—*GATESHEAD UNION v. DURHAM COUNTY COUNCIL*, [1918] 1 Ch. 146; 87 L. J. Ch. 113; 117 L. T. 796; 82 J. P. 53; 34 T. L. R. 65; 62 Sol. Jo. 86; 16 L. G. R. 33, C. A.

**8. — Conferred by Code—Limitations of.]**  
 —*GATESHEAD UNION v. DURHAM COUNTY COUNCIL*, No. 7, *ante*.

**— Differences between local authority & manager of non-provided schools.]—See Part IV., Sect. 3, sub-sect. 3, *post*.**

**9. Exercise of jurisdiction—Enforced by mandamus & certiorari.]—BOARD OF EDUCATION v. RICE**, No. 290, *post*.

**— As to necessity of elementary schools.]—See 1921 Act (c. 51), s. 19.**

**Mandamus & certiorari generally, see CROWN PRACTICE**, Vol. XVI., pp. 276–352, 398–481.

## PART II. SECT. 2, SUB-SECT. 2.

**d. Failure to provide accommodation.]—A mandamus to compel the admission of a child to a public school will not be granted where it is shown that there is not accommodation for her, for this is a valid answer to such application, especially where it appears that there is sufficient accommodation at another public school in the same town; nor where it is shown that the application for admission was not made in the regular & proper way, under the public school regulations, inasmuch as, although the child was a registered pupil at the other public school in the same town during the preceding term, she had not attended there at the commencement of the present one, nor had application been made to the inspector to have her admitted to the school to which admission was now sought.—*DUNN v. WINDSOR BOARD OF EDUCATION* (1883), 6 O. R. 126.—*CAN.***

**e. —.]—A mandamus will lie to compel a board of school trustees**

**to provide sufficient accommodation for the children of the school district, & to grant permits for admission.—*Ex p. GALLAGHER* (1892), 31 N. B. R. 472.—*CAN.***

**f. Failure to subdivide township into school districts.]—*Re ELLIS & WINDFIELD* (1904), 24 C. L. T. 298; 3 O. W. R. 802.—*CAN.***

**g. Duty to allow children to attend.]—*A.*, owning & working a farm in School District No. 10, moved his family to District No. 8, & took up his residence there, although occasionally spending a part of his time at the farm. The trustees of district No. 8 refused to allow his children to attend school, although *appet.* had notified them of his change of residence, & had asked to be assessed for school purposes:—*Held*: a mandamus should issue to compel the trustees to allow his children to attend school.—*Ex p. MILLER* (1897), 34 N. B. R. 318.—*CAN.***

**h. —.]—Apart from Public Schools Act, s. 110, which refers only**

## SUB-SECT. 2.—THE MINISTRY OF HEALTH.

**See, generally, Poor Law, & Ministry of Health Act, 1919 (c. 21).**

**Education of children in workhouses.]—See Poor Law Amendment Act, 1834 (c. 76), ss. 15, 42.**

**Appointment of schoolmasters & schoolmistresses for workhouses.]—See Poor Law Amendment Act, 1834 (c. 74), ss. 46, 109.**

## SUB-SECT. 3.—THE HOME OFFICE.

**See Children Act, 1908 (c. 67), ss. 44–93, & Children Act, 1921 (c. 4), s. 1.**

## SECT. 2.—LOCAL EDUCATION AUTHORITY.

### SUB-SECT. 1.—IN GENERAL.

**See, generally, 1921 Act (c. 51), ss. 3–10.**

**10. Council of county borough—Constitution of council.]—(1) In Education Act, 1902 (c. 42), s. 1, which enacts that “for the purposes of this Act the council of every county borough shall be the local education authority,” & throughout the Act, the words “council of a borough” are used for “the mayor, aldermen, & burgesses acting by the council.”**

**(2) The council were not incorporated as a separate body by that Act. Therefore land which the council had agreed to acquire under the powers & for the purposes of the Education Acts had to be conveyed to the mayor, aldermen, & burgesses.—*Re LEEDS INSTITUTE OF SCIENCE, ART & LITERATURE & LEEDS CITY COUNCIL*, [1909] 1 Ch. 500; 78 L. J. Ch. 321; 100 L. T. 468; 73 J. P. 201; 25 T. L. R. 297; 7 L. G. R. 912.**

**Powers, duties & liabilities.—In regard to elementary schools.]—See, generally, Part IV., *post*.**

**— In regard to higher education.]—See, generally, Part VII., *post*.**

**For purposes of elementary or higher education.]**

**—See 1921 Act (c. 51), s. 3.**

**Delegation of powers to educational committee.]—See Sub-sect. 3, *post*.**

**Co-operation between authorities for elementary & higher education.]—See 1921 Act (c. 51), ss. 8, 20 (1).**

**Statutory relations with managers & rights of teachers.]—See Part IV., Sect. 4, sub-sect. 2, *post*.**

## SUB-SECT. 2.—ENFORCEMENT OF DUTIES OF.

**See 1921 Act (c. 51), ss. 150, 151.**

**to Rural School Districts, the right to attend British Columbia Public Schools is in no way connected with the payment of rates & depends on residence.—*PATTERSON v. VICTORIA SCHOOL TRUSTEES*, [1917] 1 W. W. R. 526; 24 B. C. R. 365.—*CAN.***

**k. — Failure to provide conveyance.]—Where a school district was legally created under Public Schools Act, R. S. M. 1902, & amendments thereto, & a bye-law of the council was passed, pursuant to sect. 91, providing that the trustees should make suitable arrangements for conveying to & from school all pupils who would have further than one mile to walk in order to reach the school. On the facts:—*Held*: the children had been refused by the trustees the enjoyment of the arrangements made, & in a manner that indicated ill-will towards the relator; & he was, therefore, entitled to a mandamus, with costs against the trustees personally.—*R. (WELLS) v. GREEN* (1913), 23 W. L. R. 264; 10 D. L. R. 111.—*CAN.***

## SUB-SECT. 3.—EDUCATION COMMITTEES.

See 1921 Act (c. 51), s. 4, & Sched. 1.

**11. Scheme for establishment of—Publication by Board of Education—Scheme not approved.]—**Where a scheme for the establishment of an education committee has been submitted by the local education authority to the Board of Education, & is not approved by them, there is no duty imposed upon the Board by Education Act, 1902 (c. 42), s. 17 (6), to publish the scheme.—*Ex p. CARDIFF CORPN.* (1904), 20 T. L. R. 317.

**12. — Power of council to alter—Mode of retirement of members.]—**By the scheme for the constitution of the education committee of the Barry Urban District Council, approved by the Board of Education on Apr. 16, 1903, it was provided that the committee should consist of nine members, & that the members of it should hold office for a period of three years, provided, nevertheless, that one-third should go out of office on May 1, 1904, & in each succeeding year, "The council shall determine the order in which they shall retire." On Apr. 20, 1903, the council passed resolutions under which *pltf.* was to be a member of the committee & retire at the end of the second year. On Apr. 18, 1904, the council, purporting to act under their standing orders, passed a resolution rescinding so much of the resolution of Apr. 20, 1903, as decided that *pltf.* should retire at the end of the second year, namely, on May 1, 1905, & directing that in lieu thereof he should retire on May 1, 1904:—*Held*: (1) the council had power to make a final scheme & determine the method of retirement; (2) when they had once fixed the dates of retirement they could not alter them without a new scheme; (3) the resolution of Apr. 18, 1904, was *ultra vires*.—*MILWARD v. BARRY URBAN COUNCIL*, [1904] 2 Ch. 481; 73 L. J. Ch. 804; 91 L. T. 200; 68 J. P. 569; 53 W. R. 21; 20 T. L. R. 705; 48 Sol. Jo. 651; 2 L. G. R. 1222.

**13. Delegation of powers—By local authority to education committee—Dismissal of teachers.]—***Pltf.* was engaged as mistress of a non-provided school, a school maintained but not provided by the local education authority under Education Act, 1902 (c. 42), under an agreement with the managers of the school, one of the terms of which was that either party might terminate the agreement on giving the other party three calendar months' notice in writing. That Act came into operation in the district in Aug. 1903, & the Berkshire County Council was the "local education authority." The county council, acting under sect. 17 of the Act, delegated all its powers under the Act, except the power of raising a rate or borrowing money, to an education committee; the committee under Sched. I., A (6), appointed a sub-committee to deal with the appointment & dismissal of teachers; & the sub-committee appointed a section to deal with the details "surrounding" the dismissal of teachers, & to make recommendations to the sub-committee. In these circumstances the managers came to the conclusion that *pltf.* was out of harmony with them & that this was detrimental to the best interests of the school, & on Oct. 17, 1905, at a meeting at which *pltf.* attended the managers passed a resolution that *pltf.* should be asked to resign, & that if she refused notice should be sent to the education committee that the managers desired to terminate their engagement with her. As *pltf.* did not resign, the managers on Nov. 23 wrote to the education committee asking for its consent to the dismissal of *pltf.* forthwith on payment of

three months' salary. On Nov. 25 the section gave its consent, & on Nov. 28 the education secretary wrote: "The committee will approve the notice given by your managers to Miss Y."—*pltf.*—"to terminate her engagement." On Nov. 30 the managers gave notice in writing of dismissal, stating that the notice had the approval of the education committee & enclosing a cheque for three months' salary in lieu of notice. On Dec. 9 the sub-committee approved & adopted the action of the section. On Dec. 18 *pltf.* commenced an action to restrain *defts.* from acting on the notice to her, & on Jan. 19 applied for an injunction. On Jan. 20, before the argument was concluded the education committee passed a resolution consenting to the dismissal:—*Held*: (1) the effect of the delegation under sect. 17 was that the education committee was, in respect of any powers as to the dismissal of teachers, the educational authority; (2) to the sub-committee there was delegated power to determine, & not merely to report to the committee upon, the question whether consent to dismissal should be given; (3) the section was only a subordinate body, the duty of which was to consider & report to the sub-committee, & the action of which required the sub-committee's approval & therefore, the consent of the education authority had not been obtained at the time of the dismissal; (4) if consent to dismissal was required, it was not a condition precedent to dismissal, but if given subsequently operated as a ratification of dismissal with the provisional consent of the section; (5) the effect of sect. 7 was that unless the education authority intervened, the power to appoint & dismiss teachers rested with the managers; (6) if the education authority intervened, the managers either would have to yield to that authority's wishes, or disqualify the school for maintenance from public funds; (7) the requirements of the Act as to consent were operative only as between the managers & the education authority, & gave no right to the teacher.—*YOUNG v. CUTHBERT*, [1906] 1 Ch. 451; 75 L. J. Ch. 217; 94 L. T. 191; 70 J. P. 130; 51 W. R. 206; 22 T. L. R. 251; 4 L. G. R. 356.

*Annotations*:—*As to* (2) *Reid*, *Blanchard v. Dunlop* (1916), 85 L. J. Ch. 791. *As to* (5) *Reid*, *Crocker v. Plymouth Corp.* (1906), 75 L. J. K. B. 375; *Powell v. Lee* (1908), 99 L. T. 284; *Crisp v. Holden* (1910), 54 Sol. Jo. 784; *Harries v. Crawford*, [1919] A. C. 717; *Martin v. Eccles Corp.*, [1919] 1 Ch. 387; *Hanson v. Radcliffe U. C.*, [1922] 2 Ch. 490.

**14. — By education committee to sub-committee.]—***YOUNG v. CUTHBERT*, No. 13, *ante*.

**15. — By sub-committee to section of members.]** *YOUNG v. CUTHBERT*, No. 13, *ante*.

**16. Agreement to provide education—At cost "not covered by fees payable"—Whether power to increase fees.]—***Pltf.* sent his daughter to a secondary school managed by *defts.* The prospectus, which contained the contract between the parties, provided that the fees payable by *pltf.* should be £3 ls. per term, & further provided that *pltf.* should enter into a certain undertaking. *Pltf.* signed the undertaking, by which he pledged himself, "in consideration of the Kent Education Committee having agreed & arranged to provide my said daughter with education suitable to her age up to the end of the school year in which she attains the age of sixteen years at a cost which will not be covered by the fees payable by me," to pay a penalty if without the previous consent in writing of *defts.* the child ceased to attend the school before the end of the school year in which she attained the age of sixteen years:—*Held*: the words "at a cost which will not be covered by



**Sect. 2.—Local education authority: Sub-sects. 3 & 4.**  
**Part III.]**

the fees payable by me" in the undertaking did not entitle defts. to raise the fees specified in the prospectus to any figure they elected provided that it was lower than the cost of the education.—*SPRY v. KENT EDUCATION COMMITTEE* (1924), 40 T. L. R. 559; 22 L. G. R. 515, D. C.

**Schemes for organisation of education.]—See Part III., post.**

**Schemes as to elementary education.]—See Part III., post.**

**Schemes as to continuation schools.]—See Part III., post.**

**SUB-SECT. 4.—LIABILITY FOR NEGLIGENCE.**

*See, generally, NEGLIGENCE.*

**Legal proceedings.]—See Part XVIII., post.**

**17. Negligence of education authority—Defective state of playground.]—Pltf., a pupil at a public elementary school provided by defts., a county council, as the local education authority, fell, while playing in the playground attached to the school, through his foot being caught in a hole existing in the asphalt pavement of the playground, & in consequence, sustained injury. In an action brought by pltf. against the county council to recover damages for the injury so sustained by him, the jury found that he was injured through the negligence of defts.:—*Held*: the action was maintainable on the ground that, by Education Act, 1902 (c. 42), a statutory duty of keeping the school premises in a state of repair was imposed upon defts., & they were responsible for neglect of that duty by those who actually managed the school.—*CHING v. SURREY COUNTY COUNCIL*, [1910] 1 K. B. 736; 79 L. J. K. B. 481; 102 L. T. 414; 71 J. P. 187; 26 T. L. R. 355; 54 Sol. Jo. 360; 8 L. G. R. 369, C. A.**

**Annotations:—***Fold*. *Morris v. Carnarvon County Council*, [1910] 1 K. B. 840. *Reid*. *Smith v. Martin & Kingston-upon-Hull Corp.*, [1911] 2 K. B. 775. *Ment*. *Gateshead Union v. Durham County Council*, [1918] 1 Ch. 146.

**18. — Dangerous door.]—Pltf., a girl aged seven, attended a public elementary school provided by defts., the local education authority for the district. This school had formerly belonged to a school board, & was transferred to defts. upon the coming into operation of the Education Act, 1902 (c. 12). The only mode of entrance into & egress from a classroom in the school was by a doorway closed by a heavy swing door with a powerful spring, which door had been put up by the school board, defts.' predecessors. Pltf. while leaving the classroom, was injured through this door closing on her fingers. The door was in good repair & in the same condition as it was in when the school was taken over by defts. In an action**

brought by pltf. in respect of the injury sustained by her, the jury found that the door was not a suitable one for use by young children, when put up in the first instance, & that defts. were guilty of negligence in allowing it to remain after the school was transferred to them:—*Held*: as it was the duty of defts. to keep the school premises in proper condition for the purposes of a school, they were responsible for a breach of duty in not discovering & remedying the improper construction of the door in question, when the school was transferred to them, & therefore, the action was maintainable.—*MORRIS v. CARNARVON COUNTY COUNCIL*, [1910] 1 K. B. 840; 79 L. J. K. B. 670; 102 L. T. 524; 74 J. P. 201; 26 T. L. R. 391; 54 Sol. Jo. 443; 8 L. G. R. 485, C. A.

**Annotation:—***Dist*. *Shrimpton v. Hertfordshire County Council* (1910), 74 J. P. 305.

**19. — Conveyance of children to school—Failure to provide attendant.]—A person who provides anything for the use of another is bound to provide a thing reasonably safe for the purpose for which it is intended, even though the person using it uses it only by the permission or consent of the person providing it & has no legal claim to the use of it.**

Where an education authority in pursuance of their statutory powers, provided a vehicle to convey certain children, who lived at a distance, to & from their school, & a child who lived nearer to the school & was not one of those for whom the vehicle was provided, was conveyed in it with the consent of the education authority, & while getting out of it, fell & was injured in consequence of there being no second person in addition to the driver to help the children to get in & out:—*Held*: there was evidence of negligence on the part of the education authority, & they were liable for the injury so caused to the child.—*SHRIMPTON v. HERTFORDSHIRE COUNTY COUNCIL* (1911), 104 L. T. 145; 75 J. P. 201; 27 T. L. R. 251; 55 Sol. Jo. 270; 9 L. G. R. 397, H. L.

**Annotation:—***Apld*. *Smith v. Martin & Kingston-upon-Hull Corp.*, [1911] 2 K. B. 775.

**20. — Circular saw in technical school—Without guard.]—At technical classes provided by defts., a borough council, pltf., a lad of nineteen years of age, used a small circular saw driven by electricity which had no guard or "sword" to it. Pltf.'s hand was drawn into the machine so that his thumb had to be amputated. Pltf., in giving evidence against defts. in an action for negligence on the ground that there was no such guard or "sword," said that he knew the saw was dangerous, & that it would be less dangerous if guarded, but he had never suggested to the instructor that it should be guarded:—*Held*: the maxim *volenti non fit injuria* applied, & judgment was entered for defts.—*SMERKINICH v. NEWPORT CORPN.* (1912), 76 J. P. 454; 10 L. G. R. 959, D. C.**

**PART II. SECT. 2, SUB-SECT. 4.**

**201. Negligence of education authority**

**—Circular saw in technical school.]**

—A pupil at a school under the control of deft. board was injured by a dangerous circular saw owned by said board while he was using it during an examination in the manual arts. The examination was conducted, not by deft., but by examiners appointed by the department of education, which had, under School Ordinance, c. 75, C. O., the right to use deft.'s school & the apparatus therein for the purposes of the examination, & pltf.'s application for the examination was made to the department:—*Held*: deft. board was not liable.—*SMILES v. EDMONTON SCHOOL DISTRICT NO. 7 (BOARD OF TRUSTEES)*, [1918] 3 W. W.

R. 673; 43 D. L. R. 171; 14 Alta. L. R. 351.—**CAN.**

**m. — Loss of garments from cloakroom.]—Boards of Education are not insurers of school children's clothing; they are responsible for its loss or injury only when it is caused by their negligence. Where a pupil at a school left her coat in the cloakroom, & it was taken therefrom by some person unknown:—*Held*: no want of reasonable care was proved. *Sem*: the case would be different, if experience had shown the cloakroom to be an unsafe place.—*STEVENSON v. TORONTO BOARD OF EDUCATION* (1919), 46 O. L. R. 146; 17 O. W. N. 52; 49 O. L. R. 673.—**CAN.****

**n. — Defective gate on school premises.]—A child of seven years**

attending a public school was injured through the fall of an iron gate, which formed part of the school premises. The gate was in a defective condition & fell in consequence of school children swinging on it:—*Held*: it was the duty of the school board to keep the gate in a safe condition, & they were liable in damages for the injury.—*CORMACK v. WICK & PULFENEY TOWN SCHOOL BOARD* (1889), 16 R. (Cl. of Sess.) 812.—**SCOT.**

**o. — — —.]—An iron gate at the entrance of a public school fell upon a boy who was passing & injured him. In an action for damages against the school board it was averred that the gate was in a defective condition & that, in consequence of some of the boys swinging on it, it was**

**21. — & contractor — Dangerous materials left in playground.]**—A contractor, who was to carry out certain repairs at a public elementary school, left a quantity of rough stuff composed of sand & lime in a truck in a corner of the school playground. The headmaster of the school gave instructions to the school caretaker to have the stuff removed, as he considered it was dangerous, & the caretaker telephoned to the contractor asking him to remove it. The stuff, however, was not removed. When the boys came out of school the stuff was left unguarded & one of the boys threw a portion of the stuff at pltf., who was also a scholar at the school, injuring his eye: *Held*: there was evidence upon which the jury could find that both the education authority & the contractor had been guilty of negligence. — *JACKSON v. LONDON COUNTY COUNCIL & CHAPPELL* (1912), 76 J. P. 217; 28 T. L. R. 359; 56 Sol. Jo. 428; 10 L. G. R. 318, C. A.  
*Annotation*:—*Mentd.* Forsyth v. Manchester Corpn. (1912), 76 J. P. 216.

**22. Negligence of teacher. Injury to pupil.—Obeying teacher's orders.]** Pltf., who was a child of fourteen years of age, was being educated at a provided school. One of the teachers of the school directed her to go to a room used in common by the teachers, & to attend to the fire in that room. The fire was used for cooking this particular teacher's food. While she was attending to the fire pltf.'s clothes became alight & she was injured:—*Held*: (1) the teacher was liable; (2) the education authority were also liable on the ground that the teacher was put by them in a position in which it was intended that her orders should be obeyed by the children, & that the order given by her in the present case was therefore one for which the education authority were liable.

*SMITH v. MARTIN & KINGSTON-UPON-HULL CORPN.*, [1911] 2 K. B. 775; 80 L. J. K. B. 1256; 105 L. T. 281; 75 J. P. 433; 27 T. L. R. 468; 55 Sol. Jo. 535; *sub nom.* *MARTIN v. SMITH, SMITH v. MARTIN & HULL CORPN.*, 9 L. G. R. 780, C. A.

*Annotations*:—*Generally*, *Mentd.* Gillow v. Durham County Council, [1911] 2 K. B. 1071; *Smith v. Macnally*, [1912] 1 Ch. 816.

**23. — — — — — Playing with toy.]**—Pltf. a child of five years of age, was a scholar at a non-provided school. With the leave of the teacher another scholar had brought certain toy soldiers to the school. While playing with these soldiers, pltf. fell on a toy "lancer" with the result that the lance pierced his eye, which had subsequently to be removed. In an action against the school managers & the education authority for damages for negligence:—*Held*: the accident being one which might have happened in any nursery where children play with toy soldiers, there was no evidence of negligence & debts were entitled to succeed. *CHILVERS v. LONDON COUNTY COUNCIL* (1916), 80 J. P. 216; 32 T. L. R. 363.

**24. Negligence of medical officer.]** Where an education authority under the Education Acts, 1907, & 1909, enters into an agreement with a medical assocn. in regard to the performance of operations on schoolchildren, the education authority are not liable for the negligence, if any, of the persons performing the operation, provided that they engage competent professional persons to perform it. *DAVIS v. LONDON COUNTY COUNCIL* (1914), 30 T. L. R. 275; 78 J. P. 61.

**Liability of schoolmasters & teachers.]** See Part XVII., Sect. 8, *post*.

**Liability of managers.]** See Part IV., Sect. 4, sub-sect. 2, B, *post*.

## Part III.—Schemes as to Powers and Duties.

See 1921 Act (c. 51), ss. 11-16.

**For organisation of education.]** See 1921 Act (c. 51), s. 11.

**As to elementary education.]**—See 1921 Act (c. 51), s. 12.

**For continuation schools.]** See 1921 Act (c. 51), s. 13.

**Preparation & submission of.]** See 1921 Act (c. 51), s. 14.

**Approval by Board of Education.]** See 1921 Act (c. 51), s. 15.

**As to medical inspection & treatment.]**—See 1921 Act (c. 51), s. 16.

wrenched away & fell. It was not averred that the boys who were swinging were school children at the school or that the accident happened during school hours, or that defenders knew that the gate was used as a swing:—*Held*: as there was no obligation on the defenders to provide gates which were suitable as swings for passing boys, the pursuers' averments were irregular & action dismissed. — *M'MURRAY v. GLASGOW SCHOOL BOARD* [1916] S. C. 9.—*SCOT*.

**22 i. Negligence of teacher.—Injury to pupil.]**—The schoolmaster of a public school established under 43 Vict., No. 23, was making preparations to deliver a lesson in chemistry, & sent a pupil into another room to fetch him a tumbler, giving him no

instructions as to its contents. The tumbler contained dilute sulphuric acid, which the pupil mistook for dirty water, & whilst returning he threw the liquid away. Pltf., another pupil, who was passing received some of the acid in his eye, & sued the Govt. to recover damages for the schoolmaster's negligence:—*Held*: the Govt. were not liable at the suit of pltf. *HOLE v. WILLIAMS* (1910), 19 S. R. N. S. W. 638; 27 N. S. W. W. N. 100.—*AUS*.

**22 ii. — — — — —]** The school authorities are civilly responsible for illness contracted by a scholar by reason of the opening of a window near where the child was seated, the temperature being cold & the teacher having refused to close the window or to permit the scholar to go away from it. *PETERKIN*

*v. ST. HENRY SCHOOL TRUSTEES* (1895), Q. R. 7 S. C. 117. *CAN*.

**22 iii. — — — — —]** Pltf., a pupil at a high school, a secondary one, under Education Act, 1914, was injured by an explosion during a chemistry lesson. The accident arose through charcoal being mixed with potassium, the former being taken out of a jar marked "Manganese Dioxide." The school was controlled by a board promulgated by the Minister of Education under above Act. In an action for damages against resp. board:—*Held*: under the scheme of control, the control of the board over the teachers was not such as to make the board liable. — *CRUICKSHANK v. ASHBURTON*, [1921] N. Z. L. J. 161.—*N.Z.*

## Part IV.—Elementary Schools.

### SECT. 1.—PROVISION OF SCHOOLS.

#### SUB-SECT. 1.—BY LOCAL EDUCATION AUTHORITY.

**Sufficient school accommodation.]—***See* 1921 Act (c. 51), s. 17.

**School outside area of local education authority—For use of children within the area.]—***See* 1921 Act (c. 51), s. 17.

**Necessity for schools—Jurisdiction of Board of Education to determine.]—***See* 1921 Act (c. 51), s. 19.

**Practical & advanced instruction.]—***See* 1921 Act (c. 51), s. 20.

**Nursery schools.]—***See* 1921 Act (c. 51), s. 20.

**Vacation schools, classes, play-centres & means of recreation.]—***See* 1921 Act (c. 51), s. 22.

**Scholarships & bursaries.]—***See* 1921 Act (c. 51), s. 24.

**Marine schools & schools of instructions.]—***See* 1921 Act (c. 51), s. 25.

#### SUB-SECT. 2.—BY OTHER PERSONS.

*See* 1921 Act (c. 51), s. 18.

### SECT. 2.—MAINTENANCE OF SCHOOLS BY LOCAL EDUCATION AUTHORITY.

#### SUB-SECT. 1.—IN GENERAL.

*See* 1921 Act (c. 51), s. 17.

**25. Duty to "maintain & keep efficient"—Nature & extent of.]—***GATTENHEAD UNION v. DURHAM COUNTY COUNCIL*, No. 7, *ante*.

#### SUB-SECT. 2.—PROVIDED SCHOOLS.

*See* 1921 Act (c. 51), s. 17.

**26. Duty to "maintain & keep efficient"—Maintenance of school premises—Liability for**

**negligence—Defective state of playground.]—***CHING v. SURREY COUNTY COUNCIL*, No. 17, *ante*.

**27. ——— Dangerous door.]—***MORRIS v. CARNARVON COUNTY COUNCIL*, No. 18, *ante*.

#### SUB-SECT. 3.—NON-PROVIDED SCHOOLS.

*See* 1921 Act (c. 51), s. 17.

**28. "Maintain & keep efficient"—Denominational religious instruction—Limitation of.]—**The liability imposed by Education Act, 1902 (c. 42), upon the local education authority to "maintain & keep efficient all public elementary schools within their area" includes the obligation to defray the expense of denominational religious instruction in a non-provided school, which is a public elementary school under that Act.—*A.-G. v. WEST RIDING OF YORKSHIRE COUNTY COUNCIL*, [1907] A. C. 29; 76 L. J. K. B. 97; 95 L. T. 845; 71 J. P. 41; 23 T. L. R. 171; 51 Sol. Jo. 129; 5 L. G. R. 89, H. L.

*Annotations:—Apld.* *Willford v. West Riding of Yorkshire County Council*, [1908] 1 K. B. 685. *Edld.* *Gillow v. Durham County Council*, [1913] A. C. 54. *Mentd.* *J. v. Board of Education*, [1909] 2 K. B. 1045; *Martin v. Eccles Corp.*, [1919] 1 Ch. 387.

**29. ——— Effect of order altering character of school.]—**A non-provided school had been carried on before & after the coming into force of Education Act, 1902 (c. 42), as a public elementary school for the education of children of both sexes in all standards from 1 to 7. The local education authority issued a direction to the managers of the school that after a certain date no secular instruction was to be given in the school except to children in standards 1 to 3. The managers of the school refused to comply with the direction, & brought an action for an injunction to restrain the local education authority from obstructing or interfering with them in the discharge of their duties as managers of a fully recognised public

### PART IV. SECT. 2, SUB-SECT. 1.

**p. Erection of schoolhouse in one municipality—Power to demand contribution from adjoining municipality.]—**

Under 37 Vict. c. 27 the high school board for a district composed of two municipalities, a town & a township can compel one of the municipalities, the township, to contribute towards the erection of a schoolhouse in the other municipality, & not merely towards its maintenance.—*Re NIAGARA HIGH SCHOOL BOARD & TOWNSHIP OF NIAGARA* (1877), 1 A. R. 288.—**CAN.**

**q. Provision of accommodation.]—**The custodian of a child under a "boarding-out agreement" to clothe, maintain & educate him, is not his "guardian" within Public Schools Act, 1891 (c. 55) (O), s. 40 (3), & the trustees of the school section within which the custodian resides need not provide school accommodation for the child.—*HALL v. STISTON SCHOOL TRUSTEES* (1897), 24 A. R. 476.—**CAN.**

**r. Provision of additional school—Extent of trustees' control.]—**A second schoolhouse in a school district being necessary & having been erected in a proper place, the trustees divided the district by a line, & directed that the children living on one side should go to the original school, & the children on the other side to the new school.—*Held:* the legislature, having by School Act, sect. 92 (7), imposed upon the trustees the duty of providing the

accommodation furnished by the second school, & having vested in them, by sect. 92 (21), the management of the schools in their district, had impliedly given them the power to make all regulations necessary or advisable, not only for the management of the schools, but for determining the portion of the district that could be most suitably served by each of the schools, or the children who should attend each; & so long as the trustees acted *bona fide* & to the best of their judgment for the purpose of securing the better conduct or more efficient management of the schools under their charge, their discretion in these respects could not be interfered with.—*PATRICK v. YORKTON SCHOOL DISTRICT NO. 59, TRUSTEES* (1914), 28 W. L. R. 495; 6 W. W. R. 1107.—**CAN.**

**s. Incidence of liability.]—**Under 60 Vict. c. 14, s. 73 (O) the municipal corp., & not the individual members of the council are liable for the maintenance of pupils.—*POR ARTHUR HIGH SCHOOL BOARD v. FORT WILLIAM TOWN* (1898), 25 A. R. 522; *appd.* *NOTLAWA SAUA v. SIMCOE*, 3 O. L. R. 169.—**CAN.**

**t. Duties of school board—How exercised.]—**A school board in matters relating to the schools under its control & involving discretion or judgment is bound to exercise such functions so that the whole question must be presented to the board, should be weighed & considered by the board,

& must be determined upon by the board; nor has the board the power to delegate duties or functions of this character to another instead of exercising its own judgment & discretion throughout.—*BLACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES* (1914), 32 O. L. R. 245; 18 D. L. R. 456; 7 O. W. N. 35; 26 O. W. R. 809; *see* [1917] A. C. 62.—**CAN.**

**u. Expenditure must be authorised by statute.]—**To justify a board of trustees of a school district drawing upon the funds of the district, express authority therefor must be found in the statute, or the expenditure must be necessarily incidental to the exercise of some power possessed by the trustees.—*ELTHAM SCHOOL DISTRICT NO. 2823 (BOARD OF TRUSTEES) v. LANGSTON & BALL*, [1923] 3 W. W. R. 641.—**CAN.**

### PART IV. SECT. 2, SUB-SECT. 3.

**b. Power to define limits of separate school.]—**Application for a *mandamus* to the board of school trustees of the city of Toronto, to authorise the establishment of a separate Roman Catholic school in section 9, in St. James's ward.—*Held:* the board, & not appcs, should prescribe the limits of separate schools; & the application should therefore be for one or more such schools, in general terms, leaving it to the board of trustees to define the same.—*Re HAYES & TORONTO SCHOOL TRUSTEES* (1853), 3 C. P. 478.—**CAN.**

elementary school:—*Held*: (1) the direction was not a direction as to secular instruction within sect. 7, sub-sect. 1 (a), of the above Act, & was *ultra vires*, being in breach of the obligation imposed on the local education authority to maintain & keep the school efficient; (2) the question as to the right of the authority to enforce the direction was not a question arising under sect. 7 which had to be determined by the Board of Education under sect. 7, sub-sect. 3, or sect. 16; (3) the ct. had jurisdiction to entertain the action; (4) the managers were entitled to an injunction restraining the local education authority from enforcing the direction.—*WILFORD v. WEST RIDING OF YORKSHIRE COUNTY COUNCIL*, [1908] 1 K. B. 685; 77 L. J. K. B. 430; 98 L. T. 670; 72 J. P. 107; 24 T. L. R. 286; 6 L. G. R. 244; *sub nom.* *WALFORD v. WEST RIDING OF YORKSHIRE COUNTY COUNCIL*, 52 Sol. Jo. 263.

*Annotations*:—*As to* (2) *Reid*, *R. v. Board of Education*, [1910] 2 K. B. 165. *As to* (3) *Fould*, *Martin v. Eccles Corp.*, [1919] 1 Ch. 387.

30. — *Supply of water.*—Prior to the passing of Education Act, 1902 (c. 42), a water co. supplied the managers of a voluntary school with water by meter, payment being made therefor by the managers. After the Act came into force the school became a non-provided school, & water was supplied as before. A supply of water was necessary for the maintenance of the school. There was no contract between the water co. & the local education authority with regard to the supply of water other than might be implied from the fact of the supply, the purpose for which the water was supplied, the course of dealing, & the circumstances under which water had been previously supplied to the school. The water co. continued, as before the Act came into operation, to send their demand note to the managers of the school for the water supplied, & since the Act the managers of the school included the amount of such demand note in the accounts of their expenditure which they sent every quarter to the local education authority, by whom payment was then made to the water co. direct, & a receipt given therefor by the co. to the local education

authority. For a considerable time the local education authority paid the demand notes of the water co. in this way, but in respect of the supply for a certain period they refused to pay, contending that they were not, & that the managers were, in law liable for the supply of water to the school. In an action by the water co. against the local education authority, the county ct. judge gave judgment for the water co.:—*Held*: (1) having regard to the facts that the local education authority were under Education Act, 1902 (c. 42), bound to maintain the school, & therefore, to provide a supply of water, & had control of the expenditure necessary for that purpose, the local education authority had power under the Act to make themselves liable to the water co. for the water supplied; (2) there was evidence upon which the county ct. judge could properly find that the local education authority were the persons with whom the contract for the supply of the water in question was made.—*TROWBRIDGE WATER CO. v. WILTS. COUNTY COUNCIL*, [1909] 1 K. B. 824; 78 L. J. K. B. 406; 101 L. T. 35; 73 J. P. 280; 25 T. L. R. 388; 53 Sol. Jo. 448; 7 L. G. R. 484.

31. — *School furniture.*—Where persons other than the local education authority provide a new school under Education Act, 1902 (c. 42), s. 8, the local authority have power to provide & pay for the furniture required to equip it as a public elementary school by reason of the obligation imposed upon them by sect. 7 (1) of that Act, to "maintain & keep efficient all public elementary schools within their area which are necessary."

Two new non-provided schools were opened as public elementary schools & each school was subsequently placed by the Board of Education upon the annual grant list as from the respective dates of opening. All the furniture for one school was supplied & paid for by the local education authority, before it was opened; the other school, when opened, was provided with furniture belonging to the managers, which was unsuitable & afterwards, but before the date when the Board of Education placed the school upon the grant list as from the date of opening, was removed

a. *Debts of public school district.—Liability of separate school supporters.*—*MCCARTHY v. R.* (1918), 21 C. L. T. 321; 10 Sask. L. R. 14; *affd.* [1918] A. C. 911. —CAN.

d. *Assessment of ratepayer.—Separate school.*—Where, under the Statutes of Sask., a "public school district" has been established, & also a "separate school district"—established by a Roman Catholic minority—a ratepayer who is a member of the Ruthenian Greek Catholic Church which is in communion with Rome could be assessed as a separate school supporter.—*PANDERT. MELVILLE TOWN*, [1922] 1 W. W. R. 53.—CAN.

e. *Assessment of property for separate schools.—Effect on school privileges.*—School Assessment Acts, 1908 & 1915, ss. 42 to 45, whereunder some or all of the assessed property of a co. may be entered, rated & assessed for the purposes of a separate school, do not take away, but rather add to the privileges of such schools & are, *intra vires* of the Sask. Legislature.—*GRATTON SEPARATE SCHOOL DISTRICT NO. 13 (TRUSTEES OF) v. REGINA PUBLIC SCHOOL DISTRICT NO. 4 (TRUSTEES OF)*, [1918] 1 W. W. R. 16; 10 Sask. L. R. 455; 38 D. L. R. 217.—CAN.

f. *Qualification of teachers.—Exemption from examination.*—By Ontario Separate Schools Act, R. S. O. 1897, s. 36, members of appt. communities who became such after the

passing of the British North America Act, 1867, are not eligible for employment as teachers in the Roman Catholic schools in the province of Ont., unless they have received certificates of qualification to teach in the public schools. The exemption from examination recognised by that sect. is limited to those who were members at the date of the Act of 1867.—*BROTHERS OF THE CHRISTIAN SCHOOLS v. MINISTER OF EDUCATION FOR ONTARIO*, [1907] A. C. 69. —CAN.

g. *Language of instruction.—Restriction of French.*—In Ontario there are two classes of free primary schools, namely, public schools & separate schools, the latter being denominational schools established under the Separate Schools Act, 1863 (26 Vict. c. 5, 1 pp. Canada). Appts. were the elected trustees of the Roman Catholic separate school in Ottawa, & under the above Act had power to determine the "kind & description" of separate schools to be established therein & power to manage them. In 1913 the Department of Education for the province, under provincial statutory powers to make regulations, issued a regulation restricting the use of French in schools, whether public or separate, in which French was a language of instruction & communication. Sect. 93 of the British North America Act, 1867, enacts that for each province the Legislature may exclusively make laws

in relation to education, but by sub-s. 1 provides that "nothing in any such laws shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have in the province at the Union." Appts. contended that the regulation was invalid under the above sub-sect. & was not binding on them:—*Held*: (1) the class of persons for whom the protection of the sub-section is claimed must be a class determined by religious belief & not by race or language; (2) the power of appts. as trustees to determine the "kind & description" of schools did not extend to determining whether English or French should be the language of instruction; (3) the regulation did not prejudicially affect any right or privilege secured by law at the Union of Roman Catholics in the province, & it was consequently valid & binding upon appts.—*OTTAWA SEPARATE SCHOOLS TRUSTEES v. MACKELL*, [1917] A. C. 62.—CAN.

h. *Colour schools.—Exclusion of children from common schools.*—The students of a section in which a separate school has been established for the class to which they belong—as in this case, for coloured people—are not entitled to send their children to such section.—*JE HILL & CAMDEN & ZONK SCHOOL TRUSTEES* (1854), 11 U. C. R. 573.—CAN.

*Sect. 2.—Maintenance of schools by local education authority: Sub-sect. 3. Sect. 3: Sub-sects. 1, 2 & 3. Sect. 4: Sub-sects. 1 & 2, A.]*

by the local authority & replaced by new furniture at their expense.—*Held:* the local education authority had power to provide & pay for the new furniture of each school under sect. 7 (1), of the Act.—*R. v. EASTON, Ex p. OULTON*, [1913] 2 K. B. 60; 82 L. J. K. B. 618; 108 L. T. 471; 77 J. P. 177; 29 T. L. R. 200; 57 Sol. Jo. 225; 11 L. G. R. 279, C. A.

**32. — Salaries of caretaker & cleaner—Appointed by managers.**—The managers of a non-provided public elementary school, in exercise of the powers of management conferred upon them by Education Act, 1902 (c. 42), s. 7 (7), are entitled to appoint a caretaker & cleaner of the school, & to have their salaries paid by the local education authority.—*GILLOW v. DURHAM COUNTY COUNCIL*, [1913] A. C. 54; 82 L. J. K. B. 206; 107 L. T. 689; 77 J. P. 105; 29 T. L. R. 76; 57 Sol. Jo. 76; 11 L. G. R. 1, H. L.

*Annotations:—Mentd. R. v. Easton, Ex p. Oulton*, [1913] 2 K. B. 60; *West Suffolk County Council v. Olorenshaw*, [1918] 2 K. B. 687; *Martin v. Eccles Corp.*, [1919] 1 Ch. 387.

### SECT. 3.—CONDUCT OF SCHOOLS.

**SUB-SECT. 1.—VISITS TO PLACES OF EDUCATIONAL VALUE.**

*See, generally*, 1921 Act (c. 5f), ss. 27-29.

**School attendance.**—*See Part V., post.*

**33. Whether attendance at theatrical performance included.**—The power of a local education authority to authorise visits to "places of educational value & interest" in school hours under Art. 44 (b) of the Education Code does not extend to defraying out of public funds the cost of providing such places. Nor does attendance at a theatrical performance fall within the words "visits to places of educational value & interest." Expenditure on special performances of Shakespearean plays for school children was therefore rightly disallowed.—*R. v. LYON, Ex p. GATTI*, [1922] 1 K. B. 232; 91 L. J. K. B. 139; 126 L. T. 332; 86 J. P. 6; 38 T. L. R. 62; 66 Sol. Jo. (W. R.) 19; 19 L. G. R. 776.

**34. Whether expenses payable out of public funds.**—*R. v. LYON, Ex p. GATTI*, No. 33, *ante*.

**SUB-SECT. 2.—SCHOOLMASTERS AND TEACHERS.**

*See Part XVII., post.*

**SUB-SECT. 3.—DIFFERENCES BETWEEN LOCAL EDUCATION AUTHORITY AND MANAGERS OF NON-PROVIDED SCHOOLS.**

*See* 1921 Act (c. 51), s. 20 (9).

**Board of Education, generally.**—*See Part II., Sect. 1, sub-sect. 1, ante.*

**k. Right to send coloured persons to common school.**—Where no separate school.—Upon the facts.—*Held:* either no separate school, extending to appt. had been established for coloured persons within the statute, or it had been discontinued, & he was therefore entitled to a *mandamus* to the trustees to admit his daughter to the common school. The erection of a separate school suspends but does not annul the rights of those for whom it was established, as regards the common schools. When it is no longer kept up those rights revive.—*Re STEWART & SANDWICH EAST SCHOOL TRUSTEES* (1864), 23 U. C. R. 634.—**CAN.**

1. Schools for children of European

*extraction. Right to exclude others.*—*Appt.* the father of two children by a coloured wife, obtained their admission in the only public undenominational school in the school district of K. & paid the necessary fees. The parents of the other pupils in the school withdrew or threatened to withdraw their children if appts.' children were allowed to remain, whereupon the School Committee refused to allow appts.' children to continue their attendance & tendered back the fees which appts. refused to accept. Compulsory education for children of European parentage or extraction was in force in the district & there were two mission schools in the district

**35. Jurisdiction of Board of Education to determine—Secular instruction.**—For many years prior to 1905 it had been the custom of the managers of the M. School, a non-provided school under Education Act, 1902 (c. 42), to take the children from school to church on saints' days & holy days during the hours allowed for religious instruction. The time-table of the school, which had been approved by H.M. inspector, provided that religious observance & religious instruction should be given from 9 a.m., when the school opened, to 9.55; that at 9.55 the registers should be marked; & that secular education should commence at 10 a.m. & continue till noon. At the foot of the time-table was a note providing that on saint's days & holy days the registers should be marked at 9 a.m., the object being to enable the children to be taken to church at 11 a.m. In Sept. 1904, the local education authority under the 1902 Act issued a direction that secular instruction in all schools within their district should commence not later than 9.45 a.m. & occupy the school hours for the rest of the day. The managers did not comply with this direction, & continued to take the children to church on saints' days & holy days, & took no steps to revise their time-table to bring it into accordance with the direction of the local education authority. On Mar. 25, 1905, the local education authority ceased to maintain the school, & on Mar. 27, 1905, sent their inspector to the school, who closed it, informing the children that they must attend other schools in the neighbourhood, & offering the teachers appointments in other schools, which they accepted. The managers appealed to the Board of Education, but the Board confirmed the action of the local education authority. In an action brought by the managers claiming (1) a declaration that the local education authority were bound to continue to maintain the school, & (2) damages for trespass & illegal acts in closing the school & inducing the teachers to leave the service of the managers without due justification.—*Held:* (1) the direction of the local education authority was a direction as to secular instruction under s. 7, s-s. 1 (a), of 1902 Act, & the question, being therefore one which arose under s. 7 of that Act, was one for the decision of the Board of Education under s-s. 3 of that sect., & the jurisdiction of the ct. was therefore excluded; (2) the managers, by virtue of their appointment under 1902 Act, had not, in the absence of a special arrangement with the owner, such a possession of the school premises as would enable them to support an action of trespass; no such arrangement had been proved; & the claim for trespass therefore failed; (3) the local education authority had not induced the teachers to break their contracts with the managers without justification.—*BLENCOWE v. NORTHAMPTONSHIRE COUNTY COUNCIL*, [1907] 1 Ch. 504; 76 L. J. Ch. 276; 96 L. T. 385; 71 J. P. 258; 23

where children of other than European parentage could attend.—*Held:* it was part of the policy of Cape School Board Act of 1905 to promote the establishment of separate public undenominational schools for children of European parentage or extraction. Appts.' children were of other than European parentage or extraction & consequently he was not entitled to an order compelling the School Committee to receive his children as pupils.—*MOLLER v. KEIMOKS SCHOOL COMMITTEE* (1911), App. D. 635.—**S. AF.**

### PART IV. SECT. 3, SUB-SECT. 3.

**m. Dispute between school committee & education board.—Power of committee**

T. L. R. 319; 51 Sol. Jo. 277; 5 L. G. R. 551.

*Annotation.*—As to (1) *Consd. Wilford v. West Riding of Yorkshire County Council*, [1908] 1 K. B. 685.

36. ———.]—WILFORD v. WEST RIDING OF YORKSHIRE COUNTY COUNCIL, No. 29, *ante*.

37. ———] *Wages of staff.*—By Education Act, 1902 (c. 42), s. 7, sub-sect. 3, "If any question arises under this sect. between the local authority & the managers of a school not provided by the authority, that question shall be determined by the Board of Education." It being the duty of the local education authority under that sect. to pay the wages of the school cleaner appointed by the managers, a dispute between the managers & the local education authority as to the proper amount of such wages is a matter which the Board of Education alone can determine, & a county et. has no jurisdiction to adjudicate upon it.—WEST SUFFOLK COUNTY COUNCIL v. OLORENSHAW, [1918] 2 K. B. 687; 88 L. J. K. B. 384; 120 L. T. 91; 82 J. P. 292; 16 L. G. R. 711, D. C.

38. ———] *Salaries of teachers.*—BOARD OF EDUCATION v. RICE, No. 290, *post*.

## SECT. I. SCHOOL MANAGERS.

### SUB-SECT. 1.—PROVIDED SCHOOLS.

See 1921 Act, (c. 51), ss. 30, 33, 35, 36; Sched. III.

### SUB-SECT. 2. NON-PROVIDED SCHOOLS.

#### A. In General.

See 1921 Act (c. 51), ss. 30–35, Sched. III.

*Dismissal of teachers.*—See Part XVII., Sect. 9, *post*.

39. *Validity of acts of manager.*—Before declaration signed as member of Church of England;—(1) The final order made by the Board of Education under Education Act, 1902 (c. 42), in respect of a non-provided elementary Church of England school provided that the foundation managers should be members of the Church of England, & that no person should "be entitled to act as a foundation manager" until he had signed a declaration that he was a member of the Church of England. At the date when the body of managers of the school in question purported to dismiss the headmaster, three of the foundation managers had not signed the required declaration. Education Act, 1902 (c. 42), Sched. I., B. (3), provides that the proceedings of a body of managers "shall not be invalidated by any defect in the election, appointment, or qualification of any manager":—*Held*: the words of the final order did not amount to an absolute prohibition against any foundation manager acting until he had signed the declaration in question, & the provision in Sched. I., B. (3), applied to validate the acts of the body of managers.

(2) Objections were also taken to the validity of the appointment of the two nominated managers

& of the co-optative manager:—*Held*: having regard to the same provision in Sched. I., B. (3), any objections to the appointment of the three managers in question, founded upon any invalidity in the appointment of any of them, or the alleged want of authority in those who appointed them, did not invalidate the proceedings of the body of managers; (3) the notice dismissing the headmaster could not be impeached, & his action claiming a declaration that it was inoperative must be dismissed.—MEYERS v. KENNELL, [1912] 2 Ch. 256; 81 L. J. Ch. 794; 106 L. T. 1010; 76 J. P. 321; 28 T. L. R. 424; 56 Sol. Jo. 538.

*Annotation.*—As to (2) *Folld. Harries v. Crawford*, [1918] 2 Ch. 158.

#### 40. Powers of—Transfer of non-provided school.]

—Under Elementary Education Act, 1870 (c. 75), s. 23, managers of elementary schools are empowered to make arrangements for the transfer of schools to school boards formed under the Act, but it is provided that where there is any instrument declaring the trusts of a school, & such instrument contains any provision for the alienation of the school by any person in any manner or subject to any consent, such an arrangement shall only be made by the persons in the manner & with the consent so provided: & it is also provided that the Education Department of the Privy Council shall consider & have due regard to any objections & representations respecting a proposed transfer which may be made by any person who has contributed to the establishment of such schools. Sect. 14 of the Act also provides that no religious catechism or formulary which is distinctive of any particular denomination shall be taught in any board school. In the case of a school established by & united with the National Society, on the express condition that the children attending it were to be instructed in the Holy Scriptures & in the Liturgy & Catechism of the Church of England, the instrument declaring the trusts of the school providing that the school was to be always in union with, & conducted according to the principles of, & in furtherance of the ends & designs of, the National Society, but containing no provision whatever for its alienation:—*Held*: the consent of the National Society was not required to a transfer of the school to a school board, & the proper mode for the society to give effect to any objections to a transfer was by appearing before the Education Department. NATIONAL SOCIETY v. LONDON SCHOOL BOARD, A.-C. v. ENGLISH (1874), L. R. 18 Eq. 608; 41 L. J. Ch. 229; 31 L. T. 22; 23 W. R. 2.

#### 41. Management vested in subscribers —

*Right to refuse new subscriber.*—In a case in which the management of a school, & the right to appoint the teachers were, under a deed, vested in the subscribers to the school to the amount of 20s. & upwards:—*Held*: certain persons, on behalf of whom subscriptions were sent to the treasurer of the school on the day of the election of headmaster, with a view to their voting at such election, & whose subscriptions were returned by him to the person sending same, were not *bonâ fide* subscribers with a right to vote at such election.

*to close school.*—A school committee is not justified in closing a school within its district on the ground of alleged illegal action of the education board in regard to appointments of pupil-teachers, & with the object of compelling the board to act in accordance with the committee's view of the law, even should the action of the board be in fact illegal & the view of the committee correct.—MARLBOROUGH EDUCATION

BOARD v. BLENHEIM SCHOOL COMMITTEE (1897), 15 N. Z. L. R. 551. —N.Z.

#### PART IV. SECT. 4, SUB-SECT. 1.

*n. Relation of manager & teacher.*—*Insurance.*—An assistant teacher in a national school adopted by the Comrs. of National Education, who enters into a contract of employment with the manager of the school is an employed

contributor within National Insurance Act, 1911; & the manager of the school, notwithstanding that the teacher's salary is paid by the Comrs. of National Education, & not by him, & that the education in the school is controlled by the regulations of these Comrs., is the employer of the teacher within the meaning of the Act.—FLETCHER MOORE v. LONDON INSURANCE COMRS., [1916] 2 L. R. 70.—I.R.

*Sect. 4.—School managers: Sub-sect. 2, A. & B. Sects. 5, 6 & 7.]*

It appears to be a right inherent in such a body of subscribers to refuse to admit a new subscriber for good cause.—*NOTT v. WILLIAMS* (1900), 48 W. R. 316.

**42. — Control of religious instruction—In accordance with trust deed.**—Under a scheme confirmed by the Ct. of Ch. in 1845 provision was made for the maintenance of a day school at B. out of certain charitable funds. The scheme gave a preference to the vicar & churchwardens in the appointment of trustees, & provided that the master & mistress of the school should teach certain specified subjects & other such things as the trustees should direct, & that there should be read in the school a portion of the scriptures & suitable prayers every morning & evening. It also provided for the children going to church & Sunday school, but gave relief in this respect to the children of dissenters, & it placed the school under the superintendence of the clergymen of B. who was empowered to visit the school & instruct & examine the children. Since its foundation the school had been conducted as a Church of England School. Since 1871, except for a short interval, the school had been conducted as a public elementary school in receipt of a parliamentary grant. On the construction of the scheme:—*Held*: the school was intended to be carried on as a school at which religious instruction in accordance with the doctrine of the Church of England should be given & thereore, having regard to Education Act, 1902 (c. 42), s. 7 (6), the managers were entitled to authorise religious instruction of that character to be given by the regular teachers on weekdays during school hours.—*Re WREXHAM PAROCHIAL EDUCATIONAL FOUNDATION, A-G. v. DENBIGHSHIRE COUNTY COUNCIL* (1910), 74 J. P. 198; 8 L. G. R. 520.

**43. — Appointment of caretaker & cleaner—Salaries payable by local authority.**—*GILLOW v. DURHAM COUNTY COUNCIL*, No. 32, *ante*.

**44. Defect in appointment of individual managers—Validity of acts of whole body.**—*MEYERS v. HENNELL*, No. 39, *ante*.

**45. — — — — —**—Pltf. was engaged as master of a non-provided school under an agreement with the managers under which either party might terminate the agreement by giving three months' notice. An examination of the school in its proficiency in religious instruction was held by the assistant diocesan inspector who reported adversely upon the result of the examination. Pltf. wrote a letter of protest to the inspector in consequence of which the managers gave him three months' notice to determine his engagement. The consent of the local education authority was not given to the dismissal. There were six managers of the school, three of whom were irregularly elected. Upon action by pltf. to restrain the managers from acting upon the notice:—*Held*: (1) (*PETERSON, J.*) Education Act, 1902 (c. 42), s. 7 (1) (c), which provided that in the case of non-provided schools the consent of the local education authority should "be required to the dismissal of a teacher, unless the dismissal were on the grounds connected with the giving of religious instruction in the school" was merely a condition of the maintenance of the school by the local education authority, & did not confer any rights on a teacher as between him & the managers; (2) (*CT. OF APPEAL*) without deciding whether Education Act, 1902 (c. 42), s. 7 (1) (c), conferred any rights on teachers, upon the evidence the ground of dismissal here was

"connected with the giving of religious instruction in the school" within sect. 7 (1) (c), & the consent of the local education authority to pltf.'s dismissal was not, therefore, necessary; (3) the notice of dismissal was not invalidated by the irregular election of three of the managers, having regard to Education Act, 1902 (c. 42), Sched. I., B. (3).—*HARRIES v. CRAWFORD*, [1918] 2 Ch. 158; 87 L. J. Ch. 485; 119 L. T. 200; 34 T. L. R. 448; 62 Sol. Jo. 621; 16 L. G. R. 663, C. A.; *affd.*, [1919] A. C. 717; 88 L. J. Ch. 477; 121 L. T. 398; 83 J. P. 197; 35 T. L. R. 543; 63 Sol. Jo. 589; 17 L. G. R. 509, H. L.

*Annotations*:—*As to* (1) *Reid. Martin v. Eccles Corp'n.*, [1919] 1 Ch. 387; *Hanson v. Radcliffe U. C.*, [1922] 2 Ch. 490.

**46. Statutory relations between local authority & managers—Confer no rights on teachers.**—*YOUNG v. CUTHBERT*, No. 13, *ante*.

**47. — — — — —**—Pltf. was headmaster of a non-provided public elementary school. Under his agreement with the school managers he was liable to be given three months' notice by them terminating same. In May, 1912, defts. as the local education authority instructed the managers to dismiss pltf. Thereupon, the managers gave him three months' notice. Defts., however, allowed the operation of the notice to be suspended by the managers. In Oct. 1912, defts. again instructed the managers to dismiss pltf. "on educational grounds." In Dec. 1912, the managers appealed to the Board of Education under Education Act, 1902 (c. 42), s. 7 (3). The Board of Education drew attention to the suspension of the notice, & added that no question had arisen unless the direction to dismiss was operative. In Mar. 1913, defts. again directed the managers to dismiss pltf. The managers declined to dismiss him, & asked for the actual grounds of defts.' requirements. In May, 1913, defts. gave, "on educational grounds," three months' notice to pltf., terminating his engagement. In June, 1913, the managers submitted to the Board of Education the question whether educational grounds existed:—*Held*: it not being challenged that the notice in question was given on any grounds other than those on which it was purported to be given—namely "educational grounds"—pltf. had made out no case for the interference of the ct.—*MITCHELL v. EAST SUSSEX COUNTY COUNCIL* (1913), 109 L. T. 778; 78 J. P. 41; 58 Sol. Jo. 66; 12 L. G. R. 1, C. A.

*Annotations*:—*Appld. Martin v. Eccles Corp'n.*, [1919] 1 Ch. 387. *Consd. Hanson v. Radcliffe U. C.*, [1922] 2 Ch. 490.

**48. — — — — —**—The provision contained in Education Act, 1902 (c. 42), s. 7 (1), requiring the consent of the local education authority to the dismissal of a teacher by the managers of a non-provided school on grounds not connected with the giving of religious instruction, was inserted, not in the interests of the teacher so as to give the teacher a right to be heard before such consent is given, but in the interest of the education authority so as to prevent instruction, for which they pay & are responsible, from being interfered with without their consent.

An agreement between the managers of a non-provided school & a teacher provided that the agreement might be determined by either party by three months' previous notice to the other party, & that, where such notice by the managers required the consent of the education authority, confirmation by such authority should be sufficient. The managers duly gave the teacher notice determining the agreement. Although the grounds of the dismissal were not stated, it was admitted that



no misconduct was alleged & that the dismissal was not on the grounds connected with the giving of religious instruction. The teacher commenced the action to restrain the managers from proceeding until the consent of the education authority had been obtained & she had been heard in her own defence. Subsequently the education authority confirmed the dismissal:—*Held*: neither under her agreement nor under the above Act had pltf. any such right to be heard.—*BLANCHARD v. DUNLOP*, [1917] 1 Ch. 105; 85 L. J. Ch. 791; 115 L. T. 467; 81 J. P. 9; 15 L. G. R. 25, C. A.

*Annotations*:—*Consd.* Martin v. Eccles Corp., [1919] 1 Ch. 387. *Refd.* Hanson v. Radcliffe U. C., [1922] 2 Ch. 490.

49. ————]—*HARRIES v. CRAWFURD*, No. 45, *ante*.

#### B. Liability for Negligence.

50. *Negligence of teacher—Injury to pupil.*—Pltf. was a scholar in a voluntary school, & deft., as vicar of the parish, was a trustee of the school, & a member of the committee of management. Pltf. was injured by the fall of a blackboard which was being used by a pupil teacher, who was in charge of the class in which pltf. was. The schoolmistress was appointed by the committee of management, but neither they nor deft. had any control over the way in which the school was managed beyond the power of dismissing the mistress subject to an appeal by her to the bishop of the diocese:—*Held*: the mere fact of the fall of the board was not evidence of negligence on the part of the mistress or the pupil teacher; & if there had been negligence on the part of either of them deft. would not have been liable.—*CRISP v. THOMAS* (1890), 63 L. T. 756; 55 J. P. 261, C. A.

51. ————]—*BAXTER v. BARKER* (1903), *Times*, Nov. 13, C. A.

52. *Negligence of managers—Injury to teacher.*—Pltf., the head master of a non-provided school, sued the managers of the school for damages for personal injury occasioned by the bursting of a boiler. The defective condition of the boiler had been pointed out to some of the managers by pltf., but not to all those who were managers at the date of the accident. The managers relied on Education Act, 1902 (c. 42), s. 7, s-s. 1 (d), & further contended that pltf. accepted the risk, & that as he knew of the defective condition of the boiler he was debarred from recovering:—*Held*: (1) the managers were liable to keep the school-house in repair, whether required to do so by the local education authority or not; (2) the managers were not a legal body with succession, & so notice given to the managers at one time would not operate as against managers subsequently appointed; but (3) each manager had been guilty of negligence on appointment in not ascertaining & remedying the defect in the heating apparatus; (4) pltf. was not negligent & did not voluntarily incur the risk.—*ABBOTT v. ISHAM* (1920), 90 L. J. K. B. 309; 121 L. T. 734; 85 J. P. 30; 37 T. L. R. 7; 18 L. G. R. 719.

*Annotation*:—*Is to* (3) *Refd.* Baker v. James, [1921] 2 K. B. 674.

#### PART IV. SECT. 5.

##### a. School fees—Non-resident pupils.]

—As pltf. & his children had their permanent & principal place of residence in the school district of defts., they were not to be regarded as non-resident, although pltf. neither paid nor was liable to pay a school tax equal to the average school tax paid by the actual tax-payers of the district; & therefore, defts. had no right to insist on payment of a fee as a condition of the children being allowed to attend the

school.—*INMSTER v. MINITONKA SCHOOL DISTRICT TRUSTEES* (1912), 22 W. L. R. 57; 6 D. L. R. 57; 2 W. W. R. 1105; 22 Man. L. R. 187.—*OAN*.

b. ————]—*Liability of parent—Notice of withdrawal.*—In 1911 two school boards were amalgamated under Act 45 of 1905 & the boards so amalgamated closed up the old schools & opened a new school to which applt., who was a member of the board, sent his children. The regulations of the old school boards required a quarter's notice to be given

*Liability of schoolmasters & teachers.*—See Part XVII., Sect. 10.

*Liability of local education authority.*—See Part II., Sect. 2, sub-sect. 4.

#### SECT. 5.—SCHOOL FEES AND CONTRIBUTIONS.

See 1921 Act (c. 51), s. 37.

53. *Education authority cannot insist on fees or contribution—As condition of receiving child into school—From parent.*—(*GATESHEAD UNION v. DURHAM COUNTY COUNCIL*, No. 7, *ante*.)

54. ————]—*From board of guardians maintaining child.*—(*GATESHEAD UNION v. DURHAM COUNTY COUNCIL*, No. 7, *ante*.)

#### SECT. 6.—TRANSFERS AND CLOSING OF SCHOOLS.

See 1921 Act (c. 51), ss. 38–40, & Sched. IV.

*Application of endowments.*—See Sect. 7, *post*.

55. *Transfer of non-provided school—Must be in accordance with trust deed—Consent to transfer.*—(*NATIONAL SOCIETY v. LONDON SCHOOL BOARD*, A.-G. v. ENGLISH, No. 40, *ante*.)

*Objections to.*—See 1921 Act (c. 51), Sched. IV. Pt. 1. (7).

#### SECT. 7.—ENDOWMENTS OF NON-PROVIDED SCHOOLS.

See 1921 Act (c. 51), s. 41.

56. *Application of endowments—On transfer of school to local authority—Advancement of learning—Not for general purposes of school.*—*Semble*: in settling a scheme for the regulation of the funds of a charity school on its transfer to a school board, care should be taken to provide that the funds shall be applied for the advancement of learning, in the school, as for instance by establishing exhibitions or scholarships, & not for the general purposes of the school, which would have the effect of a grant in aid of the local rates.—*Re POPLAR & BLACKWALL FREE SCHOOL* (1878), 8 Ch. D. 543; 39 L. T. 88; 42 J. P. 678; 20 W. R. 827.

57. ————]—*Endowment in discretion of trustee—If school "materially altered."*—By a scheme approved in 1852 for appropriating the increased revenues of a charity estate founded for the benefit of the poor of the parish, the trustees were directed to pay £90 a year in aid of the expenses of a school in W., or of any other school which might be established in its stead, provided that no sum should be paid to a school becoming the property of any exclusive denomination or sect, or excluding by its regulations the children of any class or denomination of persons. If the school should not at any time fall within the

before children were removed from school, but the new board had not adopted any regulation to the same effect. During the first quarter applt. received an account for fees on which was printed an intimation that a quarter's notice of withdrawal was required, but at the end of the quarter he withdrew his children without giving such notice:—*Held*: applt. was liable to pay a quarter's fees in lieu of notice.—*PERLIN v. MOLINSO SCHOOL BOARD* (1912), C. P. D. 519.—*S. AF*.

**Sect. 7.—Endowments of non-provided schools. Part V. Sect. 1: Sub-sects. 1 & 2. Sects. 2 & 3.]**

description of school, or should "become materially altered in discipline, numbers or other circumstances," then the endowment was, in the discretion of the trustee, to be applied "for educational purposes amongst other schools of a similar character" in the parish. The managers transferred the school, & "so far as they lawfully could," the endowment to the School Board for London, the latter undertaking the management, & in consideration of the endowment agreeing to pay the then master of the school a pension of £100 a year:—*Held*: the school had not by its transfer been "materially altered" within the meaning of the scheme, & the School Board were entitled to the £90 a year.—*LONDON SCHOOL BOARD v. FAULCONER* (1878), 8 Ch. D. 571; 48 L. J. Ch. 41; 38 L. T. 636; 42 J. P. 692; 26 W. R. 652.

58. ——— Without transfer of endowment.—*Re TAYLOR*, [1915] W. N. 74.

59. Whether consent of Charity Commissioners necessary—Action for account against official trustees by local authority—Transfer of income for benefit of local authority—Subsequent transfer of corpus to official trustees.—The buildings & the income of the endowments of a national

school were leased by the managers to a school board, under the powers given by Elementary Education Act, 1870 (c. 75), s. 23, for a term of years. At a subsequent date the then trustee of the endowments transferred them to the Charity Comrs., & defts., as official trustees of charitable trusts, received the income arising from the funds. The school board brought an action against defts. to recover the sums so received by them & for an inquiry as to the trust funds:—*Held*: the claim of plffs. was under the trusts affecting the endowments & not a relief sought adversely to a charity, & they were not entitled to bring the action without the consent of the Charity Comrs., under Charitable Trusts Act, 1853 (c. 137), s. 17.—*LLANBADARNFAWR SCHOOL BOARD v. CHARITABLE FUNDS (OFFICIAL TRUSTEES)*, [1901] 1 K. B. 430; 70 L. J. K. B. 307; 84 L. T. 311; 49 W. R. 363, C. A.

—*See, further*, CHARITIES, Vol. VIII., p. 393, Nos. 2156 *et seq.*

60. Whether gifts over effective—School taken by local authority under statutory powers.—*Re ORCHARD STREET SCHOOLS TRUSTEES*, [1878] W. N. 211.

—On Education Act, 1902 (c. 42), coming into operation.—*See* CHARITIES, Vol. VIII., p. 324, Nos. 1067–1070.

## Part V.—School Attendance.

### SECT. 1.—DUTY OF PARENT.

#### SUB-SECT. 1.—IN GENERAL.

*See* 1921 Act (c. 51), s. 42.

61. Duty to educate child.—In absence of reasonable excuse.—(1) The duty of a parent under Elementary Education Act, 1870 (c. 70), s. 4, to cause his child to receive efficient elementary education is an absolute duty, unless the parent can show one of the reasonable excuses specified in sect. 11; & where the parent habitually & without such "reasonable excuse," though without personal default, neglects to provide such instruction, the ct. of summary jurisdiction ought to make an attendance order under sect. 11.

(2) The truancy of the child is not such "reasonable excuse."—*LONDON COUNTY COUNCIL v. HEARN* (1909), 78 L. J. K. B. 414; 100 L. T. 438; 73 J. P. 211; 25 T. L. R. 303; 7 L. G. R. 312, D. C.

62. Child in custody of mother—Husband at sea.—The mother of a child having its actual custody & control is liable for neglecting to cause the child to attend school while her husband is at sea, whether or not he is the father of the child.—*HANCE v. BURNETT* (1880), 45 J. P. 51, D. C.

63. Child in custody of relations—Liability of parent.—Resp. was summoned for non-compliance with an order under Elementary Education Act, 1870 (c. 70), s. 11, to educate a child of which she was the parent. The child was not residing with resp., but with a relative, & the magistrate on that ground refused to convict:—*Held*: Elementary Education Act, 1870 (c. 75), s. 3, which declared that the term parent should include "guardian &

every person who is liable to maintain, or has the actual custody of any child," did not affect the primary liability of the parent, if there was one, & resp. ought to have been convicted.—*LONDON SCHOOL BOARD v. JACKSON* (1881), 7 Q. B. D. 502; 50 L. J. M. C. 134; 45 J. P. 750; 30 W. R. 47, D. C.

Blind, deaf, defective & epileptic children.—*See* Part VI., *post*.

#### SUB-SECT. 2.—PROCEEDINGS FOR ENFORCING.

*See* 1921 Act (c. 51), ss. 43–45.

64. School attendance order—Irregular attendance—Habitual neglect of parent—Proceedings for penalty not applicable.—A child above five years of age did not attend school, & the school board officer summoned the parent under a bye-law, & required a magistrate to order the parent under a penalty to cause the child to attend school. At the hearing it being proved that the parent habitually neglected to send the child to school:—*Held*: Elementary Education Act, 1816 (c. 79), s. 11, applied, & the remedy was not to proceed for a penalty under the bye-law, but to order the child to attend some certified efficient school.—*Re MURPHY* (1877), 2 Q. B. D. 397; 46 L. J. M. C. 193; 25 W. R. 536; *sub nom.* *LONDON SCHOOL BOARD v. MURPHY*, 36 L. T. 698; \**sub nom.* *R. v. BRIDGE, Re MURPHY*, 41 J. P. 693, D. C.  
*Annotations*.—*Conn.* *Saunders v. Richardson* (1881), 7 Q. B. D. 388. *Reid*. *London School Board v. Wright* (1884), 50 L. T. 606.

65. ——— Proceedings under ultra

### PART V. SECT. 1, SUB-SECT. 1.

*q. Mennonites*—Statutory jurisdiction of provincial legislature.—School Attendance Act, 1916, Man. is binding on a Mennonite who came into Manitoba in or about 1874 with his parents, who were members of the

community of Mennonites referred to in the order in council (Dom.) passed Aug. 13, 1873. Above Act, sect. 22, gives jurisdiction in educational matters to the provincial legislature alone.—*R. v. HILDEBRAND, R. v. DORRISON*, [1919] 3 W. W. R. 286.—*CAN.*

### PART V. SECT. 1, SUB-SECT. 2.

*r. School attendance order—Form of order*.—Justice in making an attendance order under Irish Education Act, 1892, s. 4 (1), must specify therein the "regular manner" in which the child is to attend the school.—*GREENA-*

**vires bye-law.**]—*MORGAN v. HEYCOCK* (1880), 44 J. P. Jo. 199, D. C.

**66. — Fault of child.**]—*LONDON COUNTY COUNCIL v. HEARN*, No. 61, *ante*.

**67. — Child eligible for full time employment.**]—Any child between five & thirteen may be made by attendance order to attend school, but as no children between thirteen & fourteen are now prohibited from being taken into full time employment, there is no power to apply for an attendance order against such child between thirteen & fourteen unless such child is a vagabond as described in Elementary Education Act, 1876 (c. 79), s. 11 (2).—*SAUNDERS v. CRAWFORD* (1882), 9 Q. B. D. 612; 51 L. J. Q. B. 460; 46 L. T. 420; 46 J. P. 314, D. C.

**Annotation.**—*W.F. Winyard v. Toogood, Hance v. Fortnum* (1882), 10 Q. B. D. 218.

**68. —**]—An attendance order was applied for, under Elementary Education Act, 1876 (c. 79), s. 11, in respect of two children aged nine & thirteen years respectively. Neither of the children were in any employment, nor attending any school, nor had either of them obtained any certificate under sect. 5 of above Act:—*Held*: the words "any child who is under this Act prohibited from being taken into full time employment" applied to any child prohibited from being taken into employment by sect. 5, & therefore, an attendance order could be made in respect of each child.—*WINYARD v. TOOGOOD, HANCE v. FORTNUM* (1882), 10 Q. B. D. 218; 52 L. J. M. C. 25; 48 L. T. 229; 47 J. P. 325; 31 W. R. 270, D. C.

**69. — Made on father of child. Not enforceable against mother.—After father's death.**]—An attendance order, made on the father of a child under Elementary Education Act, 1876 (c. 79), s. 11, cannot, on the death of the father, be enforced against the mother, under sect. 12 of that Act.—*HANCE v. FAIRHURST* (1882), 51 L. J. M. C. 139; 47 J. P. 53, D. C.

**70. — Selection of school. Duty of local authority to name school.—In absence of parent's selection.**]—In the absence of selection by a parent, it is the duty of a local authority to name some public elementary school willing to receive a child in respect of whom an attendance order is sought from justices under Elementary Education Act, 1876 (c. 79), s. 11.—*THOMPSON v. ROSE* (1891), 61 L. J. M. C. 26; 65 L. T. 851; 56 J. P. 138; 40 W. R. 155; 8 T. L. R. 4, D. C.

**71. — Equipment of school inefficient. Magistrate may order attendance elsewhere.**]—Applt. was summoned for neglecting to provide efficient elementary instruction for a child. Evidence was given that the child was attending a private school where there was only one room which was contiguous to a factory, & that the general equipment was not efficient. It was also proved that the child was not being provided with efficient elementary instruction at the school in question. The magistrate found that applt., as the parent of the child, had habitually & without reasonable excuse neglected to provide efficient elementary instruction, & he made an order that the child should attend another school:—*Held*: even although the evidence as to the building & equipment of the school which the child was attending was irrelevant, the magistrate was justified in making the order in question.—*SHIERS*

*WY. v. MURPHY*, [1914] 2 I. R. 59.—*RAY*.

**a. Whether notice necessary.**]—When child has been duly entered in the

school register as a pupil no notice is required before taking proceedings for non-attendance.—*SMALL v. RUSSELL* (1906), 26 N. Z. L. R. 195.—*M.Z.*

*v. STEVENSON* (1911), 105 L. T. 522; 75 J. P. 441; 9 L. G. R. 1137, D. C.

**72. — Form of order.—Evidence need not appear.**]—The education authority of the county borough of O. obtained an order against the parent of a defective child requiring him to send the child to a specified school until it attained the age of sixteen years. The parent disobeyed the order & sent the child, at the age of fourteen, to work in a mill. Upon an information being preferred against the parent for non-compliance with the order, it was urged on his behalf: that there was nothing in the order to show that the child had been found to be defective in intellect; that the child had regularly attended school as required by the Education Acts until it had attained the age of fourteen years; that the child was living apart from its parent & outside the jurisdiction of the ct.; & that the offence was of so trifling a nature that the parent ought not to be convicted. The justices were of opinion that the contentions of the parent were well founded & dismissed the information:—*Held*: (1) the order for attendance at school need not show upon the face of it the evidence upon which it had been made; (2) as the order had been regularly made, the only question which the justices had to decide was whether the order had or had not been obeyed; (3) since there had been a wilful disobedience of the order, the justices were not entitled to treat it as a trivial offence of such a character as to dismiss it under Probation of Offenders Act, 1907 (c. 17), s. 1.—*RENNIE v. BOARDMAN* (1914), 111 L. T. 713; 78 J. P. 420; 12 L. G. R. 1003, D. C.

— **In respect of blind, deaf, defective & epileptic children.**]—*See* Part VI., *post*.

## SECT. 2.—BYE-LAWS.

*See* 1921 Act, ss. 46–48.

**In respect of employment of children & young persons.**]—*See* Part IX., *post*.

**73. Proceedings against parent.—Irregular attendance of child.—Bye-law ultra vires.**]—*MORGAN v. HEYCOCK* (1880), 44 J. P. Jo. 199, D. C.

## SECT. 3.—REASONABLE EXCUSE FOR NON-ATTENDANCE.

*See* 1921 Act (c. 51), s. 49.

**74. General rule.**] To send a child to school without the fee where fees are payable; to send a child to the wrong school; to send a child to school who is known to be verminous; in each of these cases, this has been held not to be a complete & efficient performance of the duty of the parent (*AVORY, J.*).—*FOX v. BURGESS*, No. 104, *post*.

**75. What constitutes reasonable excuse.—Child playing truant.**]—(1) A bye-law made under Elementary Education Acts, 1870 (c. 75), 1876 (c. 79), 1880 (c. 23), provided that, "The parent of every child of not less than five nor more than thirteen years of age, shall cause such child to attend school, unless there be a reasonable excuse for non-attendance.

(2) Any of the following reasons shall be a reasonable excuse, namely: (a) That the child is under efficient instruction in some other manner:

## PART V. SECT. 3.

**75.1. What constitutes reasonable excuse.—Child playing truant.—Question of fact.**]—A father was prosecuted for

Sect. 3.—Reasonable excuse for non-attendance.]

(b) that the child has been prevented from attending school by sickness or an unavoidable cause ;  
(c) that there is no public elementary school open which the child can attend within two miles.

(3) From May 18 to Sept. 23 resp., an engine-driver caused, his child to be sent daily from home in time to arrive at school when it opened. He did not receive any notice that the child had not duly attended, except on two occasions. On both occasions resp.'s wife corrected the child. Nevertheless it often failed to attend school. At the hearing of an information, which charged that resp. on & ever since May 18 had neglected the bye-law in not causing this child to attend school, the justices found that he had done all that could reasonably be expected of him to secure the attendance of the child at school, & had reasonable grounds for believing, & did believe, the child was duly attending school, & had, therefore, a "reasonable excuse" for not causing the child to attend school :—*Held* : there might be other "reasonable excuses" within the meaning of the bye-law besides the three reasons therein specified, & the justices were right.—*HELPER SCHOOL ATTENDANCE COMMITTEE v. BAILEY* (1882), 9 Q. B. D. 259 ; 51 L. J. M. C. 91 ; 40 J. P. 438, D. C.

*Annotations* :—As to (2) *Distd. Hewett v. Thompson* (1889), 58 L. J. M. C. 60. *Consd. R. v. West Riding of Yorkshire J.J., Ex p. Broadbent*, [1910] 2 K. B. 192. *Reid. Marshall v. Graham, Bell v. Graham*, [1907] 2 K. B. 112. As to (3) *Reid. L. C. C. v. Hearn* (1909), 7 L. G. R. 312.

76. ———.]—(1) By Elementary Education Act, 1870 (c. 79), s. 12, where an "attendance order," made under sect. 11 of that Act, is not complied with without any "reasonable excuse" within the Act, a ct. of summary jurisdiction may order the child to be sent to an industrial school.

(2) The reasonable excuse referred to must be one of those described in sect. 11—namely—that there is not within two miles from the residence of such child any public elementary school which the child can attend, or that the absence of the child from school has been caused by sickness or any unavoidable cause.

(3) The parent of a child on whom an attendance order has been served under sect. 11 gave as an excuse that he had used every endeavour, short of taking the child to the school, to insure its regular attendance, but that the child had played truant against his wish :—*Held* : the failure to comply with the attendance order was without any "reasonable excuse" within the Act, & the magistrate had therefore jurisdiction to order the child to be sent to an industrial school.—*HEWETT v. THOMPSON* (1889), 58 L. J. M. C. 60 ; 60 L. T. 268 ; 53 J. P. 103 ; 5 T. L. R. 246, D. C.

*Annotations* :—As to (2) *Reid. Marshall v. Graham, Bell v. Graham*, [1907] 2 K. B. 112. As to (3) *Fold. L. C. C. v. Hearn* (1909), 7 L. G. R. 312.

77. ———.]—*LONDON COUNTY COUNCIL v. ILKARN*, No. 61, ante.

78. ——— Child in employment—Helping to support poor family—Child with some elementary education.]—A school board made a bye-law under Elementary Education Act, 1870 (c. 75), s. 74, providing that "the parent of every child of not less than five nor more than thirteen years of age shall cause such child to attend school, unless there be a reasonable excuse for non-attendance," & that "any of the following reasons shall be a reasonable excuse, namely, that the child is under efficient instruction in some other manner ; that the

child has been prevented from attending school by sickness or any unavoidable cause ; that there is no public elementary school open, which the child could attend, within two miles from the residence of such child." Where it was shown that non-attendance was caused by the child, a girl aged twelve, with fair elementary instruction, having been in respectable employment, earning wages, which she gave to her parents, who were poor, industrious, & respectable people, & applied them to the support of their other children, whom otherwise, from no fault of the parents, they would have been unable sufficiently to support :—*Held* : these facts constituted a "reasonable excuse" for non-attendance.—*LONDON SCHOOL BOARD v. DUGGAN* (1884), 13 Q. B. D. 176 ; 53 L. J. M. C. 104 ; 48 J. P. 742 ; 32 W. R. 768, D. C.

*Annotations* :—*Consd. R. v. West Riding of Yorkshire J.J., Ex p. Broadbent*, [1910] 2 K. B. 192. *Reid. Marshall v. Graham, Bell v. Graham*, [1907] 2 K. B. 112 ; L. C. C. v. Hearn (1909), 7 L. G. R. 312 ; Neave v. Hills (1919), 121 L. T. 225.

### 79. ——— Child in beneficial employment—

What is beneficial employment—Nursing.]—Bye-laws were made by a local education authority under Elementary Education Act, 1870 (c. 75), s. 74, as amended by Education Acts, 1876 to 1902, by one of which it was provided that "The parent of every child of not less than five nor more than fourteen years of age shall cause such child to attend school unless there be a reasonable excuse for non-attendance." By another bye-law it was provided that "A child between thirteen & fourteen years of age shown to the satisfaction of the local authority to be beneficially employed shall not be required to attend school" if certain other conditions were complied with. By the direction of the local education authority a complaint was preferred before justices against a parent for unlawfully committing a breach of the bye-laws by not causing his daughter, a child between five & fourteen years of age, to attend school. Before the justices the parent stated in substance that he had kept the girl, who had attained the age of thirteen years & a half, at home owing to sickness in his family in order that she might help in nursing. The justices dismissed the complaint upon the ground that the prosecution had not proved that the child was not beneficially employed, & that if she were employed in nursing the sick it was beneficial employment. On appeal to a Div. Ct. :—*Held* : the decision of the justices was wrong upon the ground that the onus was on the parent of proving affirmatively that the child was beneficially employed, & under the bye-laws the education authority & not the justices were the judges of whether a particular occupation was or was not a beneficial employment, & in giving their decision upon that point the justices had usurped the function of the education authority.

They [the justices] will not be entitled to say generally that nursing is a reasonable excuse (*LORD ALVERSTONE, C.J.*).—*HOLLOWAY v. CROW*, [1911] 1 K. B. 636 ; 80 L. J. K. B. 153 ; 104 L. T. 73 ; 75 J. P. 77 ; 27 T. L. R. 140 ; 9 L. G. R. 80, D. C.

80. ——— Child refused admission—Parent aware that child would not be admitted—Non-payment of fees.]—A parent who, under an order by a ct. of summary jurisdiction that his child shall attend a board school, & that he do see that the order is complied with, causes the child to attend school,

failure without reasonable excuse to provide efficient elementary education for his son, who was in the habit of

playing truant :—*Held* : the question as to what constituted reasonable excuse was a question of fact & not

of law.—*GILLIES v. QUIGLEY* (1905), 3 F. (Ct. of Justiciary).—*SCOT*.

but without the school fees, & without having applied to the guardians under Elementary Education Act, 1870 (c. 75), for payment of such fees, or to the school board under sect. 17 of that Act for a remission of them, is liable to be convicted under Elementary Education Act, 1876 (c. 79), s. 12, for non-compliance with the order.—**SAUNDERS v. RICHARDSON** (1881), 7 Q. B. D. 388; 50 L. J. M. C. 137; 45 L. T. 319; 45 J. P. 782; 29 W. R. 800, D. C.

**Annotations:—***Apprvd.* London School Board v. Wright (1881), 12 Q. B. D. 578. *Consd.* London School Board v. Wood (1885), 15 Q. B. D. 415. *Apld.* Bunt v. Kent, [1914] 1 K. B. 207; Fox v. Burgess, [1922] 1 K. B. 623. *Refd.* Jones v. Rowland (1899), 63 J. P. 454; Walker v. Cummings (1912), 107 L. T. 304.

**81. ——— Failure to attend school.]—**LONDON SCHOOL BOARD v. WRIGHT (1881), 12 Q. B. D. 578; 53 L. J. Q. B. 200; 50 L. T. 300; 48 J. P. 484; 32 W. R. 577, C. A.

**Annotations:—***Consd.* London School Board v. Wood (1885), 15 Q. B. D. 415; Walker v. Cummings (1912), 107 L. T. 304.

As to school fees & contributions *see, note*, 1921 Act (c. 51), s. 37; Part IV., Sect. 5, *ante*.

**82. ——— Failure to send child to selected school.]—**Under the bye-laws of the S. School Board, the parent of every child not less than five or more than thirteen years of age shall cause such child to attend school unless there shall be a reasonable excuse for non-attendance. The child of applt. was ten years of age, & had up to May, 1898, attended at St. G. School, which was a voluntary & public elementary school, but had then been refused admission. The Education Department had confirmed the action of the managers in refusing admission. Since then applt. had & still declined to send the child to any other school than St. G. School. He had had notice of the managers' refusal, & was informed by the S. School Board that he must send his child to another school, & the board had mentioned to him certain schools within two miles that would receive the child. On several occasions applt. sent the child, between May & Sept., to the doors of St. G. School, but it was always refused admission:—*Held*: the offering did not constitute an attendance, & no reasonable excuse for the non-attendance had been proved.—**JONES v. ROWLAND** (1899), 80 L. T. 630; 63 J. P. 451; 19 Cox, C. C. 315, D. C.

**Annotation:—***Refd.* Walker v. Cummings (1912), 107 L. T. 304.

**83. ——— Child in verminous condition.]—**The parent of a child which was not exempt from compulsory attendance at school sent the child to school in such a verminous condition that the child was refused admission to the school, & it had been refused admission on previous occasions for the same reason. Its condition was capable of remedy by means within the reach of the parent & might have been easily cured. Upon an information against the parent for not "causing the child to attend school," the justices were of opinion that the parent had used some means but not the best to cleanse the child & that its condition could have been cured, but they were also of opinion that the condition of the child would not have prevented it from receiving instruction, & they held that the refusal to admit the child was a "reasonable excuse" for non-attendance, & they dismissed the information:—*Held*: the parent having knowingly sent the child to school in such a condition that admission would be re-

fused had not "caused the child to attend school" within the meaning of the bye-laws applicable, & that he had no "reasonable excuse" & ought to have been convicted.—**WALKER v. CUMMINGS** (1912), 107 L. T. 304; 76 J. P. 375; 28 T. L. R. 442; 10 L. G. R. 728; 23 Cox, C. C. 157, D. C.

**84. ——— Failure to attend special class in another school.]—**The Board of Education's code of regulations for public elementary schools for 1912 provides for annual parliamentary grants to be given for special instruction in certain specified subjects, including cookery, which may be taught at centres to scholars from more than one school. Resp.'s daughter, aged eleven years, who ordinarily attended a public elementary school at L., had been selected by the local education authority with other scholars from that school to receive special instruction in cookery & to attend a cookery centre at a school at F., which was within two & a half miles of the child's residence. On a day when, as resp. knew, the child was required to attend the cookery centre at F. school, resp. sent the child to L. school, where she was refused admittance. Resp. was charged with having on the day in question unlawfully neglected & omitted to cause his child to attend school contrary to a bye-law of the local education authority:—*Held*: the attendance of the child at the F. school for the purpose of receiving instruction in cookery was compulsory & resp. had committed a breach of the bye-law.—**BUNT v. KENT**, [1914] 1 K. B. 207; 83 L. J. K. B. 343; 110 L. T. 72; 78 J. P. 39; 30 T. L. R. 77; 12 L. G. R. 34; 23 Cox, C. C. 751, D. C.

**85. ——— Attending church service—Ascension Day.]—**Ascension Day is a "day exclusively set apart for religious observance" by the Church of England within Elementary Education Act, 1870 (c. 75), ss. 7 & 74. A member of that Church desired to send his child to church on that day, & withdrew it from school for that purpose:—*Held*: (1) he was entitled to the protection of those sects. from prosecution under a bye-law which directed him to cause his child to attend school; (2) those facts constituted a "reasonable excuse" under that bye-law for withdrawing the child from school in order to attend one service.—**MAIBHALL v. GRAHAM, BELL v. GRAHAM**, [1907] 2 K. B. 112; 76 L. J. K. B. 690; 97 L. T. 52; 71 J. P. 270; 23 T. L. R. 435; 51 Sol. Jo. 412; 5 L. G. R. 738; 21 Cox, C. C. 461, D. C.

**86. ——— Change of school Irregular attendance after transfer.]—**Resp. was summoned under Elementary Education Act, 1876 (c. 79), s. 12, for failing to comply with an attendance order by which his child was ordered to attend a certain school. Since the date of the attendance order the child had been withdrawn from the school mentioned in the order, & had been entered at another public elementary school of the local education authority, but had only attended 29 times in five weeks out of 46 times that the school was open:—*Held*: no reasonable excuse within sect. 12 of the above Act had been shown for non-compliance with the attendance order as the child was not attending the other school at which she had been entered so as to constitute a reasonable excuse.—**ISLE OF WIGHT COUNTY COUNCIL v. HOLLAND** (1909), 101 L. T. 861; 73 J. P. 507; 7 L. G. R. 1182.

**87. ——— Efficient instruction—At home.]—**At the hearing of a summons taken out under

**t. ——— Efficient instruction.]—***Held*: until regulations were made by Order in Council prescribing the instruction to be given, a parent

alleging that his child was under efficient & regular instruction could not be convicted of neglecting to cause such child to attend a state school.—

**FLEMING v. GREENE**, [1907] V. L. R. 394.—**AUS.**

u. ——— *Inspector's certificate*

**Sect. 3.—Reasonable excuse for non-attendance.**  
**Sect. 4. Part VI. Sects. 1, 2 & 3. Part VII.**  
**Sect. 1.]**

Elementary Education Act, 1876 (c. 70), s. 12, for non-compliance with an attendance order:—*Held*: the parent was entitled to call witnesses for the purpose of showing that he was providing efficient elementary instruction for the child at home, inasmuch as the meaning of the expression "reasonable excuse" in sect. 12 of that Act was not confined to the two reasons mentioned in sect. 11 as being a reasonable excuse but included the reason mentioned in Elementary Education Act, 1870 (c. 75), s. 74, namely, that the child was under efficient instruction in some other manner.—*R. v. WEST RIDING OF YORKSHIRE J.J.*, *Ex p. BROADBENT*, [1910] 2 K. B. 192; 70 L. J. K. B. 731; *sub nom. R. v. MORRIS, ETC.*, *WEST RIDING J.J.*, *Ex p. BROADBENT*, 102 L. T. 814; 74 J. P. 271; 26 T. L. R. 419; 8 L. G. R. 777, D. C.

*Annotation*:—*Reid. Holloway v. Crow* (1910), 9 L. G. R. 89.

**88. — By private teacher.—Efficiency question for magistrates.**—By a bye-law made under Elementary Education Act, 1870 (c. 75), s. 74, as amended by Education Acts, 1870 to 1902, it was provided "that the parent of every child of not less than five years or more than fourteen shall cause such child to attend school unless there be a reasonable excuse for non-attendance," & that the following reason should be a reasonable excuse, namely, "that the child is under efficient instruction in some other manner." An information was laid charging a parent with having unlawfully & without reasonable excuse neglected & omitted to cause his child to attend school as required by the bye-law. The parent had arranged with a lady for the education of the child, & the justices found as a fact that the education the child was receiving was efficient & dismissed the information upon that ground:—*Held*: the justices had jurisdiction to decide that the education the child was receiving was efficient without deciding that it was as efficient as he would have received at a public elementary school.—*BEVAN v. SHEARS*, [1911] 2 K. B. 936; 80 L. J. K. B. 1325; 105 L. T. 795; 75 J. P. 478; 27 T. L. R. 516; 9 L. G. R. 1066, D. C.

**89. — No school within three miles.—By nearest road What constitutes a "road".**—A bye-law of a local education authority provided that it should be a reasonable excuse for a child's not attending school if there was no elementary school within three miles, measured "according to the nearest road," from the child's residence. The route from a child's residence to a school consisted in part of a cart track which passed through a field forming part of a farm in the occupation of the child's father, & which constituted the approach to the house from the highway. The distance from the house to the school by this route was less than three miles:—*Held*: the word "road" in the bye-law was not confined to roads of any particular class & included a cart track of the above description, & the child was, therefore, not excused from attending the school.—*HARES v. CURTIN*, [1913] 2 K. B. 328; 82 L. J. K. B. 707; 108 L. T. 974; 76 J. P. 313; 10 L. G. R. 753; 23 Cox, C. C. 411, D. C.

**90. — Child looking after younger children at home.**—Applt., who was the father of a child

of twelve years of age, failed after due notice to cause the child to attend a public elementary school. Applt. was an agricultural labourer earning 38s. a week & had a wife & seven children, of whom the eldest was fourteen years of age & earning 14s. a week. The second child, which was the child in question, was kept at home to look after the younger children during the mother's absence at work. Applt. had to pay 2s. 6d. a week for rent & £3 for food & clothing for himself & his family. On an information against applt. for failing to cause the second child to attend school without reasonable excuse, the justices held that the facts did not constitute a reasonable excuse & convicted him:—*Held*: the justices could not be said to have gone wrong in law, & the conviction must be affirmed.—*NEAVE v. HILLS* (1919), 121 L. T. 225; 83 J. P. 217; 17 L. G. R. 485, D. C.

**91. — Verminous condition of children at school.—Admissibility of judicial evidence.**—Applt., who was the matron & proprietress of a children's home containing a number of children, & was the lawful guardian of the children, was summoned for not sending certain of the children to school in breach of a bye-law providing that any of the following excuses should be a reasonable excuse; that the child was under efficient instruction in some other manner, & that the child had been prevented from attending school by sickness or any unavoidable cause. Applt. stated that she did not send the children to the school because there had been two cases of ringworm at the school, & she tendered the evidence of a doctor to show the alleged dirty & verminous condition of children at the school, but the justices refused to accept such evidence & convicted applt.:—*Held*: the evidence ought to have been admitted, & the case must be remitted to the justices to hear the evidence & to determine whether there was a reasonable excuse for non-attendance.—*SYMES v. BROWN* (1913), 100 L. T. 232; 77 J. P. 345; 29 T. L. R. 473; 11 L. G. R. 1171; 23 Cox, C. C. 519, D. C.

**92. — Refusal of local authority to readmit child.—For non-compliance with directions.—Directions ultra vires.**—An information was preferred by applt., a school attendance officer, against resp. for that he habitually & without reasonable excuse neglected to provide efficient elementary education for his daughter, a child of school age. She had suffered from ringworm, & having recovered was sent by resp. to school with a certificate from resp.'s own doctor, a duly qualified medical practitioner. She was refused admission on the ground that under art. 53 of the Code, the local education authority had directed that no children who had been suffering from disease should be readmitted if the school medical officer was not satisfied that such children could attend school without risk to themselves or others. They had further directed the school medical officer not to be satisfied in cases of skin diseases until the child had attended the clinic of a dermatologist employed by the local education authority & had been pronounced fit to return to school by him. Resp. was willing that the dermatologist should examine the child, either at home or at school, but would not consent to her attending a clinic established for children with infectious skin diseases as he considered there was risk of

*essential*.—School Attendance Act enacts that a parent, etc., shall not be liable to penalty if "in the opinion of a school inspector, as certified in writing

... the child is under efficient instruction at home or elsewhere".—*Held*: the non-existence of the certificate by reason of its refusal by

the inspector justified conviction.—*R. (Brooks) v. ULMER*, [1923] 1 W. W. R. 1; 19 Alta. L. R. 12; (1923), 1 D. L. R. 304.—CAN.

re-infection. The local authority insisted on attendance at the clinic, & refused to readmit the child to school. After six months they took out this summons on which the justices refused to make an attendance order:—*Held*: the justices were right & the directions given to the school medical officer not to be satisfied except by the certificate of a particular dermatologist went far beyond anything contemplated by the Code, & there was abundant evidence on which the justices could find that resp. had reasonable excuse.—*BOWEN v. HODGSON* (1923), 93 L. J. K. B. 76; 130 L. T. 207; 87 J. P. 180; 40 T. L. R. 31; 68 Sol. Jo. 187; 21 L. G. R. 778; 27 Cox, C. C. 551, D. C.

**93. Whether confined to statutory excuses.]—***HELPER SCHOOL ATTENDANCE COMMITTEE v. BAILEY*, No. 75, *ante*.

**94. —.]—***HEWETT v. THOMPSON*, No. 76, *ante*.

**95. —.]—***LONDON COUNTY COUNCIL v. HEARN*, No. 81, *ante*.

**96. —.]—***R. v. WEST RIDING OF YORKSHIRE J.J.*, *Ex p. BROADBENT*, No. 87, *ante*.

**Employment of children & young persons.]—***See* Part IX., *post*.

#### SECT. 4.—CHILDREN IN CANAL BOATS.

*See* 1921 Act, s. 50.

## Part VI.—Blind, Deaf, Defective and Epileptic Children.

### SECT. 1.—IN GENERAL.

*See* 1921 Act (c. 51), ss. 51–69.

**97. Contribution by board of guardians.]—**A deaf child was boarded out & educated by the education authority at a certified school & the father agreed to contribute 1s. a week towards the expenses. The father died, leaving the child without any means of support, & there was no relation who was legally liable to maintain the child. The child's place of settlement was in S. The education authority claimed that the guardians of the S. Union were liable, under Elementary Education (Blind & Deaf Children) Act, 1893 (c. 42), s. 9 (1), to contribute towards the expenses of the maintenance & education of the child since the death of the father, as being "liable to maintain" the child & therefore, the "parent" within the sect., inasmuch as, if the child became chargeable, they would be bound to support him:—*Held*: the fact that, if the child became chargeable, the guardians of the union would be bound to support him did not make them "liable to maintain" him, & therefore, they were not the "parent" of the child within the sect. & were not liable to contribute towards the expenses.—*SOUTHWARK UNION v. LONDON COUNTY COUNCIL*, [1910] 2 K. B. 559; 79 L. J. K. B. 826; 102 L. T. 717; 74 J. P. 250; 8 L. G. R. 536, D. C.

—.]—*See, now*, 1921 Act (c. 51), s. 127.

**Duty of parent.]—***See* 1921 Act (c. 51), ss. 51–69.

**Duty of education authority.]—***See* 1921 Act (c. 51), ss. 51–69.

### SECT. 2. BLIND AND DEAF CHILDREN.

*See* 1921 Act (c. 51), ss. 51, 52, 61–69.

### SECT. 3. DEFECTIVE AND EPILEPTIC CHILDREN.

*See* 1921 Act, ss. 53–60.

*See, also*, Mental Deficiency Act, 1913 (c. 28).

*See, also*, LUNATICS.

**98. Who are—Magistrate bound by medical certificate—No discretion to examine child—Unless certificate disputed.]—**When an information is laid against a parent or guardian for neglecting to cause a child who is asserted to be mentally deficient or epileptic to attend school, the magistrate, or the justices, before whom the information is heard is not entitled to examine the child & to form an opinion of his own as to its mental condition, but is bound by the medical certificate which is produced in accordance with Education (Administrative Provisions) Act, 1909 (c. 20), s. 6, particularly when the facts stated in such certificate are not disputed.—*R. v. DE GREY*, *Ex p. FITZGERALD* (1913), 109 L. T. 871; 77 J. P. 463; 23 Cox, C. C. 657.

—.]—*See, now*, 1921 Act (c. 51), s. 55 (4).

**99. School attendance order Non-compliance by parent—Duty of magistrates.]—***RENNIE v. BOARDMAN*, No. 72, *ante*.

## Part VII.—Higher Education.

### SECT. 1.—IN GENERAL.

*See* 1921 Act (c. 51), ss. 70–74.

**100. Provision out of rates.]—**It is not within the power of a school board to expend money raised by local rate upon any education other than elementary.—*R. v. COCKERTON*, [1901] 1 K. B. 726; 70 L. J. K. B. 441; 65 J. P. 435; 49 W. R. 433; 17 T. L. R. 402; *sub nom.* *R. v. COCKERTON*, *Ex p. HAMILTON*, 84 L. T. 488, C. A.

*Annotations:—Fold.* *Dyer v. London School Board*, [1902]

2 Ch. 768. *Mentd. Batsou v. London School Board* (1903), 67 J. P. 457; *Bunt v. Kent* (1913), 110 L. T. 72.

**101. —.]—**It not being within the powers of a school board to expend money raised by local rate upon any education other than elementary, the London School Board was restrained by injunction from expending moneys arising from the local rates of the metropolis in the erection of a building as a "pupil-teacher centre," that is, a school for providing pupil teachers with an

### PART VI. SECT. 3.

**w. Provision for care of—Who are parents or guardians.]—***Held*: Under Mental Deficiency & Lunacy (Scotland) Act, 1913, s. 2 (1), (1) providing for

the care, etc., of mentally defective children does not include the provision of food, lodging & clothing; (2) "parents or guardians" include a parish council which is maintaining defective pauper children; (3) the

sect. does not transfer from such a parish council to the school board the duty of providing food, lodging & clothing for such children.—*GLASGOW SCHOOL BOARD v. GLASGOW PARISH COUNCIL*, [1916] S. C. 26.—**SCOT.**



*Sect. 1.—In general. Sects. 2 & 3. Part VIII.  
Sects. 1, 2 & 3. Part IX.]*

education beyond what was strictly elementary.—*DYER v. LONDON SCHOOL BOARD*, [1902] 2 Ch. 768; 72 L. J. Ch. 10; 87 L. T. 225; 51 W. R. 34; 18 T. L. R. 804, C. A.

*Annotation:—Held. Batson v. London School Board* (1903), 67 J. P. 467.

—.]—*See, now*, 1921 Act (c. 51), s. 70.

**SECT. 2.—CONTINUATION SCHOOLS.**

*See* 1921 Act, ss. 75–79.

**SECT. 3.—SCIENCE AND ART SCHOOLS.**

*See* Board of Education Act, 1899 (c. 33), s. 2 (1); 1921 Act (c. 51), s. 73.

## Part VIII.—Health and Well-Being of Scholars.

**SECT. 1.—IN GENERAL.**

*See* 1921 Act (c. 51), ss. 86–89.

**102. Overcrowding in day school—Nuisance—Order to Inspect—Public Health Act, 1875 (c. 55).]**

—Resp. was a mistress of a high school for girls where no boarders were received. A complaint having been received as to the over-crowding of the class-rooms, resp. refused to allow the inspector to enter. An application was made to the justices for an order under sect. 102 of the above Act, requiring resp. to admit the inspector to the school, & in support of such application a complaint on oath was made by the inspector. An order was made by the justices. Resp. appealed to quarter sessions, who were of opinion that the scholars attending the school were not "inmates" within sect. 91 (5) of the Act, & that applts. had not alleged the existence of any nuisance within the Act, or shown reasonable grounds for suspecting such a nuisance, & quashed the order of the justices:—*Held*: (1) "house" in sect. 91 (5) of the Act include a day school, & "inmates" include scholars; (2) where an application is made to a justice under sect. 102 of the Act for an order to enter premises where a nuisance is alleged to exist, the justice, although he has not to decide the fact of the existence of such a nuisance, may consider whether there are reasonable grounds for such suspicion, & receive evidence for that purpose; (3) if an order is made the form of the order should state that it is in reference to a particular subject-matter.—*WIMBLEDON URBAN DISTRICT COUNCIL v. HASTINGS* (1902), 87 L. T. 118; 67 J. P. 45.

*Annotation:—As to* (2) *Appl. Consett U. C. v. Crawford*, [1903] 2 K. B. 183.

**103. Cleansing of verminous children—Service of notice—Local Act.]—By** Liverpool Corporation Act, 1913 (c. lxxxi.), s. 35, if a child is found attending a public elementary school in a foul & filthy condition, the medical officer of health is authorised to serve a notice in writing upon the parent or guardian or other person having charge of the child requiring that the child shall have its person & its clothing properly cleansed within 24 hours of the service of the notice, & if the cleansing is not carried out by the parent or guardian, the medical officer of health may have the child cleansed. If after the child has been thus cleansed the parent or guardian allows it to get into a condition requiring a repetition of cleansing, he or she shall be liable to a penalty. The notice in writing is deemed to be properly served by giving it to the person to whom it is addressed, or by leaving it for such person with some inmate of his residence. A notice in accord-

ance with the above sect., requiring that a certain child should be cleansed, was left at the residence of resp., D., addressed to him, & was taken in by the child who was the subject of the complaint, & who was, at the time, the only person in resp.'s place of residence:—*Held*: it was no objection to the service that the child referred to in the notice was the inmate who actually received the notice, & for the purpose of calculating the 24 hours required between the service of the notice & the time of cleansing, the period of 24 hours began to run from the time of the service upon the child at resp.'s residence.—*HOPE v. DEVANEY* (1914), 111 L. T. 571; 78 J. P. 343; 12 L. G. R. 1286; 24 Cox, C. C. 303.

**104. —Refusal of child to submit to medical examination—Responsibility of parent.]—**(1) Children Act, 1908 (c. 67), s. 122, empowers a local education authority to direct their medical officer to examine in any public elementary school the person & clothing of any child attending the school, with a view to the cleansing of verminous children. Applt.'s daughter, aged twelve years, ordinarily attended a public elementary school in the borough of H. On three successive occasions, acting under the instructions or guidance of applt., she refused to submit to the medical examination directed by the local education authority in accordance with the above sect. She was accordingly reported to the education authority, & they excluded her from the school for persistent insubordination, informing applt. of their resolution. Applt. subsequently sent her to the school, but she was refused admittance. He was then charged with having unlawfully & without reasonable cause failed to comply with an attendance order previously made by the borough justices & was convicted by them:—*Held*: applt. had not taken reasonable steps to comply with the order & was rightly convicted.

(2) Sect. 122 of the Act imports an obligation upon the child to submit to the examination therein directed, & if a child, acting under the instructions or guidance of its father, refuses to submit, the father becomes responsible for the refusal.

(3) Observations as to reasonable excuse for non-attendance (*see* No. 74, *ante*).—*FOX v. BURGESS*, [1922] 1 K. B. 623; 91 L. J. K. B. 465; 126 L. T. 525; 86 J. P. 66; 38 T. L. R. 289; 66 Sol. Jo. 335; 20 L. G. R. 277; 27 Cox, C. C. 162.

—.]—*See, now*, 1921 Act (c. 51), s. 87.

**105. Conveyance of children to school—Failure to provide attendant—Negligence.]—SHRIMPTON v. HERTFORDSHIRE COUNTY COUNCIL**, No. 19, *ante*.

**PART VIII. SECT. 1.**

*a. Vaccination—Regulations issued by Provincial Board of Health—Ultra vires.]—*Sect. 68 of the regulations issued under Public Health Act (Alta.),

by the Provincial Board of Health which provided that "... no pupil shall be admitted to any school unless & until he produces evidence of successful vaccination." is *ultra vires* the Provincial Board of Health as being in

conflict with Truancy Act (Alta.), s. 3.—*CLOWES v. EDMONTON SCHOOL BOARD* (1915), 32 W. L. R. 733; 9 W. W. R. 373; 35 D. L. R. 449; 9 Alta. L. R. 106.—*CAN.*

## SECT. 2.—MEDICAL INSPECTION AND TREATMENT.

See 1921 Act (c. 51), ss. 80, 81.

**106. Obligation of parent—To consent to operation on child.**—*R. v. DE CRESPIGNY, Ex p. CARTER* (1912), *Times*, May 21.

**107. Negligence of medical officer performing**

**operation—Liability of local authority.**—*DAVIS v. LONDON COUNTY COUNCIL*, No. 24, *ante*.

## SECT. 3.—PROVISION OF MEALS.

See 1921 Act (c. 51), ss. 82–85.

## Part IX.—Employment of Children and Young Persons.

See, generally, 1921 Act (c. 51), ss. 90–108.

See, also, Education Act, 1918 (c. 39), s. 14; Factory & Workshop Act, 1901 (c. 22); FACTORIES; INFANTS.

**108. Right of local authority to regulate—Validity of bye-law.**—By Workshop Regulation Act, 1867 (c. 146), s. 14, every child "employed in a workshop shall attend school for at least ten hours in every week." By Elementary Education Act, 1870 (c. 75), s. 74, every school board may make bye-laws. The school board for B. by its bye-laws directed that the parents of every child should cause him to attend a school during the whole time it should be open for instruction, but that nothing in the bye-laws should have any effect in so far as it might be contrary to anything contained in any Act for regulating the education of children employed in labour. Resp.'s child was employed in a workshop at B. & attended a school pursuant to sect. 14 of the former Act, but did not attend the school during the whole time it was open by the bye-laws:—*Held*: the bye-laws were not contrary to that Act & were capable of being enforced, & resp. had committed a breach of them. —*BURY v. CHERRYHOLM* (1876), 1 Ex. D. 457; 35 L. T. 403; 41 J. P. 21, D. C.

**109. ——— Application of Factory Acts.**

—(1) A school board is not entitled to enforce the provisions of its bye-laws with regard to the hours of attendance of children at school, in the case of children employed in factories who are attending efficient elementary schools pursuant to Factory Acts.

(2) Elementary Education Acts do not control the provisions of Factory Acts regulating the education of children employed in accordance with those Acts. —*MELLOR v. DENHAM* (1879), 4 Q. B. D. 241; 48 L. J. M. C. 113; 40 L. T. 395; 43 J. P. 381; 27 W. R. 505; *subsequent proceedings*, (1880), 5 Q. B. D. 407.

**110. ———**—(1) A school authority, acting under powers conferred by Elementary Education Acts, made bye-laws applicable to children up to fourteen years of age. The bye-laws contained a proviso that a child between twelve & fourteen years of age should not be required to attend school, if such child had received a certificate that it had reached the sixth standard; but they contained no provision giving total exemption from the obligation to attend school to a child between twelve & fourteen who had only obtained the certificate of previous due attendance at school referred to in Factory & Workshop Act, 1901 (c. 22), s. 71:—*Held*: a child of thirteen years of age, who had obtained a certificate of previous due attendance, but had not received a certificate of having reached the sixth standard, could not lawfully be employed in a factory on full time; (2) the bye-laws contained no provision for partial exemption from the obligation to attend school in the case of a child of the age of twelve who had received a certificate of previous due

attendance at school:—*Held*: notwithstanding the absence of any such provision in the bye-laws, such a child might lawfully be employed in a factory on half time, inasmuch as Factory & Workshop Act, 1901 (c. 22), s. 68, by making provision for the compulsory education of half-timers, necessarily sanctioned partial exemption. —*STEVENSON v. GOLDSTRAW, STEVENSON v. CRAIG*, [1906] 2 K. B. 298; 75 L. J. K. B. 505; 95 L. T. 111; 70 J. P. 340; 50 Sol. Jo. 543; 4 L. G. R. 863.

**111. ———**—The power of the local education authority, under the proviso in Elementary Education (School Attendance) Act, 1899 (c. 13), s. 1, to make a bye-law for any parish within their district providing for the total exemption from school attendance of a child between thirteen & fourteen years of age who is to be employed in agriculture, though the child has not received a certificate of educational proficiency, is not affected by Elementary Education Act, 1900 (c. 53), s. 6. —*STRONG v. TREBISE*, [1909] 1 K. B. 613; 78 L. J. K. B. 401; 100 L. T. 340; 73 J. P. 105; 25 T. L. R. 214; 7 L. G. R. 411.

**112. ———**—One of the bye-laws of a local education authority providing that "a child under fourteen, shall not be employed on school days except between 5 p.m. & 6.30 p.m." is neither *ultra vires* nor unreasonable, & a person who employs such a child to deliver milk between 8 a.m. & 9 a.m. on a school day contravenes it. —*ROBERTS v. WILLIAMS* (1922), 86 J. P. 153; 127 L. T. 363; 20 L. G. R. 487.

—See, *note*, 1921 Act, s. 90 (1)(ii.).

**113. ——— On report of medical officer—Production of report before magistrates.**—Pursuant to Education Act, 1918 (c. 39), s. 15 (1), a local education authority passed a resolution which stated that they, being satisfied by a report of the school medical officer that a certain child was being employed in a manner prejudicial to his health & physical development, thereby prohibited his employment; & notice of the resolution was served upon the employers of the child. At the hearing by justices of an information at the instance of the authority against the employers for an alleged contravention of the Act in employing the child contrary to the resolution, the justices required the authority to produce the report mentioned in the resolution or other evidence upon which they had acted in passing the resolution, but the authority refused to do so, & the justices thereupon dismissed the information. On a case stated by the justices:—*Held*: the justices were entitled to require the authority to produce the report or other evidence upon which they had relied, & on their failure to do so the justices had rightly dismissed the information. —*MARGERISON v. HIND & Co.*, [1922] 1 K. B. 214; 91 L. J. K. B. 160; 126 L. T. 249; 85 J. P. 278; 38 T. L. R. 12; 66 Sol. Jo. 171; 19 L. G. R. 716; 27 Cox, C. C. 133, D. C.

**114. Employment by parent—Child kept at**

home for domestic purposes.]—Resp., in order to enable his wife to go out & earn money, kept his daughter, a child of the age of thirteen who was not exempted from school attendance, at home to do the housework :—*Held* : he did not thereby employ the child for the purposes of gain so as to render himself liable to the penalty imposed by Elementary Education Act (c. 79), s. 6.—*MATHER v. LAWRENCE*, [1899] 1 Q. B. 1000 ; 68 L. J. Q. B. 714 ; 80 L. T. 600 ; 63 J. P. 455 ; 47 W. R. 559 ; 15 T. L. R. 347 ; 43 Sol. Jo. 478 ; 19 Cox, C. C. 300, D. C.

*Annotations* :—*Reid*, R. v. Austin (1906), 5 L. G. R. 126 ; *Neave v. Hills* (1919), 121 L. T. 225.

**115. — Child doing light work—On medical advice.**—A father whose child of the age of thirteen was subject to fits, acting on medical advice, allowed such child to come into his workshop when he pleased & do such work as he was minded & able to do. He never compelled the child to work or go into the workshop :—*Held* : the father had not taken the child into his employment within Elementary Education Act, 1876 (c. 79), s. 47.—*R. v. AUSTIN*, *Ex p. LEAH* (1906), 96 L. T. 29 ; 71 J. P. 29 ; 5 L. G. R. 126 ; 21 Cox, C. C. 347, D. C.

**116. Employment by agent—Responsibility of employer.**—By a bye-law made under Employment of Children Act, 1903 (c. 45), s. 3 (1), no child shall be employed between certain hours ; & by sect. 6, sub-sect. 3, of the Act, "where an employer is charged" with any offence under the Act he shall be entitled upon information laid by him to have the person whom he charges as the actual offender brought before the ct., & if "after the

commission of the offence has been proved" the ct. is satisfied that the employer had used due diligence to comply with the provisions of the Act, & that the other person had committed the offence in question without the employer's knowledge, consent, or connivance, the other person shall be summarily convicted of the offence, & the employer shall be exempt from any fine. A vanman in the employment of resp., a baker, employed for his own convenience & benefit a child to deliver bread to resp.'s customers during hours forbidden by the bye-law. The child was actually engaged & his wages paid by the vanman, & his engagement was a voluntary & gratuitous act on the part of the vanman & formed no part of any arrangement between him & resp. Resp. had no knowledge that the child was so employed except during permitted hours. Resp. was charged with having unlawfully employed the child during prohibited hours contrary to the bye-law :—*Held* : (1) the mere fact that resp. was charged with the offence did not, in the absence of any evidence of a contract of employment of the child during prohibited hours by or on behalf of resp., make it incumbent upon him, under sect. 6, sub-sect. 3, of the Act, in order to claim exemption from a fine, to charge the vanman as the actual offender ; (2) as there was no evidence of any unlawful employment of the child by resp., either directly or by an agent purporting to employ the child on his behalf, no offence by resp. had been proved.—*ROBINSON v. HILL*, [1910] 1 K. B. 91 ; 79 L. J. K. B. 189 ; 101 L. T. 573 ; 73 J. P. 511 ; 26 T. L. R. 17 ; 7 L. G. R. 1065, D. C.

—*See, now*, 1921 Act (c. 51), s. 97 (1).

## Part X.—Acquisition, Appropriation, and Alienation of Land.

*See* 1921 Act (c. 51), ss. 100–117, & Sched. 5.

**117. Compulsory acquisition of land—Remedies against local educational authority—For lands injuriously affected.**—The sects. of Lands Clauses Act, 1845 (c. 18), relating to the purchase of lands, are incorporated in Elementary Education Act, 1876 (c. 75), for all purposes, & their application is not confined to cases where the relation of vendor & purchaser exists. Therefore, the remedy of a person whose lands are injuriously affected by the works of the school board, but no part of whose land is taken, is by proceeding for compensation under sect. 68 of the Former Act, & not by bill for an injunction.—*CLARK v. LONDON SCHOOL*

*BOARD* (1874), 9 Ch. App. 120 ; 43 L. J. Ch. 421 ; 29 L. T. 903 ; 38 J. P. 101 ; 22 W. R. 351, L. C. & L. J.J.

*Annotations* :—*Apld.* *Bedford v. Dawson* (1875), L. R. 20 Eq. 353 ; *Wigram v. Fryer* (1887), 36 Ch. D. 87 ; *Kirby v. Harrogate School Board*, [1896] 1 Ch. 437 ; *Anderson v. M. S. & L. Ry.*, M. S. & L. Ry. v. *Anderson* (1898), 78 L. T. 251 ; *Barnard v. G. W. Ry.* (1902), 86 L. T. 798. *Reid*, *Swainston v. Finn & Metropolitan Board of Works* (1883), 48 L. T. 634 ; *Barlow v. Ross* (1890), 59 L. J. Q. B. 183 ; *London School Board v. Smith*, [1895] W. N. 37.

**118. — For interference with easement.**—*LONDON SCHOOL BOARD v. SMITH*, [1895] W. N. 37.

*Annotation* :—*Apld.* *Barnard v. G. W. Ry.* (1902), 86 L. T. 798.

### PART X.

**b. Acquisition of land—By school trustees—Reference to freeholders.**—A board of school trustees cannot, under 14 & 15 Vict. c. 48, & 16 Vict. c. 185, without any reference to the freeholders, select & purchase the site for the school house, & impose a rate therefor.—*DAVEY v. RANSKY* (1855), 12 U. C. R. 377.—*CAN.*

**c. — Order on municipality to pay cost.**—The trustees of a school sect. in an incorporated village applied to the village municipality to levy a sum required for a school site which they had contracted to purchase. The municipality refused :—*Held* : the trustees should first have given an order to the person from whom they had agreed to purchase, upon the treasurer of the municipality.—*RE GALT SCHOOL TRUSTEES & VILLAGE OF GALT* (1858), 13 U. C. R. 511.—*CAN.*

**d. — Liability of town**

*council to pay cost.*—The communication of a board of trustees to the town council of a resolution of the board, that the chairman do authorise the secretary of the board to notify the town council to furnish the board with a sum of money immediately to purchase a site & erect a school house is not such compliance with 13 & 14 Vict. c. 48, as to render the council liable to be compelled to pay the amount by *mandamus*.—*PORT HOPE SCHOOL TRUSTEES v. PORT HOPE TOWN* (1856), 4 C. P. 418.—*CAN.*

**e. — Repudiation of contract.**—A school trustee, by desire of the board, bought for the board property for a school site, & signed the contract with his own name only. The board during three years, unanimously recognised the purchase as their own, & paid three instalments of the purchase money. Trustees were afterwards elected, a majority of whom

determined to repudiate the purchase. In a suit against the board by the purchaser :—*Held* : purchaser was entitled to indemnification in respect of remainder of the purchase money.—*SMITH v. BELLEVILLE SCHOOL TRUSTEES* (1869), 16 Gr. 130.—*CAN.*

**f. — Approval of school electors.**—At two meetings of the duly-qualified electors of the school section, proposals to purchase a site, build a school house, & borrow money therefor, were carried, upon which a bye-law was passed, authorising the issue of debentures to raise money for the above purposes :—*Held* : this was a sufficient submission to & approval of the proposal by the duly-qualified school electors of the section.—*MCCORMICK & TOWNSHIP OF COLCHESTER SOUTH* (1881), 46 U. C. R. 65.—*CAN.*

**g. — Power of town corporation to authorise.**—On motion to

**119. — For breach of covenant.]—**When a school board acquire land whether by agreement or compulsion, for the purposes of Elementary Education Act, 1870 (c. 75), & purchase with notice of a restrictive covenant to which the land was subject in the hands of the vendor, the covenantee cannot maintain an action against the school board for breach of covenant; his only remedy is compensation under Lands Clauses Act, 1845 (c. 18).—*KIRBY v. HARRIGATE SCHOOL BOARD*, [1896] 1 Ch. 437; 65 L. J. Ch. 376; 74 L. T. 6; 60 J. P. 182; 12 T. L. R. 175; 40 Sol. Jo. 239, C. A.

**Annotations.]—***Consol. Anderson v. M. S. & L. Ry., M. S. & L. Ry. v. Anderson* (1898), 78 L. T. 251; *Long Eaton Recreation Grounds Co. v. Mid. Ry.*, [1902] 2 K. R. 571. *Reid. Metropolitan Water Board v. Solomon*, [1908] 2 Ch. 214.

**120. — For compulsory acquisition ultra vires.]—**(1) A public body having powers for the compulsory acquisition of land cannot employ them to acquire land for a purpose which it is not legally competent to carry out & cannot by proceeding under Lands Clauses Act, 1845 (c. 18), confer upon itself a right which it would not otherwise possess.

(2) A voluntary conveyance to a public body

continue an injunction to restrain the corporation of a town in a judicial district from paying over to the high school of said town, & the said board from receiving the sum raised by bye-law of said town, for acquiring a site & erecting a high school thereon.—*Held*: the corporation were authorised to appoint a high school board therefor, & to pass a bye-law for the erection of said school; & the consent of the lieutenant-governor was not required.

—*DAWSON v. SAINT STE. MARIE TOWN* (1899), 18 O. R. 556.—**CAN.**

**h. — Statutory powers.]—***Held*: under 1895 Act, c. 1, s. 24, the choice of the site for the school building was vested in the trustees, subject to the sanction of the inspector. *MEISSNER v. MEISSNER* (1899), 32 N. S. R. 320.—**CAN.**

**k. — Meeting of ratepayers.]—***Power to hold a poll.* By 1 Edw. VII., c. 39, s. 34 (9), it is enacted that the trustees of every rural school section shall have power to select a site for a new school house, or to agree upon a change of site for an existing school house, & shall forthwith call a special meeting of the ratepayers of the section to consider the site selected by them:—*Held*: there is power to hold a poll at such meeting, & that at such polling, persons entered on the assessment roll as "farmers' sons" are entitled to vote.—*McFARLANE v. GREENOCK SCHOOL TRUSTEES* (1906), 13 O. L. R. 220; 9 O. W. R. 183.—**CAN.**

**l. — Redress against.]—**The only redress against a resolution of a board of school comrs. depending upon the purchase of a school site, is by appeal to the circuit ct., & the decision upon such appeal is final & is *res judicata* between the parties.—*PAQUIN v. SCHOOL COMRS.* (1914), Q. R. 47 S. C. 218.—**CAN.**

**m. — Le B. conveyed land to the municipal council of the district of D., on condition of their erecting within a year a school house thereon. The deed did not state that it was to be a model school house, but that was the only school they could then establish. The land formed part of what was afterwards incorporated as the town by B. & subsequently the city of O., while the district of D. became the county of C. 37 Vict. c. 28 (O), empowered the public school board of the city to take possession of all public school property, & to hold,**

as a corporation, all such property acquired or given at any time for public purposes in the city by any title whatsoever. Defts. took possession, claiming the land as being vested in them under this Act, & plffs. then brought ejectment.—*Held*: plffs. were entitled to recover.—*CARLETON COUNTY v. OTTAWA PUBLIC SCHOOL BOARD* (1875), 25 C. P. 137.—**CAN.**

**n. — Objection (validity of.)—**The principal objection to land being taken for a school site was that it was an orchard, but the facts showed that the owner had only, after the selection was first spoken of, planted some trees, which, on the movement to take the land being stopped, were suffered to die out; & these were renewed on a subsequent movement of the trustees to take possession:—*Held*: this was not such orchard as should prevent the trustees from appropriating the land for school purposes. *JOHNSON v. HOWARD SCHOOL TRUSTEES* (1878), 26 Gr. 201.—**CAN.**

**o. — Conviction for wrongful acquisition.]—**A conviction under school Act, Sask., s. 50, was quashed because (1) it stated that the accused, "did proceed to acquire" a school site whereas the offence under the Act was for "acquiring" a school site in violation of the Act, & (2) because accused did not "acquire" a site but built on a site previously acquired. *R. v. ALLPRESS* (1920), 1 W. W. R. 723.—**CAN.**

**p. Change of site.]—Power of county council.]—Union of grammar school with common school.]—**The power of a county council to change the site of a grammar school is not lost by the union of the grammar school with a common school; though, if the new site is not also adopted by the means provided by law for the case of a common school, the change may render necessary the separation of the schools.—*MALCOLM v. MALCOLM* (1864), 15 Gr. 13; *not fold.* *MORFATT v. CARLETON PLACE*, 26 Gr. 590; *ditto*, 5 A. R. 197.—**CAN.**

**q. — Powers of Board of Education.]—***Held*: the board of education formed by the union of high school & public school trustees, had power to change the site for a school, & purchase another without a bye-law or resolution of the county council, or the approval of the lieutenant-governor in council, & plff. was entitled to specific performance of an agreement by the board to purchase land for such purpose.—*MOR-*

will pass the property conveyed, although that body was acting in breach of trust in applying its funds to the purchase.

(3) Proceedings under Lands Clauses Act, 1845 (c. 18), having been *ultra vires*, the landlord is entitled to damages for injury done to the property.—*BATSON v. LONDON SCHOOL BOARD* (1903), 67 J. P. 457; 20 T. L. R. 22; 2 L. G. R. 116.

—*See Part XVII., Sect. 10, sub-sect. 5, post: & generally, COMPULSORY PURCHASE OF LAND.*

**121. Conveyance of land to local education authority—Of county borough—Form of conveyance.]—***Re LEEDS INSTITUTE OF SCIENCE, ART & LITERATURE & LEEDS CITY COUNCIL*, No. 10, *ante*.

**122. Appropriation by local education authority—Of land for art gallery—Sanction of court.]—**A testator, who died on Feb. 4, 1900, bequeathed to plffs. his pictures upon trust that (a) if within five years from his death there should be established in G. a free art gallery sufficiently extensive to admit the selected pictures, his trustees should give them absolutely; or (b) the trustees might pay £30,000 to be applied in or towards enlarging a gallery. Provided that if within a specified time a sum had been subscribed which with the £30,000

FATT v. CARLETON PLACE BOARD OF EDUCATION (1880), 5 A. R. 197.—**CAN.**

**r. — Meeting of ratepayers.]—***Consent of majority necessary.]—**Held*: no change of a school site should be made without the consent of the majority of ratepayers present at a special meeting called for that purpose, & in the circumstances the school site had been ascertained & fixed by the first meeting, but it was competent for the school meeting to change the site with the consent of the necessary majority.—*WALLACE v. LOBO SCHOOL TRUSTEES* (1886), 11 O. R. 618; *ditto*, *TRUSTEES v. ARTHUR*, 21 O. R. 560.—**CAN.**

**s. — Resolution must be specific.]—**Where it appeared that at a meeting of ratepayers, called, pursuant to R. S. O. 1887, c. 225, s. 64, to provide for a change of the school site, a resolution for that purpose, & also an amendment thereto, were submitted, both of which, in addition to the main question as to change of site, embraced matters collateral thereto, the former of which was carried:—*Held*: the resolution was invalid.—*McGUGAN v. SOUTHWOLD SCHOOL TRUSTEES* (1889), 17 O. R. 128.—**CAN.**

**t. — Approval of municipal council.]—***Issue of certificate.]—*Trustees of a school district took proceedings to select a new school site, & the council of the municipality approved of a new site. No certificate of approval was asked for or issued. Before any steps were taken towards acquiring the site, proceedings for the determination of a school site were again commenced, & the municipal council approved of the old site. A certificate of approval was asked for & issued:—*Held*: the second proceedings were regular & the certificate of approval was sufficient authority to the trustees to proceed to erect the building on the old site.—*CARMAN v. NEWTON SCHOOL DISTRICT NO. 231 (BOARD OF TRUSTEES)*, [1921] W. W. R. 347; 61 D. L. R. 58.—**CAN.**

**u. — Arbitrators.]—***Finality of award.]—*Two meetings of trustees decided against the selection of a new site. Arbitrators were then appointed, & their award was to the same effect. The trustees called a third meeting, & the change was thereat approved of:—*Held*: the proceedings were invalid.—*WILLIAMS v. PLYMPTON SCHOOL TRUSTEES* (1858), 7 C. P. 559; *ditto*, *WALLACE v. LOBO*, 11 O. R. 618.—**CAN.**

**v. — Two defts.]—**Two defts.

would be sufficient "to provide" a satisfactory gallery the fund should be paid over. (c) If his trustees should consider that a satisfactory gallery could "be provided" for the £30,000 without contributions it might be applied accordingly. The residue was bequeathed to charities. The trustees asked that a provisional agreement between them & the G. Corporation providing for the appropriation by the council, with the approval under Education (Administrative Provisions) Act, 1909 (c. 29), s. 5, of the Local Govt. Board, of certain land held by them for educational purposes as a site for the art gallery, the payment of £5,000 as its price, the income thereof to be applied for the maintenance of the gallery, the erection of the

gallery by the trustees, & its maintenance by the council, might be sanctioned:—*Held*: (1) testator must in clauses (b) & (c) have contemplated that part of the £30,000 would be applied for maintenance; (2) testator had provided for the necessary building & adequate maintenance & endowment, & therefore, the agreement providing for payment of £5,000 to the corp., for the rest of the fund to be expended in the erection, on the site proposed, of the building would be sanctioned.—*Re SHIPLEY, MIDDLETON v. GATESHEAD CORPN.* (1913), 77 J. P. 424.

**Erection of non-provided schools—On consecrated ground—Permission by faculty.**—*See BURIAL, Vol. VII., p. 553, Nos. 301–305.*

## Part XI.—Finance.

*See, generally, 1921 Act (c. 51), ss. 118–132, sched. 6; Finance Act, 1907 (c. 13), s. 17; Welsh Intermediate Education Act, 1889 (c. 40), s. 9.*

*See, also, LOCAL GOVERNMENT; REVENUE.*

**123. Power to raise temporary loan.**—A school board have not power, when the school fund proves insufficient, to contract a temporary loan for the purpose of meeting their current expenses until they can obtain money out of the rates.—*R. v. REED* (1880), 5 Q. B. D. 483; 49 L. J. Q. B. 600; 42 L. T. 335; 44 J. P. 633; 28 W. R. 787, C. A.

*Annotations:—Apld. R. v. Locke, [1910] 2 K. B. 201. Mentd. A.-G. v. L. C. C., [1901] 1 Ch. 781; Re Kingsbury Collieries & Moore's Contract, [1907] 2 Ch. 259.*

avowed; the third pleaded the convening of a special meeting of the freeholders & householders of a school section to procure a school site, when it was agreed to procure a piece of ground & erect a school house thereon. *Hfd.* pleaded that before the said meeting, another meeting had been convened according to law, when a difference of opinion existed between a majority of the freeholders & householders as to choosing a school site, & arbitrators were appointed, who decided upon a certain site; & debts, wrongfully purchased the site mentioned in their plea, & wrongfully distrained, etc.—*Held*: the second meeting pleaded by debts was a violation of the statute.—*RYLAND v. KING* (1862), 12 C. P. 198.—*CAN.*

**g. Mode of appointment.**—Where a board of school trustees passed a resolution professing to adopt a permanent site for the school, & the resolution was confirmed at a special meeting of the ratepayers, those proceedings were held not to prevent a change of site in a subsequent year. Where school trustees selected a new site for the school house, & at a special meeting of the ratepayers those present rejected the site so selected & chose another, but neither party named an arbitrator:—*Held*: an arbitrator might be appointed by the ratepayers at a subsequent meeting.—*MALCOLM v. MALCOLM* (1868), 15 Gr. 13; *not foll.* *MOFFATT v. CARLETON PLACE, 26 Gr. 590; distd. 5 A. L. 197.*—*CAN.*

**d. Powers.**—Under 1 Edw. VIII., c. 39 (O), s. 34, the arbitrators appointed in consequence of a majority of the ratepayers at a special meeting differing from the trustees, as to the suitability of the site for a school house selected by the trustees, can determine only whether or not the site selected by the trustees is a suitable one; they have no power to select another site.—*Re BONAER PUBLIC SCHOOL DISTRICT NO. 26* (1903), 21 C. L. T. 16; 6 O. L. R. 585; 2

O. W. R. 928.—*CAN.*

**e. Difference between the trustees & a majority of the ratepayers at a special meeting as to a school site selected by the trustees, that an arbn. is to be had, under Public Schools Act R. S. C. 1897, s. 31.**—*Re CARTWRIGHT PUBLIC SCHOOL TRUSTEES & CARTWRIGHT* (1903), 23 C. L. T. 216; 5 O. L. R. 699; 2 O. W. R. 340.—*CAN.*

**f. The procedure by arbn. provided for by Public Schools Act, R. S. M., s. 161, does not except from sect. 162 the provision therein making necessary the consent of two-thirds of the resident ratepayers to the removal of an existing school-house.**—*McDONALD v. EARL GREY SCHOOL DISTRICT*, [1918] 1 W. W. R. 112; 38 D. L. R. 474.—*CAN.*

**g. Reservation for school purposes.**—*Effect of.*—A reservation for school purposes of such character as to be the subject of dedication.—*WYOMING CORPN. v. BELL* (1877), 24 Gr. 564.—*CAN.*

**h. Crown Lands.**—The reservation of Crown lands for school purposes is an "alienation" within the meaning of Island Railway Act, 1884, c. 14, s. 6.—*A.-G. FOR BRITISH COLUMBIA v. ESQUIMALT & NANAIMO RY. CO.* (1912), 17 B. C. R. 427; 4 D. L. R. 337; 21 W. L. R. 549; 2 W. W. R. 568.—*CAN.*

**k. Erection of school house.**—*Powers of school board.*—The school board of a city, town or incorporated village has no authority to contract for the building of a school house, until the necessary funds have been provided, under 54 Vict. c. 53, s. 116, or for one involving the expenditure of any greater sum than has been so provided.—*SMITH v. FORT WILLIAM SCHOOL BOARD* (1893), 24 O. R. 365; *cond. KRB v. DRISDEN PUBLIC SCHOOL BOARD*, 18 O. L. R. 295.—*CAN.*

**l. Authority of Trustees.**—*Injunction.*—When a school-house has

been erected on a site approved of by the proper authorities, an injunction should not be granted restraining the trustees from paying to the contractors money which the trustees have been authorised by the Local Govt. Board to borrow for that purpose or from borrowing, with authority, & paying over the additional money necessary to make up the amount payable under the contract.—*LAWRENCE v. BEAVER SCHOOL DISTRICT NO. 3801*, [1918] 3 W. W. R. 608; 43 D. L. R. 318; 11 Sask. L. R. 429.—*CAN.*

### PART XI.

**m. School district.—Annual estimate.—Duty of town council.**—Where an estimate of the sum required for school purposes for a certain year was sent to the town council by the trustees, & the council recognised such estimate by paying a portion, & submitted to the ct. their reasons for refusing to pay the balance:—*Held*: they were precluded from objecting that the estimate was not laid before them as by law required.—*BROCKVILLE SCHOOL TRUSTEES v. BROCKVILLE TOWN* (1852), 9 U. C. R. 302.—*CAN.*

**n. The Act incorporating the town of D. provided that the Town Council should have jurisdiction over the support & regulation of the public schools, regulating & collecting the assessments, & that they should vote, assess, collect, receive, appropriate & pay whatever moneys were required for county assessments, & should have within the town all the powers relating thereto vested in the Sessions, Grand Jury, School Meeting & Town Meeting. By another act it was enacted that, after the passing of the Act, the town should be set off into a separate school section, & should have the expenditure of all rates raised within its limits for the schools of the town, as also of all government & school grants for such schools, which grants should be paid to the town:—**

R. v. WRAITH, *Ex p.* KENT COUNTY COUNCIL, [1907] 2 K. B. 756; 76 L. J. K. B. 881; 97 L. T. 577; 71 J. P. 447; 5 L. G. R. 1091, D. C.

—.]—*See, now*, 1921 Act (c. 51), s. 122 (c).

**125. — Liability of parishes served by school — Elementary school.**—R. v. WRAITH, *Ex p.* KENT COUNTY COUNCIL, No. 124, *ante*.

**126. — Intermediate school.**—A county council were the local education authority & also the governing body of an intermediate school erected under Welsh Intermediate Education Act, 1889 (c. 40). Further accommodation being required for that school, & there being no facilities for teaching subjects like laundry & cookery to girls, & wood-carving & woodwork to boys, in eight schools, in four parishes adjacent to the place where the intermediate school was

situated, the county council decided with the approval of the Board of Education to erect new buildings for the intermediate school to be used for both elementary & secondary school purposes. About 240 elementary pupils from the eight schools in the four parishes attended the school. The secondary pupils used the whole of the first floor, & the elementary pupils used part of the ground floor. Only the special subjects mentioned above were taught to the elementary pupils; the provisions of the Day School Code were never complied with in the building in question. The expense of erecting the building was met by a loan repayable by annual sums representing a sinking fund & interest. The county council sought to levy, under Education Act, 1902 (c. 42), s. 18 (1) (8), a portion of that annual sum by means of a rate on the four parishes from which

*Held*: notwithstanding these enactments, the Town Council was bound to assess & pay over to the County Treasurer its rateable proportion of the assessment of thirty cents per head.—*Re DARTMOUTH SCHOOL ASSESSMENT* (1878), 3 R. & C. 117.—CAN.

**o. —**—Under the proper construction of 1 Edw. VII. c. 39, ss. 65 (9) & 71 (1), which provide that the public school trustees are to submit to the municipal council an estimate of the expenses of the schools under their charge for the current year, & that the council shall levy & collect upon the taxable property of the municipality such sums as may be required by the trustees, & shall pay the same to the treasurer of the public school board—the right of the school board in preparing their estimate, is to include therein everything that in their best judgment may be needed to meet legitimate expenditure. The right & duty of the council is to examine the estimate so far as to ascertain that it is for purposes *intra vires* of the school board. The council has no voice in the control or management of the affairs which are committed by law to the school board; its duty is to levy & collect & pay out, from time to time, as required, the moneys shown by the estimate to be necessary for lawful school purposes.—*Re TORONTO PUBLIC SCHOOL BOARD & TORONTO CITY* (1903), 22 C. L. T. 279; 4 O. W. R. 468; 1 O. W. R. 443.—CAN.

**p. — Rural separate school.**—The High Ct. has power, in an action brought by the trustees of the rural separate school section against the town corp., to adjudge that taxes levied & collected from ratepayers of deft. municipality, who gave the required notice, shall be paid over to plffs. for the support of the rural separate school.—*SANDWICH EAST* (No. 1) ROMAN CATHOLIC SEPARATE SCHOOL TRUSTEES v. WALKERVILLE (1905), 10 O. L. R. 214; 5 O. W. R. 211, 527.—CAN.

**q. — County School Fund.**—*Held*: under 1903 Act, c. 6, s. 7, the town of D. was liable to contribute proportionately towards the School Fund of the County of H.—*DARTMOUTH TOWN v. HALIFAX COUNTY* (1906), 37 S. C. R. 514.—CAN.

**r. —**—*Held*: it was the duty of a township council to assess \$7,000 & pay the same to the school treasurer, or, to issue debentures for this amount under a bye-law.—*Re WEST MISSOURI CONTINUATION SCHOOL* (1912), 21 O. W. R. 533; 3 O. W. N. 726; 25 O. L. R. 550; 3 D. L. R. 195.—CAN.

**s. —**—Where there is no deliberate intention on the part of a high school board to postpone the payment of debts incurred in one year to the next, but the obligation arises by reason of the insufficient estimate,

& money has had to be borrowed to pay the necessary expenses for maintaining the school, that money may be regarded during the next year as a sum required for the maintenance of the school for the ensuing twelve months.—*Re ATHENS HIGH SCHOOL BOARD & TOWNSHIP OF BEAR OF YONGE & ESCORT* (1913), 20 O. L. R. 360; 5 O. W. N. 100.—CAN.

**t. — No liability to pay illegal debts of school board.**—*Held*: a township council had no jurisdiction to pass a resolution guaranteeing the payment of all illegal debts incurred by a school board in connection with litigation.—*McFARLANE v. FITZGERALD* (1913), 21 O. W. R. 230; 4 O. W. N. 869; 9 D. L. R. 629.—CAN.

**u. —**—The effect of School Assessment Ordinance, C. O. c. 105, s. 24, & of Municipal District Act, c. 49, 1918, ss. 295 & 308, is that a municipality is liable for the payment to the trustees of the school districts therein of the amounts covered by the trustees' requisitions, but that to indemnify itself against that liability it can & must collect from the ratepayers of the districts the amount of the requisitions, making due allowance for non-payment of the taxes. The accounts between the municipality & a school district are open running accounts, which are never closed. If, at any time, there is a balance to the credit of the district, it should be utilised in meeting the next requisition. A school tax levy is illegal when the municipality has on hand to the credit of the district funds more than ample to meet the requisitions.—*Re SPRUCE GROVE & HURON SCHOOL DISTRICT & SPAN SCHOOL DISTRICT RURAL MUNICIPALITY*, [1919] 1 W. W. R. 4; 44 D. L. R. 153.—CAN.

**v. —**—Public Schools Act, s. 57 (c), declares the duty of the trustees of rural school districts to call on the municipal council to levy & collect by rate sums required for school purposes during the year, but regard must be paid to ss. 203 & 224 dealing with the borrowing of money & creation of debt, & by which borrowing money for the purchase of a school site or the erection of a school-house or for other purposes mentioned is restricted to \$5,000 if the bye-law is not submitted to a vote of the ratepayers; where a bye-law to issue debentures for \$50,000 for the purchase of a site & the erection of a school-house was twice defeated by a vote of the ratepayers.—*Held*: it was *ultra vires* for the trustees to request the municipality to raise \$50,000 for the purpose by a levy in a single year.—*PHILLIPS v. ROMS*, [1921] 1 W. W. R. 298; 56 D. L. R. 381; 31 Man. L. R. 62.—CAN.

**w. —**—There is no greater obligation upon a municipality under School Assessment Act, 1915,

than to procure for the school district through the proper channels the amount of its annual demand & pay it over.—*VONDA ROMAN CATHOLIC SEPARATE SCHOOL DISTRICT No. 18 v. VONDA TOWN*, [1921] 1 W. W. R. 1110.—CAN.

**x. — Time for submission.**—By 22 Vict. c. 37, the mayor, etc., of St. John, were authorised, "on or before Apr. 1, in each year, to assess the city for certain purposes. By Common Schools Act, 1871, s. 58, the board of trustees was authorised to determine annually the amount required for the support & maintenance of schools, etc., in the district, & "previous to the order for assessment for general city purposes," notify the common council of the amount required, & the council was to cause the same to be levied & collected at the time of levying & collecting other city taxes.—*Held*: the Act was imperative as to the time of notifying the common council of the amount required for school purposes; & therefore, where the general city assessment was ordered on Mar. 5, but the board of trustees did not notify the council of the amount required for schools till Apr. 25, an assessment made for the latter purpose was bad.—*Ex p. CARVILLE* (1873), 1 P. G. 222.—CAN.

**y. — Mandamus on Municipality Who should apply.**—*Mandamus* ordered, on the application of the joint board of education of P., commanding the corp. of the town to provide \$16,000 for the maintenance & accommodation of the high school, to pay for a school site & holding of a school-house & premises connected therewith, as shown by the estimates prepared & submitted by said board to the corp.—*Held*: the joint board of education were the proper applicants, & not the trustees of the high school board.—*Re PERTH BOARD OF EDUCATION & TOWN OF PERTH* (1876), 39 U. C. R. 34; *fold. Re MONTGOMERY BOARD OF EDUCATION*, 8 A. R. 169.—CAN.

**z. — Requisites of.**—Under Public Schools Act, R. S. O., c. 292, s. 62, s. 9, it is the duty of a board of education, formed under sect. 10, to submit to the municipal council "an estimate" of the expenses of the schools under their charge for the twelve months next following.—*Held*: such estimate should furnish the council with the like details upon which the board base their own calculation, & not merely state a certain sum as required.—*BOARD OF EDUCATION v. LONDON CITY CORP.* (1901), 21 C. L. T. 210; 1 O. L. R. 284.—CAN.

**aa. — Re-arrangement of boundaries.**—*Duty of Minister.*—When a re-arrangement is made of the boundaries of school districts whereby a portion of one district is withdrawn from it & becomes part of another,

the elementary pupils came, as being the parishes served by the school:—*Held*: the school was not a public elementary school, & therefore, the county council were not entitled, under sect. 18 (1) (c) to levy a rate on the four parishes as being capital expenditure or rent on account of the provision or improvement of a public elementary school, & the four parishes were entitled to appropriate declarations & injunctions.—**LLANGOLLEN**

**PARISH COUNCIL v. DENBIGHSHIRE COUNTY COUNCIL**, [1921] 3 K. B. 313; 90 L. J. K. B. 488; 124 L. T. 793; 85 J. P. 222; 37 T. L. R. 458; 19 L. G. R. 249.

**Money arising from an endowment.**—See Part IV., Sect. 7, *ante*.

**Provision for higher education out of rates.**—See Part VII., Sect. 1, *ante*.

## Part XII.—Reformatory and Industrial Schools.

### SECT. 1.—IN GENERAL.

*See, generally*, CRIMINAL LAW; Children Act, 1908 (c. 67), Part IV., ss. 44-93; Children Act, 1921 (c. 4), s. 1.

**127. Reformatory schools—Sentence of imprisonment for absconding.**—Whether further detention in school can be imposed. Where a lad was found guilty of absconding from a reformatory school, & sentenced to be imprisoned for that offence under 17 & 18 Vict. c. 80, s. 4:—*Held*: the justices had no authority to add to such sentence of imprisonment, an order that after the expiration thereof he should be again detained within the reformatory school.—**ROBSON v. ANDERSON** (1862), 5 L. T. 789; 26 J. P. 118.

**128. Provision for cost of clothing of offender.**—**Prisons Act, 1877** (c. 21), s. 4.—By the above Act, the "prison authority" constituted under Prison Act, 1865 (c. 126), s. 5, is relieved from the obligation of defraying the expense of clothing requisite for the admission of a youthful offender to a reformatory school under Reformatory

Schools Act, 1866 (c. 117), ss. 14, 23; for expenses of that description fall within the definition of "maintenance of a prisoner" contained in sect. 37 of the above Act, & must be defrayed out of moneys provided by parliament under sect. 4.—**PRISON COMRS. v. LIVERPOOL CORPN.** (1880), 5 Q. B. D. 332; 49 L. J. Q. B. 431; 42 L. T. 838; 44 J. P. 616; 29 W. R. 6, C. A.

**129. Order for detention beyond age of nineteen—Validity of.**—**R. v. BOUNDY, ETC. JJ.** (1904), 68 J. P. Jo. 340.

—See Children Act, 1908 (c. 67), s. 65 (a).

**130. Industrial schools—Removal of child from immoral surroundings—Magistrates bound to order—Mother's consent not necessary.**—If it can be proved that a child under fourteen years of age brought before a magistrate under Industrial Schools Acts, 1866 (c. 115) & 1880 (c. 15), is living in a house resided in or frequented by prostitutes for the purpose of prostitution, the magistrate is bound to make an order for his or her removal to an industrial school, even although such child

there is imposed upon the Minister by School Act, 1870 (c. 51), s. 71, a judicial duty to determine the due proportion of the assets & liabilities of the district from which the portion is withdrawn which belong to the area withdrawn or the district to which it is added, & to prescribe the method of adjusting the same.—**R. (McKAY) v. BAKER**, [1923] 2 L. L. R. 527; 1 W. W. R. 1430.—**CAN.**

**h. County council—Statutory power to raise money.** For grammar school.—*Held*: a county council is not bound under C. S. U. C., c. 23, to raise a sum of money upon the application of grammar school trustees for purposes connected with the grammar school.—**Re WESTON GRAMMAR SCHOOL TRUSTEES & YORK & PEEL COUNTIES** (1864), 13 C. P. 423.—**CAN.**

**k. Only for school in existence.**—A county council is not authorised under 37 Vict. c. 27, s. 47 (b), to raise money by bye-law for a high school not in existence, but in contemplation only.—**SHARP v. PEEL COUNTY** (1876), 40 U. C. R. 71.—**CAN.**

**l. Aid to supplement government grant.** (How assessed.) The three united counties of S., D., & G. were formed into five high school districts.—*Held*: under 36 Vict. c. 48, s. 383, ss. 6, & 37 Vict. c. 27, s. 45 (b), the aid granted by the corpns. to the high schools to supplement the govt. grant must be by an equal rate upon the assessable property of the united counties, not upon each high school district for the sum apportioned to its schools.—**Re CHAMBERLAIN & COUNTIES OF STORMONT, DUNDAS & GLENAGARRY** (1877), 42 U. C. R. 279.—**CAN.**

**m. Bound to support model school.**—In towns within its territorial limits.—The town of T. territorially within the limits of the county of Y., but a separate town within the pro-

visions of the Municipal Act, & as a municipality not under the jurisdiction of the county council, is yet part of the county, within the meaning of 1 Edw. VII. c. 39, ss. 83 & 84, & the county is bound to contribute to the support of a county model school situated in the town.—**TORONTO JUNCTION PUBLIC SCHOOL BOARD v. YORK** (1902), 22 C. L. T. 145; 3 O. L. R. 416.—**CAN.**

**n. Apportionment of school funds—Validity of bye-law.**—A township bye-law enacted that the interest arising on the invested funds for schools in a township should be apportioned on & according to the numbers of days the schools had been open in each half year. It was objected that the bye-law was one made under 37 Vict. c. 28, s. 48 (4), which did not authorise this method of apportionment. The court refused to quash the bye-law.—**Re STORMS & TOWNSHIP OF ERNESTOWN** (1876), 39 U. C. R. 353.—**CAN.**

**o. Common school fund—Provincial contributions—Arbitration.**—By submission the provinces of O. & Q. referred the "ascertainment & determination of the amount of the principal of the common school fund & the method of computing" interest thereon, & of the amount for which O. was liable.—*Held*: a claim by Q. that O. should be debited with a claim for wilful neglect & in the nature of damages, not suggested in but heterogeneous to the matters actually specified in the submission, was not, on its true construction, included therein.—**A.-G. FOR ONTARIO v. A.-G. FOR QUEBEC**, [1903] A. C. 39.—**CAN.**

**p. District municipality—Liability for resident children.**—Attending city schools.—Under Public Schools Act, R. S. B. C., c. 206, s. 15, a city municipality may claim a contribution from a district municipality for the expense of educating children who

reside in the district municipality but attend the public schools of the city municipality.—**VICTORIA v. OAK BAY DISTRICT**, [1918] 1 W. W. R. 158; 38 D. L. R. 238; 21 B. C. R. 516.—**CAN.**

**q. School committee—Liability to Municipal Council.**—For expenses of public schools.—The Municipal Council of M. financed the public school of M. & with the aid of govt. grants, bought books & furniture for the school. Upon the taking over of the school by the School Board under School Board Act, 1905, the Council claimed from that body the sums so expended as liabilities of the old school committee.—*Held*: the Council had supplied the furniture & the funds to the school because it had a legal obligation to do so; there was no resulting liability to the Council on the part of the committee, & therefore no liability on the part of the School Board.—**MOLTEUX SCHOOL BOARD v. MOLTEUX MUNICIPALITY** (1912), App. D. 772.—**S. AF.**

### PART XII. SECT. 1.

**r. Reformatory schools—Order for detention—Appeal.**—The right of appeal given by Criminal Justice Administration Act, 1914, s. 43 (11), is not limited to cases where a fine or imprisonment is imposed. An appeal lies to quarter sessions from a conviction & sentence imposing detention in a reformatory under (Children Act, 1908, s. 57.—**R. (HIGGINS) v. DUBLIN JJ.**, [1917] 2 L. R. 45.—**IR.**

**s. Inapplicable to minor offenders.**—*Held*: minor offences did not come within Reformatory Schools Act, 1866, s. 14, which was intended to apply to minor grades of serious crimes.—**McQUIRE v. FAIRBAIRN** (1881), 9 R. (C. of Sess.) 4; 19 Sc. L. R. 72.—**SCOT.**

**t. Industrial schools—Warrant bad**



is living in such house with his or her mother who is not a prostitute. The consent of the mother to such removal is not necessary.—*HISCOCKS v. JERMONSON* (1883), 10 Q. B. D. 360; 52 L. J. M. C. 42; 48 L. T. 225; 31 W. R. 656; 27 J. P. Jo. 116; *sub nom. Re JERMONSON*, 47 J. P. 183, D. C. Annotation:—*Reid*, R. v. Plowden, *Re Industrial Schools Acts* (1895), 11 T. L. R. 181.

**131. — Magistrates must issue summons against child—Warrant on non-appearance.**—Industrial Schools Act, 1866 (c. 118), s. 14, provides that there shall be a power to any person to bring before two justices or a magistrate, any child, apparently under the age of fourteen years, that comes within certain descriptions therein set out, to which Industrial Schools Act Amendment Act, 1880 (c. 15), s. 1, adds the following descriptions, namely, "that is lodging, living, or residing with common or reputed prostitutes, or in a house resided in or frequented for the purpose of prostitution; or that frequents the company of prostitutes." The *ct.* is always desirous of doing all that can be done to carry out the beneficent object of these Acts, & will require justices to whom complaint has been made to issue a summons against the child. If the child does not appear, then a warrant may be issued to bring her before the justices.—*HAMPSHIRE JJ., Re A FEMALE CHILD* (1888), 52 J. P. 311.

**132. — Private person may institute proceedings—Application to local authority not necessary.**—(1) Any private person may bring a child before the justices with a view to the justices sending such child to an industrial school.

(2) It is not necessary to show that an application has been made to the local authority requiring such local authority to bring the child before the justices.—*WALKER v. LAXTON* (1894), 70 L. T. 690; 58 J. P. 571; 10 R. 404, D. C.

Annotation:—*Generally*, *Mentd.* R. v. Stewart (1896), 65 L. J. M. C. 83.

**133. — Failure of criminal charge—Fresh summons not necessary.**—Industrial Schools Act, 1866 (c. 118), does not contain a code of criminal procedure & is not punitive in its character, but is intended for the protection of children coming within its operation. Where, therefore, a child apparently under fourteen years of age is charge before a *ct.* of summary jurisdiction with larceny, & the charge is dismissed, but evidence is given that he frequents the company of reputed thieves, he may be sent to an industrial school under s. 14 of the Act, upon an application under that sect. without being brought afresh before the *ct.* by summons or otherwise.—*R. v. JENNINGS*, [1896] 1 Q. B. 64; 65 L. J. M. C. 26; 73 L. T. 412; 18 Cox, C. C. 205; *sub nom.* R. v. JENNINGS, *ETC.* DEVONSHIRE JJ., *Ex p.* SYMONS, 60 J. P. 199; 44 W. R. 128; 12 T. L. R. 37; 40 Sol. Jo. 70, D. C.

**134. — Child convicted of offence punishable by imprisonment—Power of magistrates to send child to industrial school.**—Under Children Act,

1908 (c. 67), s. 58 (3), justices have jurisdiction to order a child to be sent to a certified industrial school, as well where he has been guilty of an offence the maximum punishment of which would in the case of an adult be less than penal servitude, as where he has been guilty of an offence which in the case of an adult would be punishable with penal servitude.—*TYDEMAN v. THROWER*, [1914] 2 K. B. 494; 83 L. J. K. B. 814; 110 L. T. 1018; 78 J. P. 182; 30 T. L. R. 374; 12 L. G. R. 739; 24 Cox, C. C. 163, D. C.

*See, also*, INFANTS; MAGISTRATES.

## SECT. 2.—CENTRAL AUTHORITY.

*See* Children Act, 1908 (c. 67), Part IV., ss. 44–93; & Children Act, 1921 (c. 4), s. 1.

## SECT. 3.—RESIDENCE OF OFFENDER.

**135. How determined—"Constructive residence" with parents—Children Act, 1908 (c. 67), s. 74 (7).**—The words "place of residence of a youthful offender" in sect. 74 (7), of the above Act, mean the place where the youthful offender is actually living. Therefore if he is not in fact living with his parents he cannot be considered as constructively residing with them.—*STOCK-ON-TRENT BOROUGH COUNCIL v. CHESHIRE COUNTY COUNCIL*, [1915] 3 K. B. 699; 85 L. J. K. B. 36; 113 L. T. 750; 79 J. P. 452; 13 L. G. R. 1077, D. C.

Annotations:—*Distd.* Yorkshire West Riding Council v. Colne Corpn. (1917), 87 L. J. K. B. 120. *Apd.* Berkshire County Council v. Reading B. C. [1921] 2 K. B. 787. *Reid*, Sawyer v. Kropp (1916), 14 L. G. R. 989.

**136. —**—A child, on being charged with certain offences, was ordered to be sent to an industrial school, his residence being specified in the order in accordance with sect. 74 (2) of the above Act, as being in the district of *resps.* thereupon applied under sect. 74 (7) of the Act for an order transferring the liability to maintain the child to *appls.*, on the ground that the child resided at S. in the West Riding. At the hearing it was proved that before Dec. 1910 the child resided with his father & stepmother at S. but since the war the father had been absent on military service. About Dec. 1910, the child ran away to his aunt at C., having stolen articles from his parents' house, & his aunt wrote to his stepmother to take him back. His father, on hearing of the matter, wrote to the police to take him into custody, & he stated in evidence that if he had been at home he would have fetched the child back, & that he never intended the child to stay at C. The child slept & had his meals at his aunt's house, & work was procured for him in C. & his employers would have kept him permanently if he had been suitable. After working for three days the child committed a theft at C. for which he was arrested

*in form—Habeas corpus*—P., an infant under the age of 11 years, was detained under a warrant which stated that he had been "found wandering about the streets." P.'s father applied for a writ of *habeas corpus*, on the ground that the warrant should have stated that "he was found habitually wandering about the streets."—*Held*: the writ should go.—*Re PETER* (1890), 11 N. S. W. L. R. 242; 6 N. S. W. W. N. 172.—*AUS.*

**a. — Powers of chairman.**—In an appln. for a *mandamus* to the chairman of the Boys' Industrial Home

to compel him to issue his warrant to deliver to the custody of the superintendent a boy sentenced to a term of imprisonment in the home under 56 Vict. c. 33:—*Held*: the words "is hereby authorized" in 56 Vict. c. 33 (D.), s. 6, & "may" in 56 Vict. c. 16 (N. B.), s. 9, are not only enabling words but imperative as well, & the chairman has no discretionary power as to the issue of the warrant.—*Re GOODESPEED, Ex p.* A.-G. (1903), 36 N. B. R. 91.—*CAN.*

**b. — Power of judge to commit.**—*Held*: the judge had power, without

sending the case to trial, to commit to an industrial school, under Industrial Schools Act, 1908, s. 20, a lad of fourteen arraigned upon an indictment for attempted rape.—*R. v. LAWTON* (1911), 30 N. Z. L. R. 921.—*N.Z.*

**c. — Powers of sheriff.**—*Held*: under Children Act, 1908, s. 74 (8), an order for the detention of a child in a certified industrial school cannot be pronounced by the sheriff until after the local education authority has been given an opportunity of being heard.—*A. B. v. HOWMAN*, [1917] 8 C. (J.) 23.—*SCOT.*

*Sect. 3.—Residence of offender. Sects. 4, 5 & 6. Part XIII. Sects. 1, 2 & 3: Sub-sects. 1, 2, 3 & 4.]*

& was committed to an industrial school as above stated. The justices found that as the child left S. against his father's wishes the child was resident at S. at the time of the offence, & they made an order transferring to applts. the liability for his maintenance. By sect. 74 (3) of the above Act, "For the purpose of the foregoing provisions of this section a youthful offender or child shall be presumed to reside in the place where the offence was committed, or the circumstances which rendered him liable to be sent to a certified school occurred, unless it is proved that he resided in some other place":—*Held*: there was evidence on which the justices could find as a fact that at the time of the offence the child resided at his father's house at S. & therefore their decision must be affirmed.—*YORKSHIRE WEST RIDING COUNCIL v. COLNE CORPN.* (1917), 87 L. J. K. B. 120; 117 L. T. 671; 82 J. P. 14; 62 Sol. Jo. 160; 15 L. G. R. 863, D. C.

137. — *Presumption as to residence—Children Act, 1908 (c. 67), s. 74.*—On Apr. 18, 1918, a boy was convicted of larceny by the stipendiary magistrate of B. & ordered to be sent to a reformatory school, his place of residence being specified as H. The magistrate on July 3, 1918, on the application of the S. Corpn., under sect. 74 (7) of the above Act, decided that the residence of the boy was L., & transferred the liability for his maintenance from the corpn. of S. to that of L. The latter appealed. The facts were that the boy, having been convicted of larceny by the H. justices on Nov. 27, 1917, was placed on probation in L. He remained there until Mar. 7, 1918, when he absconded, & on Mar. 11 he went to B., where he obtained work. He remained at B. until Apr., except for several short absences, when he returned to B. On Apr. 18, 1918, he was convicted & ordered to be sent to a reformatory school as above stated:—*Held*: there was evidence before the magistrate upon which he could find that the residence of the boy was L., the presumption being displaced of residence in the place where the offence was committed, & the ct. could not interfere with his decision.—*LEICESTER CORPN. v. STOKES-ON-TRENT CORPN.* (1918), 88 L. J. K. B. 830; 120 L. T. 320; 83 J. P. 45; 17 L. G. R. 172; 20 Cox, C. C. 377, D. C.

*Annotation.—Apld. Berkshire County Council v. Reading B. C.* (1921) 2 K. B. 787.

138. — *—* On Feb. 15, 1922, a child, apparently under the age of twelve years, was charged with larceny at B., where he then resided, & was placed on probation, one of the conditions of his recognisance being that he should report any change of address to the probation officer. After other changes which he failed to report, he came to L. & resided in applts. area with his parents. In Feb. 1923, he was arrested & charged at B. with a breach of recognisance, & was ordered to be sent to a certified industrial school, the place of residence specified in the order being in H. Applts. applied under Children Act, 1908 (c. 67), s. 74 (7) to the B. ct. to transfer the liability to maintain to B. on the ground that he resided there at the time of the larceny in 1922. The stipendiary declined to transfer the liability, but stated a case:—*Held*: (1) the breach of the recognisance was neither an "offence" nor yet a "circumstance which rendered him liable to be sent to a certified school"; (2) it was the original larceny in B. which rendered him liable to be sent to a certified

industrial school: under Probation of Offenders Act, 1907 (c. 17), s. 6 (5), it was only the original offence for which he could be sentenced on the breach of his recognisance; (3) his residence at the date of the original offence was that which determined liability to maintain, & residence at the date of the breach of recognisance was immaterial.—*LONDON COUNTY COUNCIL v. BIRMINGHAM CORPN.* (1923), 87 J. P. 202; 40 T. L. R. 76; 68 Sol. Jo. 209; 21 L. G. R. 816, D. C.

#### SECT. 4.—DISCHARGE, TRANSFER, LICENCE, SUPERVISION, ETC.

*Discharge.*—*See* Children Act, 1908 (c. 67), s. 69 (1).

*Transfer.*—*See* Children Act, 1908 (c. 67) s. 69 (2).

*Maintenance in case of.*—*See* Children Act, 1908 (c. 67), s. 74 (10).

*Placing out on licence.*—*See* Children Act, 1908 (c. 67), s. 67.

*Boarding out of children under Children Act, 1908 (c. 67), s. 53.*—*See* Stat. R. & O. 1921, No. 990.

*Supervision after detention.*—*See* Children Act, 1908 (c. 67), s. 68.

*Apprenticeship.*—*See* Children Act, 1908 (c. 67), s. 70.

*Emigration.*—*See* Children Act, 1908 (c. 67), s. 70.

#### SECT. 5.—EXPENSES OF SCHOOLS.

*Grants by Secretary of State.*—*See* Children Act, 1908 (c. 67), s. 73; Children Act, 1921 (c. 4), s. 1 (3) (4).

*Parents' contributions.*—*See* Children Act, 1908 (c. 67), s. 75; Children Act, 1921 (c. 4), s. 1 (5) (6); Stat. R. & O. 1921, No. 1026.

*Expenses—How defrayed.*—*See* Children Act, 1908 (c. 67), s. 74 (13).

*Borrowing of money.*—*See* Children Act, 1908 (c. 67), s. 74 (14); *see, also*, LOCAL GOVERNMENT.

*Acquisition of land.*—*See* Children Act, 1908 (c. 67), s. 74 (12).

*Cost of conveyance & clothing.*—*See* Children Act, 1908 (c. 67), s. 70 (2); Children Act, 1921 (c. 4), s. 1 (7).

#### SECT. 6.—DAY INDUSTRIAL SCHOOLS.

*Establishment of.*—*See* Children Act, 1908 (c. 67), ss. 77, 83; *see, also*, Stat. R. & O. 1909, 342 (England).

*Class of children received.*—*See* Children Act, 1908 (c. 67), s. 78.

*Reception of child under attendance order or without order.*—*See* Children Act, 1908 (c. 67), s. 79; *see, also*, Stat. R. & O. 1909, No. 342, scheds. A. & B.; & 1921, Stat. R. & O., No. 933.

*Period of detention.*—*See* Children Act, 1908 (c. 67), s. 65; *see, also*, Stat. R. & O. 1919, No. 673.

*Powers of local authorities.*—*See* Children Act, 1908 (c. 67), s. 81.

*Expenses.*—*See* Children Act, 1908 (c. 67), s. 80.

*Contributions by parent.*—*See* Children Act, 1908 (c. 67), s. 82 (1); & Children Act, 1921 (c. 4), s. 1 (5); *see, also*, Stat., R. & O., 1921, No. 900.

*Enforcement of order.*—*See* Children Act, 1908 (c. 67), s. 75 (3); s. 82 (2), (3), & Stat. R. & O. 1909, No. 342, XII.

## Part XIII.—Powers and Duties of Poor Law Authorities.

### SECT. 1.—THE MINISTRY OF HEALTH.

*See, generally,* POOR LAW; & Ministry of Health Act, 1919 (c. 21).

**Education & apprenticing of children in work-houses.**—*See* Poor Law Amendment Act, 1834 (c. 70), ss. 15, 42.

**Appointment of schoolmasters & schoolmistresses for workhouses.**—*See* Poor Law Amendment Act, 1834 (c. 70), ss. 46, 100.

### SECT. 2.—GUARDIANS.

*See, generally,* POOR LAW.

**139. Contribution towards expenses—Boarding out & educating—Deaf child.**—SOUTHWARK UNION v. LONDON COUNTY COUNCIL, No. 97, *ante*.

**140. — Of public elementary school—Child maintained by board of guardians.**—GATESHEAD UNION v. DURHAM COUNTY COUNCIL, No. 7, *ante*.

—*See* 1921 Act (c. 51), s. 127.

—**Of school for defective or epileptic children.**—*See* 1921 Act (c. 51), s. 127.

—**Of child in industrial school.**—*See* Children Act, 1908 (c. 67), ss. 58 (5), 74 (11).

**Power to send child to certified school.**—*See* Poor Law (Certified Schools) Act, 1862 (c. 43).

### SECT. 3.—DISTRICT BOARDS.

#### SUB-SECT. 1.—SCHOOL DISTRICTS.

**141. Dissolution of district—Effect on Board of Management—Vesting of property.**—(1) A school district formed under sect. 40 of Poor Law Amendment Act, 1844 (c. 101), & the board of management for that district formed under sect. 42 of that Act, are distinct & separate entities, the latter being by sect. 45 of the same Act constituted a corp'n. to hold the property of the district; & when the district is dissolved by virtue of an order of Local Government Board made under sect. 1 of Metropolitan Poor Amendment Act, 1869 (c. 63), the corp'n. created by sect. 45 of the Act of 1844 remains in existence.

(2) In such a case the property of the district does not automatically vest in the last acting managers of the corp'n. by virtue of the words "shall be transferred to & vested in" in sect. 12 of the Dissolved Boards, etc., Act, 1870 (c. 2), but must be transferred to them or to other parties, as the case may be, by a proper document, & the last acting managers or the survivors of them, as the last acting corporators, can for that purpose affix the seal of the corp'n. to the document.

**Qu. :** (3) whether the Local Government Board, when they have issued an order under sect. 1 of the Act of 1869 dissolving & fixing a date for the dissolution of a school district, have power from time to time by subsequent orders to postpone the date of dissolution; (4) whether, when an order is issued under sect. 1 of the Act of 1869, dissolving a school district, the Local Government Board ought not, "prior to" issuing such order, make an order under the sect. for the sale of the

property of the managers of the district & the application of the proceeds.

**Semble :** when the Local Government Board make an order under sect. 1 of the Dissolved Boards, etc., Act, 1870 (c. 2), extending the period for which the last acting managers of a dissolved district are to continue in office, the order should follow the words of the sect., & should state the "special purpose" for which the last acting managers are to continue to act.—MORTON v. BANK OF ENGLAND, [1904] 1 Ch. 604; 73 L. J. Ch. 503; 90 L. T. 375; 68 J. P. 208; 52 W. R. 393; 20 T. L. R. 230; 2 L. G. R. 734.

*See, now,* Poor Law Authorities (Transfer of Property) Act, 1904 (c. 20), s. 1; Metropolitan Poor Amendment Act, 1869 (c. 63), ss. 1, 2; Dissolved Boards of Management & Guardians Act, 1870 (c. 2); Poor Law Authorities (Dissolution of School Districts & Adjustments) Act, 1903 (c. 19), s. 1.

**Formation of.**—*See* Poor Law Amendment Act, 1844 (c. 101), s. 40; Poor Law (Schools) Act, 1848 (c. 82), s. 1; Ministry of Health Act, 1919 (c. 21).

**Alteration of.**—*See* Poor Law Amendment Act, 1844 (c. 101), s. 43; Poor Law Amendment Act, 1867 (c. 100), s. 16; Poor Law Authorities (Dissolution of School Districts & Adjustments) Act, 1903 (c. 19), s. 2 (1).

#### SUB-SECT. 2.—CONSTITUTION.

*See* Poor Law Amendment Act, 1844 (c. 101) s. 42.

**Resignations, abortive elections, vacancies, etc.]**—*See* Poor Law Amendment Act, 1842 (c. 57); Poor Law (Schools) Act, 1848 (c. 82), s. 2.

#### SUB-SECT. 3.—POWERS AND DUTIES.

*See, generally,* Poor Law Amendment Act, 1844 (c. 101), ss. 43–45.

**Power to dispose of land.**—*See* Poor Law Amendment Act, 1851 (c. 105), s. 17.

**Superannuation of officers & servants.**—*See* Poor Law Officers' Superannuation Act, 1896 (c. 50), s. 14.

#### SUB-SECT. 4.—EXPENSES.

**Apportionment to parishes.**—*See* Poor Law Amendment Act, 1844 (c. 101), s. 47; Metropolitan Poor Act, 1867 (c. 6), ss. 47, 48, 55; Poor Law Amendment Act, 1868 (c. 122), s. 11; Statute Law Revision Act, 1875 (c. 66).

**Contribution of parishes.**—*See* Poor Law Amendment Act, 1844 (c. 101), s. 46.

**Borrowing power.**—*See* Poor Law Amendment Act, 1844 (c. 101), s. 44; Poor Law Act, 1889 (c. 56), s. 2 (5).

**Audit of accounts.**—*See* Poor Law Amendment Act, 1844 (c. 101), s. 49; District Auditors Act, 1879 (c. 6).

### PART XIII. SECT. 2.

**d. Power to dismiss assistant school-master—Without notice.**—*Held :* the

guardians had an absolute power of dismissal vested in them in respect of assistant officers, which power they could exercise without any previous

notice to the person to be dismissed.—M'GUIGAN v. BELFAST UNION GUARDIANS (1885), L. R. 18 Ir. 89.—IR.

# SECT. 4.—GRANTS TO POOR LAW AUTHORITIES BY COUNCILS.

*See* Local Government Act, 1888 (c. 41), ss. 24 (2), 26, 34.

# SECT. 5.—RULES SPECIALLY APPLICABLE TO THE METROPOLIS.

**Nomination of members.**—*See* Metropolitan Poor Act, 1867 (c. 6), s. 49.

**Training ships.**—*See* Metropolitan Poor Amendment Act, 1869 (c. 63), s. 11.

**Expenses repayable out of Metropolitan Common Poor Fund.**—*See* Metropolitan Poor Act, 1867 (c. 6), s. 69; Metropolitan Poor Amendment Act, 1869 (c. 63), s. 21; Metropolitan Poor Amendment Act, 1870 (c. 18), s. 2.

# SECT. 6.—RELIGIOUS INSTRUCTION.

**Orders of Central Authority.**—*See* Poor Law Amendment Act, 1834 (c. 76), s. 19; Poor Law Amendment Act, 1844 (c. 101), s. 43.

**Creed register.**—*See* Poor Law Amendment Act, 1868 (c. 122), ss. 16–19.

**Visits of minister.**—*See* Poor Law Amendment Act, 1868 (c. 122), s. 20.

**Instruction in other religious creed.**—*See* Poor Law Amendment Act, 1868 (c. 122), s. 22.

**Dissenting children.**—*See* Poor Law Amendment Act, 1866 (c. 113), s. 14.

**Certified schools.**—*See* Poor Law (Certified Schools) Act, 1862 (c. 43), s. 9.

# Part XIV.—Universities and Public Schools.

## SECT. 1.—THE UNIVERSITIES GENERALLY.

**142. University of Oxford—Extent of liberties.**—*NORTH'S (LORD) CASE* (1594), Moore, K. B. 361; 72 E. R. 630.

**143. — As national institution—Judicial notice.**—The ct. takes judicial notice that the University of Oxford is a national institution, the purposes of which are the advancement of religion & learning, therefore, it is not liable to poor rate in respect of property occupied by it for these purposes solely.—*OXFORD POOR RATE CASE* (1857), 8 E. & B. 184; 120 E. R. 68; *sub nom. Re OXFORD UNIVERSITY & CITY OF OXFORD POOR RATE*, 27 L. J. M. C. 33; 3 Jur. N. S. 1240; *sub nom. R. v. OXFORD UNIVERSITY VICE-CHANCELLOR*, 20 L. T. O. S. 343; 21 J. P. 644; 5 W. R. 872. *Annotations: Reid, R. v. Stewart, R. v. Stainsby* (1857), 8 E. & B. 300. *Mentid. North Manchester Overseers v. Winstanley*, [1908] 1 K. B. 835.

**144. — Residence at—What constitutes—Mandamus.**—Rule to show cause why a *mandamus* should not issue to Oxford University Hebdomadal Council & Vice-Chancellor. E. was the vicar of F., which was distant nine miles from Oxford, & he resided at the parsonage house; but he rented a set of rooms within St. John's College, of which he was a resident fellow, which he had furnished, & for which he paid rent, & which were not occupied by any one else. When he visited Oxford, he sometimes slept there, but he generally returned to F. the same day:—*Held*: there must be an actual as distinguished from a constructive residence, & E. was not a resident within Oxford University Act, 1854 (c. 81), s. 48.—*R. v. OXFORD (VICE-CHANCELLOR)* (1872), L. R. 7 Q. B. 471; 26 L. T. 506; 38 J. P. 520.

**145. — Religious tests for fellows—Universities Tests Act, 1871 (c. 26)—Newly created college.**—By Hertford College Act, 1874 (c. 55), Magdalen Hall in the University of Oxford was

dissolved, Hertford College created & the property of Magdalen Hall transferred to Hertford College. An endowment for a lay fellowship restricted to members of certain specified churches was afterwards accepted by Hertford College. T., who was not a member of any of the specified churches tendered himself for examination as a candidate & was informed that he might be examined if he desired it, but he must understand that he would not be elected even if he stood at the head of the list. T. did not present himself for examination & M. a duly qualified candidate was elected after examination to the fellowship. After the election T. applied to the Q. B. Div. for a *mandamus*:—*Held*: (1) there was no refusal to examine T.; (2) assuming that T. was refused examination, the office being full of a candidate properly qualified, a *mandamus* would not lie commanding the college to examine T., & to proceed to an election; & T.'s remedy if any, was by way of appeal to the visitor; (3) the operation of 1871 Act is confined to colleges subsisting before it was passed & the Act does not prevent the creation in the universities of fresh colleges, the endowments of which are confined to the members of a particular religious community; (1) 1871 Act is not incorporated with 1874 Act, & sect. 13 of the latter Act which provides that nothing in this Act contained shall be construed to repeal any of the provisions of 1871 Act does not render Hertford College a "subsisting college" within the former statute.—*R. v. HERTFORD COLLEGE* (1878), 3 Q. B. D. 693; 47 L. J. Q. B. 649; 39 L. T. 18; 42 J. P. 772; 27 W. R. 347, C. A.

**146. — — — — —**—By a will dated in 1723, lands were directed to be purchased & conveyed to pltf. corp., upon trust to divide the rents & profits between ten of the servitors of Christ Church College in Oxford, to be recommended by the dean & certain other members of the college,

## PART XIV. SECT. 1.

**a. University of Toronto—Status of Governors.**—*Held*: the Governors of the university of Toronto were a body corporate, liable to be sued as such & were in no sense Crown officers, even though appointed by the Lieutenant-Governor in Council.—*SCOTT v. TORONTO UNIVERSITY* (1913), 24 O. W. R. 325; 4 O. W. N. 994; 14 D. L. R. 154.—CAN.

**L. Queen's University—Power to accept supplemental charter—Right of private persons to sue.**—A petition was

filed by three graduates of the Queen's University praying that it might be declared that the Supplemental Charter of 1866 was inconsistent with that of 1864; that the resolution of the senate accepting the Supplemental Charter might be declared void; & for an injunction against doing any act to accept the same, or conferring any degrees in pursuance of its provisions. To this suit the university & members of the senate were made parties resp., but the Attorney-General was not a party.—*Held*: the suit should have been by information in

the name of the Attorney-General, & the petition was unsustainable for want of interest in the petitioners.—*MACCORMACK v. QUEEN'S UNIVERSITY* (1867), 11 E. R. 160.—IR.

**g. Dublin University—Power of Crown to alter charter.**—Where the Crown has created a corp. by charter it cannot alter or recall the charter except in three cases: (1) where the Crown has in the original charter (or in a subsequent charter made valid by acceptance) expressly reserved power to alter the charter; (2) where the corp. is wholly or partially

"for their sobriety, diligence at their studies, & of parts fit for a minister of the gospel & designed for holy orders." This benefaction was known as the Pouncefort Charity. By the Universities of Oxford & Cambridge Act, 1877 (c. 48), comrs. were appointed to make statutes for the universities & colleges, & they were empowered to make provision for altering the conditions of eligibility to any emolument or office held in any college, & for modifying the conditions of any college endowment; but they were to have regard to the main design of the founder, except where the conditions affecting the emolument had been altered in substance by or under any other Act; then a certain time was allowed for appealing against the proposed statutes; & it was provided that every statute approved by Order in Council should be effectual notwithstanding any instrument of foundation. By a statute made for Christ Church in pursuance of this Act, & duly approved, the Pouncefort benefaction was to be applied to the support of the college exhibitioners, without any condition being attached as to taking holy orders. Upon a summons by plffs. to determine the question whether the condition as to holy orders ought still to be observed:—*Held*: without deciding whether the trust was affected by the Universities Tests Act, 1871 (c. 26), that the statute was binding upon plffs., & the condition as to holy orders was no longer in force.—*Re POUNCEFORT, SONS OF CLERGY CORPN. v. CHRIST CHURCH, OXFORD* (1889), 42 Ch. D. 624; 58 L. J. Ch. 578; 61 L. T. 109; 38 W. R. 172; 5 T. L. R. 557.

— *Vice Chancellor's Court.*—*See* COURTS, Vol. XVI., pp. 200 *et seq.*; CROWN PRACTICE, Vol. XVI., p. 391, No. 2374.

**147. University of Cambridge—Mandamus lies—To restore to a degree.**—A *mandamus* lies to restore a member of a university to a Doctor's degree from which he had been degraded by the University Ct. for speaking contemptuous words of the Vice-Chancellor & of the process of the ct.—*R. v. CAMBRIDGE UNIVERSITY, BENTLEY'S CASE* (1723), *Fortes. Rep.* 202; 2 *Id.* *Raym.* 1331; 8 *Mod. Rep.* 148; 1 *Str.* 557; 92 *E. R.* 818.

*Annotations*:—*Reid. R. v. Lincoln's Inn Benchers, Wooller's Case* (1825), 7 *Dow. & Ry. K. B.* 351; *Osgood v. Nelson* (1869), 10 *B. & S.* 119. *Mentd. Ex p. Kinning* (1817), 4 *C. B.* 507; *Re Hammersmith Rent-charge* (1819), 1 *Exch.* 87; *Whiston v. Rochester* (1849), 18 *L. J. Ch.* 473; *Abley v. Dale* (1850), 10 *C. B.* 62; *Bonaker v. Evans* (1850), 16 *Q. B.* 162; *Cooper v. Wandsworth District Board of Works* (1863), 14 *C. B. N. S.* 180; *Re Brook, Delecomyn & Badart* (1864), 16 *C. B. N. S.* 493; *R. v. Cheshire Lines Committee* (1873), 42 *L. J. M. C.* 100; *Abergavenny v. Llandaff, Bp.* (1888), 20 *Q. B. D.* 460.

**148. ——— To seal appointment of high steward.**—(1) *Mandamus* lies to compel the university to put their seal to their appointment of their high steward.

(2) The corps. of the universities are lay corps. & the Crown cannot take away from them any rights that have been formerly subsisting in them under old charters or prescriptive usage. The validity of new charters must turn upon the acceptance of the university (LORD MANSFIELD).—*R. v. CAMBRIDGE (VICE-CHANCELLOR, ETC.)* (1765), 3 *Burr.* 1617; 1 *Win. Bl.* 517; 97 *E. R.* 1027.

*Annotations*:—*As to* (1) *Apld. R. v. Windham* (1776), 1

*morbund*; (3) where the corp. consents to the alteration. The Crown on a true construction of the Trinity College Charters of Elizabeth & 13 Charles I., has no power, save with the consent of the corp., to alter the provisions of the Charter & the Constitution of Trinity College, Dublin. The majority

of the corp. of Trinity College, Dublin, proposed to affix the corporate seal of the college to an application to the King for a King's Letter altering the constitution of the corp. without the consent & against the protest of a minority:—*Held*: the ct. ought not to, & could not, restrain the action of

the majority. *GRAY & CATHCART v. TRINITY COLLEGE (PROVOST, ETC.)* (1910) 11 *R.* 370. *IR.*

*h. University of St. Andrews—Affidavit.*—University (Scotland) Act, 1880, s. 16, provides: "Without prejudice to any of the powers herein-

*Cowp.* 377. *As to* (2) *Reid. R. v. Westwood* (1825), 4 *B. & C.* 781.

**149. ——— Mandamus does not lie—For restoration of banished member—For offence against university statutes.**—The publication of a pamphlet against the established religion in the University of Cambridge is an offence within one of the statutes of the university, & punishable by banishment by the Vice-Chancellor, assisted by the heads of colleges in the Vice-Chancellor's Ct., & though the statute inflicting that punishment add that the party shall be banished from his college, this ct. will not grant a *mandamus* to restore a person against whom only banishment from the university is pronounced in the above ct.—*R. v. CAMBRIDGE UNIVERSITY (CHANCELLOR, ETC.)* (1794), 6 *Term Rep.* 89; 101 *E. R.* 451.

*Annotations*:—*Mentd. Ex p. Death* (1852), 21 *L. J. Q. B.* 337; *Pusey v. Jowett* (1863), 1 *New Rep.* 488.

— *See, generally, CROWN PRACTICE, Vol. XVI.*

— *Chancellor's Court.*—*See* COURTS, Vol. XVI., p. 108.

**150. University of London—Nomination to Council of Medical Education—Vests in senate.**—By Medical Act (c. 90), s. 4, the General Council of Medical Education & Registration is to consist of one person chosen from time to time by each of the several bodies therein named, & amongst them, by the University of London:—*Held*: the authority to choose such member is vested in the Senate, consisting of the Chancellor, Vice-Chancellor & Fellows for the time being, & not in the whole body of graduates of the university.—*R. v. STORRAR* (1859), 2 *E. & E.* 133; 28 *L. J. Q. B.* 326; 33 *L. T. O. S.* 250; 5 *Jur. N. S.* 1301; 7 *W. R.* 612; 121 *E. R.* 51.

**151. ——— Jurisdiction of courts—In matters within jurisdiction of visitor.**—The University of London conferred upon plff. a gold medal, as being the candidate who had obtained the highest number of marks in the examination of 1861 for the LL.D. degree. Two years afterwards, it was discovered by the Senate of the University, that, according to the construction put by the Senate on the regulations for the LL.D. examination, the Examiners had miscarried in the mode which they had adopted in ascertaining the highest number of marks; & the Senate thereupon determined to confer a second gold medal upon the candidate to whom according to their view the medal ought to have been awarded. Plff. filed his bill, alleging, in effect, that before becoming a candidate he made inquiry of the Registrar of the University, & had been informed by him that the examination would be conducted upon the principle & the marks ascertained in the mode upon & in which they were in fact subsequently conducted & ascertain, & that he had become a candidate & paid his examination fee upon that footing, & praying that the University might be restrained from awarding such other medal. Upon demurrer:—*Held*: the ct. had no jurisdiction to entertain the suit, the matter being one solely within the jurisdiction of the visitor; & even if the matter was one which might, in its nature, fall within the cognisance of the ct., plff. had not alleged any sufficient ground of equity.—*THOMSON v. LONDON*

**Sect. 1.—The universities generally. Sect. 2: Sub-sect. 1, A. & B.; sub-sects. 2, 3 & 4.]**

**UNIVERSITY** (1804), 33 L. J. Ch. 625; 10 L. T. 403; 10 Jur. N. S. 669; 12 W. R. 733.

**Annotation.**—*Mentd.* *Itooke v. Dawson* (1895), 43 W. R. 313.

**152. As lay corporation.]**—The college is a corp'n. within a corp'n. for the university is anciently a corp'n. (WINDHAM, J.).—*R. v. PATRICK* (1667), as reported in 2 Keb. 164; 84 E. R. 103.

**Annotations.**—*Reid.* *Appleford's Case* (1672), 1 Mod. Rep. 82. *Mentd.* *R. & All Souls College, Oxford* (1681), 84 L. J. 13; *Phillips v. Bury* (1694), 84 L. J. 447; *Anon.* (1698), 12 Mod. Rep. 232; *It. v. Blythe* (1698), 5 Mod. Rep. 404; *It. v. Whaley* (1740), 7 Mod. Rep. 308.

**153. —.]**—*R. v. CAMBRIDGE (VICE-CHANCELLOR, ETC.)*, No. 148, ante.

**Charitable purposes of.]**—*See CHARITIES*, Vol. VIII., p. 246, Nos. 58–60.

## SECT. 2.—CONSTITUTION AND CONTROL OF UNIVERSITY COLLEGES.

### SUB-SECT. 1.—FELLOWSHIPS.

#### A. Nomination.

**154. Right of nomination—Construction of grant—Mandamus to college.]**—The right of nomination to a fellowship being in dispute between two parties claiming under the same grant, the ct. directed an issue to try "whether plff. had a better right than deft. to nominate." On the trial it appeared that deft. had nominated for nearly twenty years, & that vacancies occurred about once in five years; that the right of nomination was limited, by the grant, to the heirs male of E. with limitation over in default of such heirs; that the eldest son of E. had three sons; that plff. was lineally descended from the third; but that in 1634 the two elder sons were living, and one had then living male issue. No further evidence was given:—*Held*: plff. might recover upon this evidence without showing that the two elder branches were extinct.—*SANDYS v. SANDYS* (1840), 1 Q. B. 316, n.; 113 E. R. 1152; *sub nom.* *R. v. ST. PETER'S COLLEGE, CAMBRIDGE (MASTER & FELLOWS)*, 9 L. J. Q. B. 321; *subsequent proceedings, sub nom.* *R. v. PETERHOUSE (MASTER, ETC.)* (1841), 1 Q. B. 314.

**Annotation.**—*Reid.* *R. v. Hertford College* (1878), 3 Q. B. D. 693.

**155. Religious tests—University Tests Act, 1871 (c. 26).]**—*R. v. HERTFORD COLLEGE*, No. 145, ante.

**156. —.]**—*Re PAUNCEFORT, SONS OF CLERGY CORPN. v. CHRIST CHURCH, OXFORD*, No. 146, ante.

#### B. Appointment and Removal of Fellows.

**Qualification.]**—*See CHARITIES*, Vol. VIII., pp. 366, 367, Nos. 1711–1719.

**Election.]**—*See CHARITIES*, Vol. VIII., p. 366, Nos. 1705–1710; p. 368, No. 1731; p. 386, No. 2021; p. 390, No. 2101.

**Admittance.]**—*See CHARITIES*, Vol. VIII., p. 386, Nos. 2020, 2023; p. 388, No. 2062.

before conferred, the courts "charged with the administration of the Scottish universities" shall with respect to the University of St. Andrews & the University College of Dundee have power to affiliate the said University College to & make it form part of the said university, with the consent of the University Court of St. Andrews, & also of the said college.

An agreement purporting to be the consent required by s. 16 contained

a stipulation that the said union should be permanent, & dissoluble only by Act of Parliament.—*Held*: the stipulation was not *ultra vires*.—*MEDCALFE v. COX*, [1896] A. C. 647.—**SCOT.**

### PART XIV. SECT. 2, SUB-SECT. 4.

**K. Professors—Power to dismiss.]**—By 23 Vict. c. 63, s. 8, the Senate of the University of New Brunswick has absolute power, subject to the approval

**Forfeiture.]**—*See CHARITIES*, Vol. VIII., p. 367, Nos. 1729–1732; p. 368, Nos. 1735–1736.

**Restoration.]**—*See CHARITIES*, Vol. VIII., p. 367, No. 1727; p. 386, Nos. 2015–2019.

**Expulsion.]**—*See CHARITIES*, Vol. VIII., p. 389, No. 2078; p. 390, Nos. 2102, 2107, 2108.

### SUB-SECT. 2.—THE VISITOR.

**Appointment & powers of visitor.]**—*See CHARITIES*, Vol. VIII., pp. 385–388.

**Control of court over visitor.]**—*See CHARITIES*, Vol. VIII., p. 390.

**Procedure of visitor.]**—*See CHARITIES*, Vol. VIII., p. 408.

### SUB-SECT. 3.—WHEN MANDAMUS LIES.

**157. To take oath of fellow.]**—The Ct. of King's Bench will grant a *mandamus* to the master of a college to compel him to take the oaths of the fellows, as prescribed by 1 Will. & Mar. c. 8; but a *mandamus* directed to the master & fellows of a college, commanding them to remove certain members of the college for not having taken the oaths, is bad, unless the members complained of are made parties to the writ.—*R. v. ST. JOHN'S COLLEGE, CAMBRIDGE* (1693), 4 Mod. Rep. 233; *Skin.* 393; *Comb.* 279; *Holt*, K. B. 436; 87 E. R. 306.

**Annotations.**—*Consd.* *Green v. Rutherford* (1750), 1 Ves. Sen. 462. *Reid.* *R. v. Bland* (1740), 7 Mod. Rep. 355.

**158. To admit a scholar.]**—On a motion for a *mandamus* [to the President of the College] to admit a scholar to a college, if it be doubtful whether the visitor have power to refuse, the ct. will grant the writ & order the statutes to be returned.—*R. v. ST. JOHN'S COLLEGE, OXFORD* (1694), *Holt*, K. B. 437; *Comb.* 238; 4 Mod. Rep. 260, 368; 90 E. R. 1141.

**Annotation.**—*Consd.* *R. v. Hertford College* (1878), 3 Q. B. D. 693.

**159. To affix college seal—To pleading in Chancery.]**—*Mandamus* granted to compel the warden of Wadham College to affix the common seal of the college to an answer of the fellows, etc., in Ch. contrary to his own separate answer put in.—*R. v. WINDHAM* (1776), 1 Cowp. 377; 98 E. R. 1139.

**Annotations.**—*Mentd.* *R. v. Beeston* (1790), 3 Term Rep. 592; *Re Queen's College, Cambridge* (1828), 5 Russ. 64; *Mill v. Hawker* (1871), L. R. 9 Exch. 309.

**160. To permit inspection of charter & documents of endowment.]**—*R. v. ST. JOHN'S COLLEGE, OXFORD (PRESIDENT, FELLOWS & SCHOLARS)* (1845), 5 L. T. O. S. 221; 9 J. P. Jo. 388.

### SUB-SECT. 4.—OTHER CASES.

**161. Chaplain of Christ Church, Oxford—Removal for marriage—Usage of university & college.]**—Upon a question whether the chaplain of Christ Church had been properly deprived by the dean of Christ Church of his chaplainship on

of the Governor in Council, to remove any of the professors, etc., without any formal proceedings in the nature of a trial, & such removal not being a judicial act, the supreme ct. has no power by *certiorari* to remove the proceedings & inquire into it.—*Er p.* *JACOBS* (1861), 5 All. 153; *disd.* *Er p.* *LITTLE*, 33 N. B. R. 222, 263.—**CAN.**

**1. —.]**—By letters patent under the great seal certain persons were created a body corporate by the

account of marriage. In the absence of any general statute of the University, or any particular statute relating to the foundation of Christ Church as a college:—*Held*: from the general usage of the universities of England prohibiting fellows from marrying, & from general reputation relating to this foundation, & from particular usage of this society, in like cases, which prohibited students from marrying, marriage was a lawful cause for a chaplain of Christ Church being expelled or removed from his chaplainship.—*Ex p. LAMPREY* (1737), *West temp.* Hard. 209; 25 E. R. 899.

**162. Inspection of public books of foundation—No liberty to commoner—Not belonging to college.**—*Ex p. DAVISON* (1772), cited in 1 Cowp. 319; 98 E. R. 1107.

*Annotation*:—*Consd.* R. v. Grunden (1775), 1 Cowp. 315.

**163. Lay corporations—Subject to temporal jurisdiction—Trinity Hall, Cambridge.**—*R. v. GREGORY* (1772), 4 Term Rep. 240, n.; 100 E. R. 995.

*Annotations*:—*Reid*, R. v. St. Catherine's Hall (1791), 4 Term Rep. 233; R. v. Hertford College (1877), 2 Q. B. D. 590. *Mentl.* Darby v. R. (1840), 12 Cl. & Fin. 520.

**164. Profits of fellowship—Assignable by way of mortgage.**—An assignment by a fellow of King's College, Cambridge, of the profits of his fellowship, by way of mtge. for securing the repayment of a sum of money advanced to him, & interest thereon, is not contrary to public policy, in respect of the duties incident to the situation or office; neither is there anything in the nature of the income of the fellowship from which it can be inferred that the emoluments are not assignable in equity. Although the assignment is contrary to the implied intention of the founder of the college, & to the spirits of the

name of "Queen's College at Kingston," with the style & privilege of a university, with power to appoint professors & other officers, & in case of complaint made to the trustees to institute inquiry, & in the event of any impropriety of conduct being duly proved, to admonish, reprove, suspend, or remove the person offending:—*Held*: there was no jurisdiction in equity to interfere for the restoration of a professor removed, & under the charter, a sufficient number of trustees might remove in their discretion.—*WHEIR v. MATTHESON* (1865), 3 E. & A. 123.—*CAN.*

**m.** —.—.—]—Where the appointment of university professors is "during pleasure," they may be removed without notice & without a hearing; but the discretionary power of removal must be exercised *bona fide*.—*Re UNIVERSITY ACT, Re SAKKATHESWAN & MACLAURIN UNIVERSITY* (1920), 2 W. W. R. 823.—*CAN.*

**n.** —.—.—]—A contract of employment between a college & one of its professors contained no definite agreement as to its duration:—*Held*: (1) not a contract permanent or at pleasure, nor one for six years, but for one year definite, to be continued from year to year without notice, terminable at the end of any year on one year's notice or on tender of one year's salary in lieu of notice; (2) the fact that such contract discloses that the salary is to commence at \$4,500 with five annual increases of \$100 each until a salary of \$5,000 is reached does not of itself raise any presumption that the tenure is for six years.—*SMITH v. WESLEY COLLEGE*, [1923] 3 W. W. R. 195.—*CAN.*

**o.** —.—.—]—*Appointment of—Powers of senate.*—The five conditions laid down in the proviso to Specific Relief Act, s. 45, are cumulative & all have to be fulfilled. The senate of the university is only bound by its resolutions.

It cannot be held bound by representations, made by any individual officer without the sanction or authority of the university. Where a person deals with a corp., whose rights are defined by statute, he must be deemed to have informed himself of those rights. In this case the resolution of the senate cannot be interpreted as having appointed the appt. without the sanction of the Governor-General, or even that it was intended to appoint him without such sanction. No legal right can be said to exist, because the petitioner had lectured the previous year.—*Re ABDUL HASUL* (1913), 1 L. R. 41 Calc. 518.—*IND.*

**p.** —.—.—]—Under Madras University Act, 1857, & Indian University Act, 1904, the senate of Madras University is the legislative & the syndicate the executive government of the university. No sanction of govt. is required for the syndicate's application of the general rules made by the senate, & the syndicate is entitled to make its own standing orders & subject to the regulations of the university, to regulate its business without the sanction of the senate. A power given to the university by Universities Act of 1904, s. 3, to appoint professors & lecturers & to make regulations under sect. 25 for their appointment & duties are exercisable only by the senate & not by the syndicate.—*Re NATHAN & RAMANATHAN* (1916), 1 L. R. 40 Mad. 125.—*IND.*

**q.** —.—.—]—*Contract of employment—Need not be under seal.*—*Held*: although the Auckland University College Council is a corporate body possessing a common seal, a contract of employment entered into by the Council with a professor need not be under seal.—*TUBBS v. AUCKLAND UNIVERSITY COLLEGE COUNCIL* (1908), 27 N. Z. L. R. 149.—*N.Z.*

**r.** —.—.—]—*Assistant of professor—Power of Crown to appoint.*—The Crown, being

statutes regulating the college, & may be a violation of the duty of the fellow to the college, it is nevertheless not void. In a suit instituted by the assignee against the fellow, the assignor, & the college, the ct. directed the fines already apportioned to the assignor to be applied in satisfaction of pltf.'s demand, & the necessary accounts to be taken of all sums then or thereafter to be appropriated to the fellow by the College.—*FEISTEL v. KING'S COLLEGE, CAMBRIDGE* (1847), 10 Beav. 491; 10 L. J. Ch. 339; 50 E. R. 671; *sub nom.* *FEISTEL v. KING'S COLLEGE*, 11 Jur. 500.

**165. Appointment of new trustees of property—By master & fellows.**—In a petition praying the appointment of the present master & fellows of a college, as trustees of property given for the foundation of two scholarships, it was prayed that the master & fellows of the college might have power from time to time, under their corporate seal, to appoint new trustees of the property, & the ct. directed that provision should be made accordingly.—*Re SIDNEY SUSSEX COLLEGE, CAMBRIDGE, Ex p. DAVIES* (1849), 14 L. T. O. S. 307.

**166. Infant undergraduate—Appointment of guardian ad litem.**—The head of a college in one of the universities at which an infant doct. is an undergraduate, is the person under whose care such infant is, for the purpose of service, with a view to the appointment of a guardian, *ad litem*, to the infant.—*CHRISTIE v. CAMERON* (1850), 25 L. J. Ch. 488; 27 L. T. O. S. 166; 2 Jur. N. S. 635; 4 W. R. 580.

**167. Sale of college property—Re-investment of proceeds—Universities & College Estates Amendment Act, 1880 (c. 46).**—The effect of sects. 2 & 4 of the above Act, 1880, in conjunction with Universities & Colleges Estates Act, 1858 (c. 44),

patron of the chair, has the power of appointing a permanent assistant to the professor of mathematics in the United College of St. Andrews, with his concurrence, with right to teach.—*ST. ANDREWS UNIVERSITY v. LEEN* (1850), 21 Dunl. (Ct. of Sess.) 566; 31 Sc. Jur. 303.—*SCOT.*

**s.** —.—.—]—*Reduction of term of study—Allowed to graduates.*—To entitle a student at law to the benefit of the reduction of the term of study allowed to graduates by 20 Vict. c. 23, he must be a graduate at the time of commencing his study.—*Ex p. TRAVIS* (1867), 1 Han. 31.—*CAN.*

**t.** —.—.—]—*Meetings of senate—Powers of chancellor.*—*Held*: under the Acts incorporating Victoria University, & the statutes thereof, the chancellor had no power to call a meeting of the senate elsewhere than at Cobourg, the seat of the University.—*CORBOURN TOWN v. VICTORIA UNIVERSITY* (1889), 18 O. R. 165.—*CAN.*

**u.** —.—.—]—*Disqualification of candidates—Powers of senate.*—*Held*: the senate of a university is under Indian Universities Act, s. 25, empowered to make rules disqualifying a candidate who cheats at an examination from passing it & from appearing at any university examination for a period of two years from the date of his disqualifications & that a candidate against whom the rule has been enforced has no remedy by civil action against the university.—*TAJ AHMAD v. PUNJAB UNIVERSITY* (1921), 1 L. R. 2 Lah. 197.—*IND.*

**v.** —.—.—]—*Admission of women—University of Edinburgh.*—*Held*: in respect of the language of the deeds of foundation the contemporaneous interpretation by usage, female students were not entitled to study or graduate in the University of Edinburgh & that the regulations of 1869 admitting women to the study of medicine were ultra vires of the University C.—



*Sect. 2.—Constitution and control of university colleges: Sub-sect. 4. Sects. 3 & 4.]*

ss. 27 & 28, is that the purchase-money of land, belonging to a college, which has been compulsorily taken under Lands Clauses Consolidation Act, 1845 (c. 18), may be applied, with the consent of the Board of Agriculture, in the erection of new buildings upon land belonging to such college, & repaid into ct. by thirty equal annual instalments.

—*Ex p. KING'S COLLEGE, CAMBRIDGE*, [1891] 1 Ch. 333, 677; 60 L. J. Ch. 508; 64 L. T. 623; 39 W. R. 331.

**168. Presentation to benefice.—By Roman Catholic—Void—Bishop may refuse induction.]**

A presentation to a benefice made by a college on the nomination of a Roman Catholic patron, & appearing on the face of it to have been made, not in right of the college, but in trust for the Roman Catholic is absolutely void under 13 Anne, c. 13, & the bishop is entitled to refuse induction to the person so nominated.—*BOYER v. NORWICH (Bp.)*, [1892] A. C. 417; 61 L. J. P. C. 46; 67 L. T. 30; 56 J. P. 692; 8 T. L. R. 603, P. C.

**SECT. 3.—PUBLIC SCHOOLS.**

**169. Shrewsbury school.—Within Public Schools Act, 1868 (c. 118).—A.-G. v. CHRIST CHURCH, OXFORD (DEAN & CHAPTER), No. 190, *post*.**

**170. — Nomination of master.—Delegation of powers.—Usage.]—A.-G. v. SHREWSBURY TOWN** (1726), Buntb. 215; 145 E. t. 652.

**171. — Nomination to curacy.—Of person educated at the school.—Qualification.]—By an Act for the better government & regulation of the Shrewsbury School, the preamble of which recited certain grants to the bailiffs & burgesses of Shrewsbury, including that of the presentation to the living of St. Mary, as having been made for the advancement of the school, & referred to certain rules & ordinances touching the revenues & government of the school, some of which rules prescribed that the persons from time to time appointed to serve the ministry in the church of St. Mary should be such a fit man as had been brought up at the school, & a graduate, being a burgess's son of Shrewsbury, if any such could be found; & also recited, that many of the existing rules had been found inexpedient; & that it would tend to the advancement & good of the school that other rules better adapted in the present situation of the school, & more calculated for the due management of its revenues, should be established; it was enacted, that the existing rules should be repealed; & amongst other things, it was declared, that the right of nomination to St. Mary's was in the mayor, aldermen, & assistants of Shrewsbury, & their successors; & it was enacted, that they should appoint "a fit & proper person duly qualified according to law,"**

provided that in such appointment such person should be preferred, *ceteris paribus*, who should have been brought up at the school, & should be a graduate, & also the son of a burgess of Shrewsbury; & if there were no burgess's son of that description, then a preference should be given in like manner to such person of the above description born in C. Except that it should be lawful to bestow the living upon either of the masters of the said school after he should have resigned his mastership, notwithstanding any such claim or preference as aforesaid; & that such master should be capable of holding the living "equally the same as if he had been of the description hereinbefore mentioned":—*Held*: the words *ceteris paribus* in the statute referred to the previously specified qualification of being fit & proper, & duly qualified according to law, & not to the general qualifications of a candidate for the duties of a clergyman.—*A.-G. v. POWIS (EARL)* (1853), Kay. 186; 2 Eq. Rep. 566; 24 L. J. Ch. 218; 2 W. R. 140; 69 E. R. 79.

**172. Harrow School.—Crown as visitor.—Jurisdiction of courts.—Regulation of school.]—(1)**

Information for the regulation of Harrow School dismissed as to the removal of governors, unduly elected according to the founder's statutes, not being inhabitants, the Ct. of Ch. having no jurisdiction with regard to either the election, or amotion, of corporators of any description, eleemosynary corps. being the subject of visitatorial jurisdiction, therefore, in the case of the Crown becoming visitor for want of an heir of the founder, the removal of a corporator *de facto* to be sought by petition to the Great Seal; not by bill or information.

(2) As to the revenues, including the management of the estates, & the application of the income, inquiries directed to ascertain, whether the estates are properly & advantageously managed with a view to prospective regulation & a lease to one of the governors, though without fraud, set aside upon general principles, as inconsistent with his duty, charging him with the full value, if exceeding the rent reserved.

(3) The application of the income, to purposes partly specified by the founder's rules, & partly left to discretion, not being in all respects agreeable to the founder's directions, though with no improper motives, to be ascertained by a scheme, having regard, on the one hand, to the founder's directions; on the other, to the alteration of circumstances; which might render a literal adherence to them adverse to their general object & spirit.

(4) An alteration in the constitution of the school, with the view of reducing it to a mere parochial school, by restraining the number of foreigners, i.e., boys not on the foundation, refused. The admission of foreigners, without prejudice to the children of the poor inhabitants, being

*JEX-BLAKE v. EDINBURGH UNIVERSITY* (SENATUS OP) (1873), 11 Macph. (Ct. of Sess.) 784; 45 Sc. Jur. 476.—**SCOT.**

*e. Bursars.—Election of.]—*Testamentary trustees were directed to apply part of the trust estate to founding bursaries at the Universities of Edinburgh, Glasgow & St. Andrews, which were to be "as the gift & appointment" of the trustees under the condition that the bursaries were to be conferred after competitive examinations for which the trustees were to appoint 3 examiners who were "to report upon the qualifications of the candidates" but "the opinion of the examiners as to the qualifications of the candidates" was to be "subject to

the review" of the trustees. In pursuance of these directions the trustees advertised three bursaries of equal value to be competed for at the same examination—one at each of the favoured universities—to be open to "students about to enter on their first session" at the university:—*Held*: the trustees in refusing to appoint the pursuer to hold the Glasgow bursary had not acted in breach of any contract between them & him.—*MARTIN v. MACDOUGALLS TRUSTEES* (1885), 13 R. (Ct. of Sess.) 374; 23 Sc. L. R. 190.—**SCOT.**

*d. —*—A trustee appointed certain trustees to hold a fund & to apply the annual produce for a

bursary to a student on his entering the Divinity Hall of a Scottish University declaring that certain qualifications should be required of competitors. The trustees after an examination of candidates, awarded the bursary to A. B.; C. D. who had competed in the examination raised an action for declarator that he had been duly elected & was entitled to the bursary & for payment of the value of it for the period prescribed by the trustee & alternatively for a sum of damages:—*Held*: as the pursuer was not elected he was not entitled to decree of declarator & payment.—*M'DONALD v. M'COLL* (1890), 17 R. (Ct. of Sess.) 951; 27 Sc. L. R. 761.—**SCOT.**

expressly directed, & the small result of the latter not proved the result of abuse.

(5) No objection to encourage attention to parish scholars by an allowance to the master for each.

(6) The expenditure not to be measured by the number of parish boys, who are to be immediately benefited by it, if fairly referable to the purposes of the school. A considerable allowance therefore to the master towards repairs, & a considerable expenditure in enlarging & improving his house for the accommodation of boarders, considered upon the whole not extravagant, as a benefit from the increased revenue in that shape, instead of an increased salary; nor improper, with reference to the general advantage of the school.

(7) The course of education & internal discipline left to the governors & masters. The governors being expressly authorised to alter the founder's rules, alterations, long known & acquiesced in, presumed to have been by their authority; though the precise order does not appear. Any substantial deviation from the principle & purpose of the institution the subject of visitatorial interposition. —*A.-G. v. CLARENDON (EARL)* (1810), 17 Ves. 491; 34 E. R. 190.

*Annotation:—Generally, Reffd. A.-G. v. Stamford* (1839), 1 Ph. 737.

**173. — Duration of exhibitions—Construction of endowment.**—Testator left stock, producing £100 a year, for an exhibition, towards the maintenance & support of a scholar going from a public school to the universities, but did not mention for what period he was to hold it:—*Held: four & not six years was a proper period.* —*A.-G. v. HARROW SCHOOL (GOVERNORS)* (1852), 19 L. T. O. S. 224, C. A.

**174. — Petition against new scheme Who are persons "directly" interested.** —*HARROW SCHOOL SCHEME* (1874), cited 3 App. Cas. at p. 877. *Annotation:—Consd. Re Shaftesbury Charity* (1878), 3 App. Cas. 872.

**175. Rugby School—Scholars Qualifications for admission.**—(1) The ct. being of opinion that Lord Eldon on a previous occasion had considered that exhibitions belonging to a free school might be given to scholars not on the foundation, declined interfering so as to give the free scholars a priority over those who were not "foundations." (2) The entrance of boys under twelve years of age into a free school having been discouraged. On petition under Charities Procedure Act, 1812 (c. 101):—*Held: such a course of proceeding was prejudicial to the objects of the charity, & ought to be corrected.*

(3) The school was designated by the founder as a grammar school, but the boys were to be taught writing & arithmetic in all its branches:—*Held: those who were qualified in other respects, ought to be admitted if they could read English & were capable of being taught the first elements of grammar.*—*Re RUGBY SCHOOL* (1839), 1 Beav. 457; 48 E. R. 1017.

**176. — Dismissal of head master—Powers of governing body.**—Pltf., who was appointed head master of Rugby School in Nov. 1869, by the old trustees of the school, the existing governing body, & was dismissed by the new governing body, appointed under Public Schools Act, 1868 (c. 118), in Dec. 1873, filed his bill against the governing body, alleging that his dismissal was due to the influence of certain members of the governing body who, prior to their election, had shown hostility to pltf.'s appointment, & had formed a scheme to procure its annulment; & praying that

the resolution of dismissal might be declared invalid:—*Held: (1) the ct. was not justified in interfering; (2) although pltf. was appointed by the old trustees in 1869, the new governing body, were not bound by the rules & regulations in force previously to their appointment, but had a power of dismissal unfettered by those restrictions.*—*HAYMAN v. RUGBY SCHOOL (GOVERNORS)* (1874), L. R. 18 Eq. 28; 43 L. J. Ch. 834; 30 L. T. 217; 22 W. R. 587.

*Annotations:—Generally, Mentd. Abergavenny v. Llandaff, Bp.* (1888), 20 Q. B. D. 480; *Cassell v. Inglis*, [1916] 2 Ch. 211.

**177. Eton College—Mandamus to provost—To affix college-seal—To presentation by college.**—

A *mandamus* lies to the provost of a college to compel him to affix the college-seal to a presentation by the college.—*R. v. BLAND* (1740), 7 Mod. Rep. 355; 87 E. R. 1287.

*Annotations:—Reffd. R. v. Cambridge* (1765), 3 Burr. 1647; *R. v. Kendall* (1841), 1 Q. B. 366; *R. v. Orton Trustees* (1851), 14 Q. B. 139.

**What is a public school for taxing purposes.**—*See Sect. 1, post.*

#### SECT. 4.—EXEMPTION FROM RATES AND TAXES.

**178. Income tax—What is a "public school."**—By 5 & 6 Vict. c. 35, s. 61, r. 6, allowances in respect of property tax levied under Schedule A, of Income Tax Acts, are to be made by the comrs. for the duties charged "on any hospital, public school, or almshouse in respect of the public buildings, offices, & premises" belonging thereto, if occupied under certain specified conditions:—*Held: a school founded & carried on by the Corp. of London under an Act of Parliament not for purposes of profit, but for the benefit of a large portion of the public; & maintained partly by a charitable endowment, was a "public school" within rule 6 notwithstanding the fact that the school was partly maintained by fees charged for instruction.*—*BLAKE v. LONDON CORPN.* (1887), 19 Q. B. D. 79; 56 L. J. Q. B. 421; 35 W. R. 791; 3 T. L. R. 616; 2 Tax Cas. 209, C. A.

*Annotations:—Appl. Needham v. Bowers* (1888), 21 Q. B. D. 436; *Cardinal Vaughan Memorial School v. Ryall* (1920), 36 T. L. R. 694. *Reffd. Charterhouse School v. Lannarquo* (1890), 25 Q. B. D. 121; *Cawse v. Nottingham Lunatic Hospital Committee*, [1891] 1 Q. B. 585; *Ackworth School General Committee v. Betts* (1915), 113 L. T. 855. *Mentd. R. v. Income Tax Comrs.* (1888), 22 Q. B. D. 296; *Rotunda Hospital, Dublin v. Coman* (Surveyor of Taxes) (1920), 7 Tax Cas. 517.

**179. — — — — —**—*Ackworth School* was established in 1779 by subscriptions collected from members of the Society of Friends, for the education of children who were members of the society in Great Britain whose parents were not in affluence. The rules of the school provided that when the school was not full there should be eligible for admission at the discretion of the controlling committee, children from beyond the limits of Great Britain being members of the society, failing whom, children closely connected with the society, or failing whom, children not in the membership of the society. The object of the school was to train up the children in the principles & practices of the Christian religion as professed by the Society of Friends, & to impart to them a sound English education. The school was supported by substantial fees paid by the parents of the children, by the income arising from its invested property, by annual subscriptions & other donations & legacies, & was under the direction of a general meeting appointed by the



provided by him between the years 1876 & 1883. In the latter year he endowed the college with a sum of £300,000 & directed that sum to be applied for the benefit of the college, in paying off the building debt, if any, in furnishing & equipping the college, in establishing scholarships, exhibitions, & prizes, in paying the salaries of professors & teachers, & otherwise in defraying the domestic & other expenses incurred. The average income from the endowment under the trust & from other benefactions for the last four years had been £7,800 *per annum*, & from the fees of students about £1,000 *per annum*. The students paid £90 each a year, which covered all expenses except laundry, medical attendance, fees for university examinations & individual lessons in special subjects. For that sum each student received, in consequence of the mode in which the endowment was used, more educational advantages & greater material comforts than could be supplied to her for the fees paid:—*Held*: (1) the mere fact that in a boarding school in which a considerable fee is charged the inmates obtain various advantages & comforts from the endowment is not sufficient to constitute the school "a charity school" within House Tax Act, 1808 (c. 55), sched. B.; (2) the words "charity school" in schedule B., must be interpreted as "school primarily intended for the supply of gratuitous education"; (3) in the case of Holloway College there did not appear to have been an intention to supply gratuitous instruction to any pupil rich or poor.—*SOUTHWELL v. ROYAL HOLLOWAY COLLEGE, EGHAM (GOVERNORS), [1895] 2 Q. B. 487; 64 L. J. Q. B. 791; 73 L. T. 183; 59 J. P. 503; 41 W. R. 315; 11 T. L. R. 520; 39 Sol. Jo. 656; 15 R. 533; 3 Tax Cas. 386.*

*Annotations*:—As to (2) *Reid*, *Reith v. Westminster School Governing Body, [1913] 1 K. B. 190; Ackworth School v. Betts (1915), 84 L. J. K. B. 2112; Paul v. Godolphin & Latymer Girls' School, Godolphin & Latymer (Girls' School) v. Paul (1919), 7 Tax Cas. 181. Generally, Mendt, Bradford Grammar School v. Northwood (1905), 5 Tax Cas. 124.*

185. —.—:—A public secondary day school was supported by income from endowment, fees from pupils, & grants from Board of Education & London County Council. The school buildings were detached from, but within the same curtilage as the headmistress' house. The headmistress was required to reside in the dwelling-house, & did so rent-free & in her official character & not as tenant. Except by permission of the Governors she could not permit any person to occupy the house or any part thereof:—*Held*: the School was not a charity school within the meaning of House Tax Act, 1808 (c. 55), sched. B.—*PAUL v. GODOLPHIN & LATYMER (GIRLS' SCHOOL (GOVERNORS), GODOLPHIN & LATYMER GIRLS' SCHOOL (GOVERNORS) v. PAUL (1919), 7 Tax Cas. 181.*

**Educational purposes as charitable.**—See CHARITIES, Vol. VIII., p. 245, Nos. 51-73.

## SECT. 2.—JURISDICTION OVER EDUCATIONAL CHARITIES.

**The visitor.**—See CHARITIES, Vol. VIII., p. 385, Nos. 2003 *et seq.*

**The courts.**—See CHARITIES, Vol. VIII., p. 388, Nos. 2071 *et seq.*

**The Charity Commissioners—Charities within or exempt from jurisdiction of—Unendowed charities.**—See CHARITIES, Vol. VIII., p. 391, Nos. 2118 *et seq.*

**Endowed charities.**—See CHARITIES, Vol. VIII., p. 392, Nos. 2130 *et seq.*

— "Cathedral, collegiate chapter or

other school."—See CHARITIES, Vol. VIII., p. 392, No. 2148.

— **Consent of to legal proceedings.**—See CHARITIES, Vol. VIII., Nos. 2156 *et seq.*

## SECT. 3.—ASSURANCE OF PERSONALTY FOR PROVISION OF BUILDINGS.

**To "build" school.**—See CHARITIES, Vol. VIII., p. 274, No. 421.

**To "erect" school.**—See CHARITIES, Vol. VIII., p. 275, Nos. 433-437.

**To "establish" school.**—See CHARITIES, Vol. VIII., p. 276, Nos. 450-457.

**To "found" school.**—See CHARITIES, Vol. VIII., p. 277, No. 474.

**To "provide," "maintain," "support" school.**—See CHARITIES, Vol. VIII., p. 277, Nos. 475 *et seq.*

**To "rebuild," "repair," "enlarge" school.**—See CHARITIES, Vol. VIII., p. 278, No. 486.

**To take lease of school.**—See CHARITIES, Vol. VIII., p. 278, No. 487.

**Purchase or rent school.**—See CHARITIES, Vol. VIII., p. 278, No. 488.

**Exemptions from restrictions on assurances.**—See CHARITIES, Vol. VIII., p. 280, Nos. 623-629.

## SECT. 4.—MANAGEMENT OF TRUST PROPERTY.

**With approval of Charity Commissioners or Board of Education.**—See CHARITIES, Vol. VIII., p. 358, Nos. 1553, 1555.

**Mortgage of lands of industrial school.**—See CHARITIES, Vol. VIII., p. 361, No. 1604.

## SECT. 5.—EFFECTUATION OF EDUCATIONAL TRUSTS BY SCHEMES.

**In general.**—See CHARITIES, Vol. VIII., pp. 338-340, Nos. 1279-1307.

**Construction & effect of schemes.**—See CHARITIES, Vol. VIII., pp. 340-341, Nos. 1310-1318, & 1321.

**Alteration of schemes established by statute.**—See CHARITIES, Vol. VIII., p. 341, Nos. 1325 *et seq.*

**Power of court to vary schemes.**—See CHARITIES, Vol. VIII., pp. 342, 343, Nos. 1344-1356.

**Interference by court with schemes settled by Charity Commissioners.**—See CHARITIES, Vol. VIII., pp. 343, 344, Nos. 1361, 1363.

**Application of cy-pres doctrine.**—See CHARITIES, Vol. VIII., p. 344, Nos. 1367-1370; p. 345, No. 1380.

— **School ceasing to exist.**—See CHARITIES, Vol. VIII., pp. 346, 347, Nos. 1402, 1408-1411.

— **Surplus remaining after satisfaction of prescribed objects.**—See CHARITIES, Vol. VIII., p. 349, Nos. 1438 *et seq.*

## SECT. 6.—APPOINTMENT AND REMOVAL OF OFFICERS, FELLOWS, ETC.

**Mode of election.**—See CHARITIES, Vol. VIII., p. 366, Nos. 1705-1710.

**Qualification.**—See CHARITIES, Vol. VIII., pp. 366-367, Nos. 1711-1720.

*Sect. 6.—Appointment and removal of officers, fellows, etc. Sects. 7 & 8: Sub-sects. 1 & 2, A.]*

**Removal & expulsion.**—*See CHARITIES, Vol. VIII., p. 367, Nos. 1727–1732.*  
*See, also, Part XIV., Sect. 2, sub-sect. 1, B., ante.*

#### SECT. 7.—TRUSTEES.

**Appointment of new trustees—Qualification.**—*See CHARITIES, Vol. VIII., p. 370, Nos. 1761–1762, Nos. 1766–1769.*

**By court.**—*See CHARITIES, Vol. VIII., p. 372, Nos. 1788 et seq.*

**Removal of.**—*See CHARITIES, Vol. VIII., p. 375, Nos. 1863–1864.*

**Duties of trustees.**—*See CHARITIES, Vol. VIII., p. 375, Nos. 1807 et seq.*

**Powers of trustees—Mode of exercise of.**—*See CHARITIES, Vol. VIII., p. 376, No. 1876.*

**Interference by court with exercise of.**—*See CHARITIES, Vol. VIII., p. 376, No. 1877.*

**Liability of trustees—To whom trustees accountable.**—*See CHARITIES, Vol. VIII., p. 380, Nos. 1935, 1937.*

**How far accounts carried back.**—*See CHARITIES, Vol. VIII., p. 381, Nos. 1944 et seq.*

#### SECT. 8. — POWERS UNDER THE ENDOWED SCHOOLS ACTS.

##### SUB-SECT. 1.—IN GENERAL.

**186. Who are founders—Original subscribers only.**—*Re ST. LEONARD, SHOREDITCH, PAROCHIAL SCHOOLS, No. 189, post.*

**187. What is an endowment—Temporary annual payment.**—*Re FREE GRAMMAR SCHOOL & HOSPITAL OF ARCHBISHOP HOLGATE AT HEMSWORTH, & GRAMMAR SCHOOL AT BARNLEY, No. 191, post.*

**188. Right of inquiry as to endowments—Exhibitions tenable at university.**—*The Endowed Schools Comrs. have power to inquire into the endowment of exhibitions at a college in a university whenever they are restricted to a school or district.—Re MEYRICKE FUND (1872), 7 Ch. App. 500; 41 L. J. Ch. 553; 26 L. T. 506; 20 W. R. 715, L. C. & L. J.J.*

*Annotation:—Consd. A.-G. v. Christ Church, Oxford, [1894] 3 Ch. 524.*

##### SUB-SECT. 2.—SCHEMES FOR APPLICATION OF ENDOWMENTS.

###### A. In General.

**189. Application of endowments—Power to alter—By charity commissioners—Exhibitions applied to larger area.**—*Where the comrs. by their scheme provided that certain endowments which had theretofore been applied in carrying on the schools of a particular parish, should thenceforth be applied in exhibitions for the benefit of a larger area of schools:—Held: (1) this was within their powers under Endowed Schools Act, 1869 (c. 56), s. 9, & being so the way in which those powers had been exercised was not the proper subject of appeal; (2) a charity which has no instrument of foundation or statutes, or duly authorised regulations impressing upon it a denominational character does not fall within 1869 Act, clause 19, or Endowed Schools Act, 1873 (c. 87), clause 7. Its trustees cannot impress upon it that character, nor is any practice for the time being as to the application of its funds sufficient evidence of there ever having been regulations in existence which*

*prescribed it. Where a charity is established by subscriptions, the original subscribers alone are the founders the later benefactions are on the footing of the original foundations. If its regulations are relied upon as impressing upon it a denominational character they must be shown to have been authorised by all the founders & to have been issued before fifty years from their deaths.—Re ST. LEONARD, SHOREDITCH, PAROCHIAL SCHOOLS (1884), 10 App. Cas. 304; 51 L. T. 305; 33 W. R. 756; sub nom. ST. LEONARD'S, SHOREDITCH TRUSTEES v. CHARITY COMRS., 54 L. J. P. C. 30, P. C.*

*Annotation:—As to (2) Consd. Re Swansea Free Grammar School, [1894] A. C. 252.*

**190. ——— Ouster of High Court.**—*Property, producing an annual income of about £900, was held in trust, first, to pay thereout an annual stipend of £40 to the minister for the time being of a specified parish, & next in the maintenance of eighteen exhibitors in the College of Christ Church, Oxford, or in any other college or colleges at Oxford, & then in the maintenance of an annual prize of £100, the eighteen exhibitors were to be chosen from six schools, viz., four from Shrewsbury, three from Bridgnorth, four from Newport, three from Shifnal, two from Wem, & two from Donnington. If on any vacancy there should not be a properly qualified candidate from the school whence the vacancy ought to be supplied, the vacancy was to be filled by the election of a properly qualified candidate from any of the other schools. The annual prize was to be open to the competition equally of the scholars of all the six schools. Shrewsbury School was a "public school" within Public Schools Act, 1868 (c. 118), the other five schools were "endowed schools" within Endowed Schools Acts:—Held: the exhibitions were "educational endowments" within Endowed Schools Acts, & they formed part of the endowments of the six schools respectively; but inasmuch as Shrewsbury School was not solely interested in the endowment, the Charity Comrs. had jurisdiction to make a scheme for the management of the whole charity, & the jurisdiction of the High Court was entirely excluded.—A.-G. v. CHRIST CHURCH, OXFORD (DEAN & CHAPTER), [1894] 3 Ch. 524; 63 L. J. Ch. 901; 71 L. T. 472; 43 W. R. 198; 10 T. L. R. 615; 38 Sol. Jo. 696; 8 R. 651.*

**191. ——— Power to remove site of school.**—*(1) The removal of the site of a school is within the scope of Endowed Schools Act, 1869 (c. 56), & the powers conferred on the Charity Comrs. by sect. 9.*

*(2) An annual sum temporarily applied to the purposes of the school is an endowment within sect. 5.*

*(3) The interest of a boy on the foundation of a school is not saved or directed to be compensated by 1869 Act, unless he was there at the date of the passing thereof.*

*(4) In 1861 a Chancery scheme for a school contained a "conscience clause" allowing parents to object to their boys receiving Church of England instruction:—Held: the comrs. were bound in making a new scheme for the school to embody the provisions of the "conscience clauses" of 1869 Act, ss. 15, 16.—Re FREE GRAMMAR SCHOOL & HOSPITAL OF ARCHBISHOP HOLGATE AT HEMSWORTH, & GRAMMAR SCHOOL AT BARNLEY (1887), 12 App. Cas. 444; 56 L. J. P. C. 52; sub nom. Re HEMSWORTH FREE GRAMMAR SCHOOL, 56 L. T. 212; 35 W. R. 418; 3 T. L. R. 439, P. C.*

*Annotation:—As to (1) & (3) Held. Re Colchester Grammar School, [1898] A. C. 477.*

**192. Modification of scheme—Powers under Endowed Schools Acts, 1869 (c. 56), 1873 (c. 87)—What constitutes “vested interests.”**—In an appeal under 1869 Act, s. 30, by the *corp.n.* of Sutton Coldfield against two schemes of the Charity Comrs., by which it was proposed to withdraw from that part of the funds of the *corp.n.* which was applicable for educational purposes a sum equal to £15,000 to be applied as part of the foundation of Sutton Coldfield Grammar School:—*Held*: (1) the scheme could not be regarded as wanting in the finality required by the Act because it was expressed to be without prejudice to a future scheme to be framed in accordance with the Acts of Parliament words to that effect being surplusage; (2) 1869 Act, s. 11, protects vested interests only, that is the privileges or educational advantages to which the class of persons thereby or by later Acts designated have a legal title & cannot be invoked to protect benefits which have been enjoyed by the permission or bounty of another.

(3) In a similar appeal by the inhabitants of the locality:—*Held*: such inhabitants had no *locus standi* to present it.—*Re SUTTON COLDFIELD GRAMMAR SCHOOL* (1881), 7 App. Cas. 91; 51 L. J. P. C. 8; 45 L. T. 631; 30 W. R. 311, P. C. *Annotations*:—*As to* (1) *Consd. Re Betton's Charity*, [1908] 1 Ch. 205. *As to* (3) *Consd. Re Free Grammar School & Hospital of Archbishop Holgate at Hemsworth & Grammar School at Barnsley* (1887), 12 App. Cas. 444. *Refd. Re Colchester Grammar School*, [1898] A. C. 477.

**193. — Powers of Board of Education.**—A testator who died in 1721 gave his residue to trustees on trust to pay half the income for the redemption of Barbary slaves, one-fourth for certain educational charities, & one-fourth for certain non-educational charities. In 1816, for want of Barbary slaves, the slave fund income was applied by a *ct.* scheme to assisting charity schools. By Board of Education Act, 1899 (c. 33), s. 2 (2), the powers of the Charity Comrs. in matters appearing to relate to education may be transferred by Ord. in Council to the Board of Education, provided that any question whether any part of an endowment “is held for or ought to be applied to educational purposes” shall be determined by the Charity Comrs. By the Board of Education (Powers) Ord. in Council, 1902, it is ordered that all powers, except the powers of appointing official trustees & making vesting orders, shall, so far as those powers relate to endowments “held solely for educational purposes,” be transferred to the Board, & where the Charity Comrs., in exercise of the powers conferred on them by Charitable Trusts Acts, 1853 to 1894, or Endowed Schools Acts, 1869 to 1899, determine by scheme or otherwise what part of a mixed endowment is “held for educational purposes,” that part shall, “for the purposes of this order,” be treated as an educational endowment “held solely for educational purposes.” In 1907 the Charity Comrs. made a scheme under Charitable Trusts Acts, 1853 to 1894, determining (*inter alia*) that the slave fund income was “held for & ought to be applied to educational purposes.” The trustees appealed, contending that the effect of the determination scheme would be to devote the income permanently & in all events to educational purposes. At present, notwithstanding free education, there were managers’ purposes to which the income was & could be applied under the scheme of 1816 without relieving the rates, but when these expenses also were thrown on the rates there would be no proper objects left under the scheme of 1816. On that event the income ought to be applied *cy-près* the will as a non-educational

charity:—*Held*: the determination scheme merely determined the controlling body for the time being, & did not in any way restrict, alter, or affect the objects of the charity or prevent the income being applied by a future scheme to non-educational purposes.—*Re BETTON'S CHARITY*, [1908] 1 Ch. 205; 77 L. J. Ch. 193; 98 L. T. 35; 72 J. P. 105; 24 T. L. R. 143; 6 L. G. R. 638.

**194. — Effect of Local Government Act, 1894 (c. 73), s. 14 (5).**—The B. Grammar School was an ancient foundation & had been regulated from time to time by schemes settled by the Ct. of Ch. which conferred certain educational privileges on the inhabitants of the parishes of B. & N.

In 1877 the Endowed Schools Comrs. made a scheme for the regulation of the school which as altered by a scheme made in 1903 by the Board of Education, who had succeeded to the powers of the Charity Comrs. preserved the educational privileges of the inhabitants by providing that the tuition fees should in the case of boys whose parents were resident in one or other of the parishes of B. & N. be reduced by one-third. In 1905 the Board of Education, under Charitable Trusts Act, 1890 (c. 110), s. 6, gave public notice of a proposal by them to make a new scheme, & under the above sub-sect. sent a draft of the proposed scheme to the parish councils of B. & N. The draft scheme preserved the privilege of the inhabitants of B. & N. to a remission of one-third of the tuition fees, but made it a condition that the parents to be entitled to receive it must have resided seven years in one or other of the parishes. The scheme was objected to by the parish councils & by the governors of the school, & for a time remained in abeyance. In 1907, without giving any further notice either under 1860 Act, or 1894 Act, the Board sealed a modified scheme. The scheme as modified abolished the privilege of the inhabitants of B. & N. to a remission of one-third of the tuition fees, but substituted therefor a provision giving a preference as to admission to the school to the children of the inhabitants of B. & N. over other children, & a provision that a yearly sum of not less than £100 nor more than £200 should be applied in establishing bursaries, tenable at the school by boys whose parents or guardians were resident in the parishes of B. & N., & who were, in the opinion of the governors, in need of assistance to enable them to continue to attend the school:—*Held*: (1) the Board had jurisdiction under Endowed Schools Act, 1869 (c. 56), s. 28, to alter the scheme of 1877 in the manner provided by the scheme of 1907; (2) in making the scheme of 1907 the Board had had “due regard” to the educational interests of the inhabitants of B. & N. within Endowed Schools 1869 Act, s. 11; (3) the Board having given public notice as required by 1860 Act, s. 6, of the draft scheme of 1905, had an absolute discretion to determine whether or not the modifications introduced into the scheme of 1907 were such as to render a fresh notice desirable; (4) the Board having given to the parish councils the notice required by 1894 Act, s. 14 (5), were under no obligation to give them a further notice of the modified scheme.

*Semhle*: the directions as to notice in 1894 Act, s. 14 (5), are merely directory, & in no way affect the jurisdiction of the Board to make a scheme.—*Re BERKHAMSTED GRAMMAR SCHOOL*, [1908] 2 Ch. 25; 77 L. J. Ch. 571; 99 L. T. 147; 72 J. P. 273; 24 T. L. R. 514; 6 L. G. R. 791.

**195. Validity of scheme.**—A direction in a deed of foundation that certain persons may be or continue at the school thereby founded after





W. R. 758; *sub nom.* CHRIST'S HOSPITAL (GOVERNORS) v. CHARITY COMRS., 62 L. T. 10, P. C.

*Annotations*.—As to (3) *Re* A.-G. v. Christ's Hospital, [1896] 1 Ch. 879. *Generally*, *Mentl. Hadfield v. Liverpool Corpn.* (1899), 80 L. T. 566.

205. Whether specific religious instruction must be provided for.—Not directed in modern endowment.]—In an appeal under Endowed Schools Act, 1869 (c. 56), s. 39, against a scheme framed by the Charity Comrs. under the Welsh Intermediate Education Act, 1889 (c. 40):—*Held*: (1) the policy of the scheme could not be considered. It could only be modified so far as it was not within the legal powers of its framers.

(2) Where there was no direction to that effect in the original instrument of foundation, nor any regulations prescribed by the founder or under his authority in his lifetime or within fifty years after his death, the scheme need not provide for instruction in religion according to the Established Church. Such regulation could not be presumed from any practice to that effect which may have obtained for many years.

(3) Welsh Intermediate Education Act (c. 40), s. 13, 1889, does not apply to rights of patronage which are not, at the date of the Act, exercised by a member of the governing body or possessed in consequence of his gift or donation.

(4) A modern endowment under the Welsh Act is one which had been given since the Act of 1869. Such endowment applied in fitting up a crypt, being part of the old endowment, as a chapel, is so mixed therewith that it cannot be conveniently separated therefrom, & must be deemed to be part thereof.—*Re* SWANSEA FREE GRAMMAR SCHOOL, [1894] A. C. 252; 63 L. J. P. C. 101; *sub nom.* SWANSEA GRAMMAR SCHOOL (GOVERNORS) v. CHARITY COMRS., 70 L. T. 738; 6 R. 470, P. C.

206. Modification of scheme.—To secure grants *in aid*.]—Where the primary object for which a secondary school was originally founded cannot be given effect to under its existing constitution without the aid of grants from the Board of Education, the ct. will modify the scheme of the Charity Comrs. under which the school is being administered, so far as necessary to comply with the regulations of the Board of Education & enable the school to secure the grants.—*Re* QUEEN'S SCHOOL, CHESTER, [1910] 1 Ch. 796; 79 L. J. Ch. 270; 102 L. T. 485; 26 T. L. R. 297; 54 Sol. Jo. 309.

#### D. Appeals.

See Endowed Schools Acts, 1869-1889; Board of Education Act, 1899 (c. 33).

207. Right of appeal.—Where aggregate income of charities exceeds £100.—Individual income less than £100.]—*Re* CHARITABLE GIFTS FOR PRISONERS, *Ex p.* CHRIST'S HOSPITAL (GOVERNORS), No. 225, *post*.

208. — Alteration of application of endowments.—By Charity Commissioners.]—*Re* ST. LEONARD, SHOREDITCH, PAROCHIAL SCHOOLS, No. 189, *ante*.

209. Who may appeal.—Only persons directly affected.]—*Re* SHAFTE'S CHARITY, No. 198, *ante*.

210. — — —.]—In appeal from a scheme relating to a grammar school:—*Held*: petitioners, who were ratepayers of the borough where the school was situate & parents of scholars attending the school, were not in either capacity persons directly affected by the scheme within Endowed Schools Act, 1869 (c. 56), s. 39, & therefore, had no *locus standi* for appeal.—*Re* COLCHESTER

GRAMMAR SCHOOL, [1898] A. C. 477; 67 L. J. P. C. 86; 78 L. T. 509; 14 T. L. R. 409, P. C.

211. — Not inhabitants of locality as such.]—*Re* SUTTON COLDFIELD GRAMMAR SCHOOL, No. 192, *ante*.

212. — Donation governors.—Having right of patronage.]—*Re* CHRIST'S HOSPITAL, No. 204, *ante*.

213. Grounds of appeal.—Limited by Endowed Schools Act, 1869 (c. 56), s. 39.]—*Re* SWANSEA FREE GRAMMAR SCHOOL, No. 205, *ante*.

#### SUB-SECT. 3.—ENDOWMENTS WITHIN AND WITHOUT FIFTY YEARS LIMIT.

214. Endowments within fifty years limit.—Expended on older property.—Consent of governors to scheme.]—*Re* CHRIST'S HOSPITAL, No. 204, *ante*.

215. — Scheme to include excepted endowments.—Jurisdiction of court.]—In 1890 a scheme was approved of under Endowed Schools Act, 1869 (c. 56), dealing with certain of the endowments of Christ's Hospital. Among the endowments excluded from the scheme of 1890 were educational & non-educational endowments which were of less than fifty years' standing on Aug. 2, 1869, the time limited for the commencement of the above Act. By the scheme of 1890 it was provided that the endowments dealt with by it should be administered by the governing bodies thereby constituted, namely, the governors & the council of almoners, in accordance with the scheme under the name of Christ's Hospital, the result being that with regard to the endowments comprised in the scheme the charity was reconstituted, but with regard to the excepted endowments the old governing body & its powers & duties as constituted & existing at the date of the scheme were left intact, & were wholly exempted from the operation of the scheme. The scheme under consideration proposed that all the excepted educational endowments should be made over to the governing body constituted by the scheme of 1890, in augmentation of the endowments already comprised therein, & should be dealt with & administered according to that scheme. The scheme was opposed by the existing governing body of the excepted endowments:—*Held*: it was beyond the jurisdiction of the ct. to sanction the scheme in the face of the opposition of the existing governing body, their title being founded on Royal Charter & established by Act of Parliament, & no breach of trust being charged.

Endowed Schools Act, 1869 (c. 56), s. 14, has left the jurisdiction of the ct. untouched in regard to endowments within the fifty years' limit; it has neither diminished nor increased the jurisdiction. The sect. can at most assist the ct. in the exercise of its discretion.—*A.-G. v. CHRIST'S HOSPITAL* (GOVERNORS), [1896] 1 Ch. 879; 65 L. J. Ch. 646; 74 L. T. 96; 60 J. P. 246; 44 W. R. 379; 12 T. L. R. 242; 40 Sol. Jo. 353.

216. Charitable endowments outside fifty years limit.—Effect of appropriation for educational purposes.—By Court of Chancery.]—(1) Endowments originally given for charitable uses but made applicable to the purposes of education by a scheme & an order of the Ct. of Ch. are educational endowments within Endowed Schools Act, 1869 (c. 56), s. 5. Where such endowments were actually given more than fifty years before the passing of the Act:—*Held*: such subsequent appropriation of them as aforesaid could not be





**Sect. 8.—Powers under the Endowed Schools Acts:**  
*Sub-sects. 3, 4 & 5. Sects. 9 & 10.]*

deemed to be an original gift thereof within sects. 14 (1) or 19 (2) so as to require the assent of their governing body to any scheme or provision made by the Charity Comrs. relating thereto.

(2) Where the scheme of the Charity Comrs. increased the amount of tuition fees previously payable by a certain class of boys & added the condition that the trustees should be satisfied that aid was needed by their parents:—*Held*: such provision did not fail in due regard to their educational interests within Endowed Schools Acts, 1869 (c. 56), s. 11, & 1873 (c. 87), s. 5.—*ROSS v. CHARITY COMRS.* (1882), 7 App. Cas. 463; *sub nom. ROSS v. CHARITY COMRS., Re ST. DUNSTON-IN-THE-EAST*, 51 L. J. P. C. 106; 47 L. T. 172, P. C.

*Annotations*:—*As to* (1) *Reid. Re Betton's Charity*, [1908] 1 Ch. 205. *As to* (2) *Appld. Re Berkhamsted Grammar School*, [1908] 2 Ch. 25.

**217. — By governing body.]—***Re CHRIST'S HOSPITAL*, No. 204, *ante*.

**218. Effect of scheme under Endowed Schools Act, 1869 (c. 56)—Abrogation of pre-existing statutes—Unless expressly preserved.]—**A scheme for the government of an endowed school framed by the Comrs. under the above Act abrogates all pre-existing statutes except so far as they may be expressly preserved by such scheme.—*CHESTER (DEAN & CHAPTER) v. CHESTER (Bp.)* (1902), 87 L. T. 618; 19 T. L. R. 131, H. L.; *reversd. S. C. sub nom. R. v. CHESTER (Bp.)* (1901), 17 T. L. R. 533, C. A.

**SUB-SECT. 4.—APPORTIONMENT OF MIXED CHARITIES.**

**219. Less than half endowment for educational purposes—Consent of governing body—Jurisdiction of court.]—**An ancient charitable corpn. was regulated by a scheme contained in an Act of Parliament, which provided that the directions of the ct. might, whenever needed, be obtained by application in a certain information. Under the Act the charity was partly educational & partly non-educational, but less than one half was applicable to education. The corpn. refused to assent to a scheme being framed under Endowed School Acts appointing new trustees & altering the mode of dealing with the estates, & it subsequently presented a petition to the ct. asking that alterations might be made in the existing scheme:—*Held*: (1) the jurisdiction of the ct. was not excluded by Endowed Schools Acts; (2) the corpn. was the governing body; (3) there was no power to frame a scheme under Endowed Schools Act, 1869 (c. 56), s. 24 (3), appointing new trustees of the non-educational part of the endowment where the governing body refused to assent; (4) Endowed Schools Act, 1874 (c. 87), s. 6, consequently did not apply; (5) the ct. would not refuse to exercise its jurisdiction, because if the corpn. had assented, a scheme might have been made under Endowed Schools Acts.—*A-G. v. MOISES* (1879), Tudor's Charitable Trusts, 4th ed., p. 1036.

*Annotation*:—*As to* (1) *Consol. A-G. v. Christ Church, Oxford*, [1894] 3 Ch. 524.

**220. Mixed old & modern endowments—Separation impossible.]—***Re SWANSEA FREE GRAMMAR SCHOOL*, No. 205, *ante*.

**221. Scheme of Charity Commissioners not final—Powers of Board of Education.]—***Re BETTON'S CHARITY*, No. 193, *ante*.

**SUB-SECT. 5.—TENURE OF OFFICE OF MASTERS.**

**222. Dismissal of assistant master—Notice of dismissal—Power to dismiss.]—**A scheme made under Endowed Schools Act, 1869 (c. 56), with regard to an endowed school, provided that the foundation should be administered by a body of governors, who should appoint the headmaster of the school, & that the headmaster should have the sole power of appointing, & might "at pleasure" dismiss, all assistant masters in the school. In an action for wrongful dismissal by a pltf. who had been an assistant master in the school against the governors in respect of his dismissal by the headmaster without notice, the jury found that a custom existed entitling assistant masters in endowed schools to a term's notice of dismissal:—*Held*: such a custom as above-mentioned was excluded by the terms of the scheme, & therefore, pltf. was not entitled to notice of dismissal, & in any case the action was not maintainable against the governors.—*WRIGHT v. ZETLAND (MARQUIS)* [1908] 1 K. B. 63; 77 L. J. K. B. 152; 97 L. T. 807; 24 T. L. R. 48, C. A.

*Annotations*:—*Consol. Wood v. Prestwich* (1911), 104 L. T. 388. *Reid. Mansell v. Griffin* (1907), 24 T. L. R. 67.

*See* Endowed Schools (Masters) Act, 1908 (c. 39), s. 1 (3).

**223. Compensation to master—On dismissal.]—***Re ALLEYN'S COLLEGE, DULWICH*, No. 200, *ante*.

**224. — School premises sold by governors.]—**The governors of the grammar school of G. were incorporated by Royal Charter, & were seised in fee of the school, of the school-house, & premises; they were to find a house in which the school should be fitly kept; they had also power to elect & remove the master as often as, according to their discretion, they might see necessary & convenient. W. was appointed master in 1843, & put into possession of the school-house, with a garden & play-ground attached to it. The appointment of W. was subject to the terms that he should keep the school-house in repair; that he should take certain articles at a valuation, & when he should quit the mastership, leave them to be taken by the succeeding master at a valuation; that he should give three calendar months' notice, ending on June 21, or Dec. 21, if he wished to relinquish his appointment; & that, upon the same notice, two-thirds of the governors, with the sanction of the bishop, should have the power of removing him. In 1843 a railway co. bought of the governors part of the premises of which W. was in possession as master of the school, for a sum which was to include compensation for all damage & incumbrance sustained by the governors or W. by reason of the co. taking the land. The interest of W. in the residue of the premises was injuriously affected, & he proceeded, under Land Clauses Act, 1845 (c. 18), s. 68, to determine the amount of his compensation. Upon *mandamus* to the co. to take up the award of the arbitrator:—*Held*: W. had no greater interest in the house than as tenant for a year, or from year to year, & therefore, was not entitled to have his claim settled by arbn. under sect. 68 of the above Act, but could obtain compensation only by the determination of two justices, under sect. 121.—*R. v. MANCHESTER, ETC. RY. CO.* (1854), 4 E. & B. 88; 23 L. T. O. S. 287; 1 Jur. N. S. 419; 2 W. R. 591; 18 J. P. Jo. 487; 110 E. R. 35.

*Annotations*:—*Consol. Re Allyn's College, Dulwich* (1875), 1 App. Cas. 68. *Reid. R. v. Met. Ry.* (1862), 8 Jur. N. S. 617; *Knapp v. L. C. & D. Ry.* (1863), 2 H. & C. 212. *Mentd. Cameron v. Charing Cross Ry.* (1864), 12 W. R. 803.

# SECT. 9.—CONVERSION OF NON-EDUCATIONAL CHARITIES TO EDUCATION.

**225. Powers of Charity Commissioners—Pendency of scheme—Jurisdiction of Court of Chancery.**—If the Endowed Schools Comrs. have not made a declaration under Endowed Schools Act, 1869 (c. 50), s. 30, that it is desirable to apply, for the advancement of education, the income of a charitable endowment not previously applicable to education, the mere pendency of a scheme before the Comrs. is no reason why the Ct. of Ch. should not exercise its jurisdiction to settle a scheme for the management of the charity; but the governing body of the charity ought to have an opportunity of proposing their own scheme in chambers, in opposition to the scheme of the A.-G. The right of appeal from an order of the Vice-Chancellor, under Charitable Trusts Act, 1853 (c. 137), s. 28 extends to cases where the aggregate income of several charities dealt with by the order exceeds £100, although the income of each charity separately is less than that amount.—*Re CHARITABLE GIFTS FOR PRISONERS, Ex p. CHRIST'S HOSPITAL (GOVERNORS)* (1872), 8 Ch. App. 199; 42 L. J. Ch. 391; 28 L. T. 84; 21 W. R. 213, L. C. & L. J.J.

## SECT. 10.—GRAMMAR SCHOOLS.

See Grammar Schools Act, 1840 (c. 77).

**226. Misapplication of revenue—Jurisdiction of court.**—The ct. will not interfere where particular powers are given by charter as to a school though not appointing general visitors but will as to management of the revenue & make the master on collusion with the usher account for fifteen years salary.—*A.-G. v. BEDFORD CORPN.* (1751), 2 Ves. Sen. 505; 28 E. R. 323, L. C.

*Annotation:—Re Bedford Charity* (1833), 5 Sim. 578.

**227. Breach of duty in managing school—Not amounting to trust—Proper remedy through visitor.**—If, on the true construction of the statutes of a college, the college are trustees for the maintenance of a free grammar school for the public, the ct. having authority to enforce the execution of the trust, any breach of trust will be redressed by it in the exercise of its ordinary jurisdiction; but if the master & usher of the school are only officers appointed to perform certain duties of the college, & the duty of appointing them is not otherwise annexed to the mere property of the college than by the necessity of paying certain fixed stipends, & not in the nature of a trust the execution of which is within the jurisdiction of the ct. to enforce, but the observance of which is to be enforced by the visitor of the college, the breach of duty, whatever it may be, must be redressed by the authority of the visitor, & not in this ct.—*A.-G. v. MAGDALEN COLLEGE, OXFORD* (1817), 10 Beav. 102; 7 Hare, 504; 16 L. J. Ch. 391; 10 L. T. O. S. 85; 11 Jur. 681; 50 E. R. 637.

*Annotation:—Fidd. Whiston v. Rochester* (1819), 7 Hare, 532.

**228. Alteration of scheme of education—Commercial subjects not allowed.**—The nature of a charity can be changed by an application to objects different from those intended by the founder, only, where it is clear, that by a strict adherence to the plan his general object will be destroyed; not upon the notion of advantage to the inhabitants of the place. Therefore, the foundation being a free grammar school at Leeds, for teaching grammatically the learned languages:—*Held*: permission for the application of part of the funds

to procure masters for French, German, & to other establishments with a view to commerce would be refused.—*A.-G. v. WHITELEY* (1805), 11 Ves. 211; 32 E. R. 1080, L. C.

*Annotations:—Apld. Re Highgate School* (1838), 2 Jur. 774. *Reid. A.-G. v. Hartley* (1820), 2 Jac. & W. 353; *A.-G. v. Christ Church* (1822), Jac. 474. *Mentl. Lang v. Purves* (1862), 15 Moo. P. C. C. 389; *Re Weir Hospital*, [1910] 2 Ch. 124.

**229. — Confined to classical education.**—Where a school upon the true construction of the instruments establishing it, ought to be a grammar school for instruction in the classics, the trustees will not be permitted to convert it into a school for teaching merely English, writing, & arithmetic, though it had ceased, from before the time of living memory, to be a place for classical education, & though it appeared from old regulations, that elementary instruction in English had always been one of the objects of the institution.—*A.-G. v. MANSFIELD (EARL)* (1827), 2 Russ. 501; 38 E. R. 423, L. C.

*Annotations:—Mentl. Clephane v. Edinburgh* (1869), L. R. 1 Sc. & Div. 417; *Re Weir Hospital*, [1910] 2 Ch. 124.

**230. — Mathematics not allowed.**—A petition to engraft the teaching mathematics, etc., upon the course of study in a grammar school set aside because inconsistent with the decree.—*Re Highgate School*, (1838), 2 Jur. 774.

**231. — Funds insufficient.**—Where the funds of a grammar school are not greater than are required to carry out the objects of the founder, the ct. will be unwilling to extend the system of education, more particularly where the scholars would probably lose the benefit of exhibitions at the universities, & where instruction in other branches of education is given for the payment of a small annual sum.—*Re Marlborough School*, (1843), 13 L. J. Ch. 2; 2 L. T. O. S. 93; 7 J. P. 223; 7 Jur. 1047, L. C.

**232. —**—An extended scheme of gratuitous education, which had been settled by the ct. in 1849, for the regulation of a free grammar school, having become impracticable through the diminution of the charity fund, a new scheme, on the application of the trustees, had been drawn up, & sanctioned. On appeal:—*Held*: (1) it would be confirmed so far as it provided for the increase of funds by the admission of additional scholars on the payment of capitation fees, & for the expenditure of such funds for the benefit of all classes of scholars, but would be varied, so far as it made a competitive examination the instrument of selection of the free scholars, & established distinctions, other than the payment of capitation fees, between the free & the paying scholars; (2) the scheme would be remodelled as to the order of introduction of the new purposes in case the income should not be sufficient for all, & also, with a view to increase the proportion of masters to scholars.

(3) Provisions tending to the introduction into a free school of boys of different degrees of social standing, are neither in themselves adverse to the original constitution of the school as a free school, nor necessarily detrimental to the interests of the poorer class.

(4) Provisions for the selection of scholars of a free school by means of a competitive examination are in favour of clever boys & the children of the wealthier classes, & are not in accordance with the presumable intention of the founder in favour of education generally.

(5) Where a scheme for the management of a charity has become impracticable in any of its details, it is the positive duty of the trustees to



schools; but the number of boarders admitted ought not to be such as in any manner to affect the admission of free boys, or the means of educating them to the best advantage, according to the provisions of the scheme.—*A.-G. v. WORCESTER (Bp.)* (1851), 9 Hare, 328; 21 L. J. Ch. 25; 18 L. T. O. S. 86; 15 J. P. 831; 16 Jur. 3; 68 E. R. 530.

*Annotations*.—*Consd. Re Bristol Free Grammar School* (1860), 28 Beav. 161. *Reid. Manchester School Case* (1867), 2 Ch. App. 497. *Mentd. Re Sir John Port's Hospital & Free-School* (1852), 16 J. P. 196; *Re Manchester New College* (1855), 16 Beav. 610; *Re Chelmsford Grammar School* (1855), 3 Eq. Rep. 517; *A.-G. v. St. John's Hospital, Bath* (1865), 1 Ch. App. 92; *A.-G. v. Stewart* (1872), L. R. 14 Eq. 17; *Re Browne's Hospital v. Stamford* (1889), 60 L. T. 288; *Re Betton's Charity*, [1908] 1 Ch. 205.

**241.** ———. — The ct., under the circumstances, refused to sanction the introduction of a clause into a scheme authorising the master of a grammar school to take boarders.—*A.-G. v. GLOUCESTER CORPN.* (1860), 28 Beav. 438; 51 E. R. 434.

**242.** ———. — (1) In considering the question as to the propriety of introduction of boarders into free grammar schools, each case must be tried on its own merits.

(2) The ct., in 1860, refused to alter a scheme made in 1847, prohibiting the masters of the Bristol Free Grammar School taking boarders, the school being very prosperous, & there appearing on necessity for admitting them.

(3) In those grammar schools which are, from their position & neighbourhood, well attended by free scholars, boarders should not be admitted, unless to such a limited extent as not to interfere with the general character of the school; & when a school has attained a great amount of success under this system, it would be foreign to the duty or province of this ct. to interfere with or alter the system.—*Re BRISTOL FREE GRAMMAR SCHOOL* (1860), 28 Beav. 161; 29 L. J. Ch. 514; 2 L. T. 74; 6 Jur. N. S. 285; 51 E. R. 327; *sub nom. A.-G. v. BRISTOL CORPN. GRAMMAR SCHOOL*, 24 J. P. 105.

*Annotation*.—*Mentd. Manchester School Case* (1865), L. R. 1 Eq. 55.

**243. Boarders permitted.**—A school having been founded by letters patent in the town of B., & afterwards incorporated by statute, for "the teaching of children in grammar freely, without any exaction or request of money, not exceeding the number of 144":—*Held*: (1) instruction in Latin & Greek was made imperative by the terms of the foundation; (2) the average number of scholars presenting themselves from the town of B. & its neighbourhood having never exceeded fifty, the ct. would refuse to adopt a proposal for increasing the number of scholars by throwing the school open to the whole world, & establishing dames' houses in the town, & would sanction a scheme for enlarging the school by allowing the headmaster to take boarders; (3) an offer of a grant of money to an endowed school, accompanied by conditions that exhibitions to the university of like amount to the interest of the grant should be maintained out of the school revenues, & the capital of the grant applied in restoration & enlargement of the masters' houses, would be accepted by the ct.

(4) A scheme having been settled in 1857, providing that £5 a year should be paid to the masters for each foundation boy out of the school revenues, so far as they would extend, & when they failed, then by the parents of such foundation boy; & that £9 a year should be paid by the parents of each boy not on the foundation, the

ct. varied the scheme by directing that a fee of £3 3s. a year should be paid for each foundation boy, to the number of fifty out of the school revenues, & that 144 foundation scholars should be elected, with preference to town boys, for whom capitation fees were to be paid out of the revenues of the school, so far as the income would extend, but that no town boy should pay more than £3 3s. as a capitation fee.—*BERKHAMPSTEAD SCHOOL CASE* (1865), L. R. 1 Eq. 102.

*Annotations*.—*Mentd. Manchester School Case* (1865), L. R. 1 Eq. 55; *Re Berkhamsted Grammar School*, [1908] 2 Ch. 25.

**244. Enlarging number of scholars—Scheme rejected.**—*BERKHAMPSTEAD SCHOOL CASE*, No. 243, *ante*.

**245.** ———. **Paying scholars introduced—Scheme allowed.**—*MANCHESTER SCHOOL CASE*, No. 232, *ante*.

**246. Religious instruction—Discretion of headmaster.**—(1) In settling a scheme for a grammar school, where the headmaster is to be a graduate of Oxford or Cambridge, & in holy orders, the ct. will give no specific directions as to religious instruction or discipline, but will leave the details of both to the discretion of the headmaster.

(2) Restrictions imposed on the master of a free grammar school as to holding ecclesiastical preferment.—*Re KING'S GRAMMAR SCHOOL, WARWICK* (1845), 1 Ph. 564; 14 L. J. Ch. 338; 4 L. T. O. S. 349; 9 J. P. 178; 41 E. R. 747.

*Annotations*.—*Mentd. A.-G. v. Worcester, Bp.* (1851), 9 Hare, 328; *Re Chelmsford Grammar School* (1855), 3 Eq. Rep. 517.

**247.** ———. **Exemption of dissenters—Powers of visitor.**—Upon an information, filed on behalf of divers dissenters from the Church of England, against the governors of a school founded & endowed by Edward VI., to obtain a declaration that the religious teaching prevented them from obtaining the advantages of the school, & that it was contrary to the intention of the founder & a breach of trust, & that it might be altered:—*Held*: the question related to the internal management of the school, & it must be left for the consideration of the visitor.—*A.-G. v. SHELBORNE GRAMMAR SCHOOL (GOVERNORS, ETC.)* (1854), 18 Beav. 256; 2 Eq. Rep. 917; 24 L. J. Ch. 74; 23 L. T. O. S. 326; 18 J. P. 312; 18 Jur. 630; 2 W. R. 396; 52 E. R. 101.

*Annotations*.—*Fold. Re Stafford Charities* (1858), 31 L. T. O. S. 20. *Reid. Re Chelmsford Grammar School* (1855), 1 K. & J. 513. *Mentd. Re Campden Charities* (1881), 18 Ch. D. 310; *Re Weir Hospital*, [1910] 2 Ch. 124.

**248.** ———. A testator in 1614 founded a preachingship, a school & almshouses, but neither by the will nor by the Royal Charter of foundation was any provision made as to the religious instruction of the scholars; the latter empowered the governors to make such reasonable statutes for the "good rule & governance" of the school as they should think proper, so as not to be repugnant to the laws of the realm. Statutes were accordingly made, requiring the scholars to attend church & receive religious instruction:—*Held*: (1) this was not a Church of England school; (2) the ct. would order, in a proposed new scheme, that children, whose parents objected, should neither be compelled to attend church, or to receive religious instruction.—*A.-G. v. HABERDAHERS' CO.* (1854), 19 Beav. 385; 24 L. J. Ch. 329; 23 L. T. O. S. 328; 52 E. R. 399.

**249.** ———. **BASINGSTOKE SCHOOL CASE** (unreported), cited 25 L. T. O. S. 33. *Annotation*.—*Consd. Re Chelmsford Grammar School* (1855), 3 Eq. Rep. 517.





## Part XVI.—Grant of Land for Educational Purposes.

### SECT. 1.—IN GENERAL.

**Educational purposes.**—*See* CHARITIES, Vol. VIII., pp. 245-248, No. 51 *et seq.*

**Land acquired compulsorily.**—*See* COMPULSORY PURCHASE, Vol. XI., p. 204, No. 2226-2229.

### SECT. 2.—GRANTS UNDER THE SCHOOL SITES ACTS.

*See* School Sites Acts, 1841 (c. 38), 1841 (c. 37), 1849 (c. 40), 1851 (c. 24), 1852 (c. 49).

**Liability for cost of street improvement.**—*See* Sect. 4, *post*.

**258. Subsequent exchange—Not made by deed Prescriptive title acquired by trustee.**—*BROWN v. PATTERSON* (1809), 13 Sol. Jo. 208.

*Annotation*:—*Mentd.* *Harper v. Hodges*, [1923] 2 K. B. 314.

**259. Failure of purpose—Reverter to estate of donor.**—In 1868 S. executed a deed poll under School Sites Act, 1841 (c. 38), s. 2, conveying to the minister & churchwardens of a parish a piece of land for the purposes of the Act & upon trust to permit the premises & all buildings to be erected thereon to be used as a school for the education of children & adults of the poorer classes of the parish & for no other purpose. The schools were to be open to the inspection of the Established Church inspectors & managed by the principal minister of the parish, who was to superintend the religious & moral instruction of the scholars & might use the premises for a Sunday school. A school was erected on the land & used till 1907 as a public elementary school, when it ceased to be used except as a Sunday school. S. claimed that the premises had reverted to him under the Act; the Board of Education contended that they were still devoted to charity & that a scheme ought to be settled for the future administration thereof:

*Held*: inasmuch as the school had ceased to be used for the purposes specified in the deed poll it had reverted to the estate of S., the donor, although it had been continuously used for other purposes specified in the Act.—*A.-G. v. SHADWELL*, [1910] 1 Ch. 92; 79 L. J. Ch. 113; 101 L. T. 630; 20 T. L. R. 82; 54 Sol. Jo. 180.

*Annotation*:—*Reid*, *A.-G. v. Price* (1911), 75 J. P. 566.

**Scheme cy-pres.**—*See* CHARITIES, Vol. VIII., p. 347, Nos. 1408-1411.

### SECT. 3.—TECHNICAL AND INDUSTRIAL INSTITUTIONS.

**260. Gift within year of donor's death—Direction in will to executors to execute conveyance—Technical & Industrial Institutions Act, 1892 (c. 29), sects. 2, 6, & 10.**—By his will, dated Mar. 1908, the testator, by clause 2, gave all his real & personal estate, with certain exceptions, to his exors. upon the trusts thereafter declared, & by clause 5, after referring to a technical trade school which the testator had erected on his freehold land, & which he intended to endow, he directed his exors., in case he might not have executed a conveyance of the school & premises, & of other real & personal property, which by reason of his death within twelve months from its execution should have become void, to execute & enrol a conveyance. By deed dated Oct. 20, 1908, & duly enrolled, the testator conveyed to a trustee the freehold lands & buildings described in the first

schedule thereto, upon trusts therein declared, for the maintenance of the school & the education of the scholars. Part 1, of the first schedule comprised the site of the school; Part 2 comprised freehold ground-rents as an endowment for the school; & Part 3 comprised the freehold residence of the testator. The testator died in Aug. 1909:—*Held*: the site of the school described in Part 1 of the schedule to the deed of Oct. 20, 1908, passed by that deed by virtue of the provisions of the above Act; the remainder of the property described in Parts 2 & 3 of the schedule to the deed passed under the testator's will to the exors.; & clause 5 of the will operated as a good equitable devise of that property to charitable uses.—*Re STANLEY'S TRUST DEED*, *STANLEY v. A.-G.* (1910), 20 T. L. R. 365.

### SECT. 4.—LIABILITY FOR COST OF STREET IMPROVEMENT.

**261. Trustee as "owner"**—*School Sites Act, 1841 (c. 38).*—A charity school was established in W. on premises granted under the provisions of the above Act of which applt. was a trustee, receiving no rent, & deriving no profit therefrom. The Local Board of Health of W., acting under Public Health Act, 1848 (c. 63), s. 69, gave proper notice that certain works therein mentioned should be done in a street upon which the school abutted, which works not being effected the board themselves did them, & charged the expenses to applt. as "owner," as described by sect. 2 of the 1848 Act: *Held*: they were justified in so doing.—*BOWDITCH v. WAKEFIELD LOCAL BOARD* (1871), L. R. 6 Q. B. 567; 40 L. J. M. C. 214; 25 L. T. 88; 36 J. P. 197.

*Annotations*:—*Consd.* *Wright v. Ingle* (1885), 16 Q. B. D. 379. *Distd.* *Re Christchurch Inclosure Act*, *Meyrick v. A.-G.*, [1894] 3 Ch. 209. *Follid.* *Hornsey District Council v. Smith*, [1897] 1 Ch. 813. *Reid*. *Pound v. Plumstead Board of Works* (1871), L. R. 7 Q. B. 183; *Plumstead Board of Works v. British Land Co.* (1874), L. R. 10 Q. B. 16; *Truman, Hanbury & Buxton v. Kerslake*, [1894] 2 Q. B. 774; *St. Mary, Islington Vestry v. Cobbett*, [1895] 1 Q. B. 369; *Hackney Corp'n. v. Lee Conservancy Board*, [1904] 2 K. B. 541; *Hampstead Corp'n. v. Mid. Ry.*, [1905] 1 K. B. 538.

**262. Whether charge enforceable by order for sale.**—Under sect. 6 of the above Act, a piece of land was conveyed in the form given in sect. 10 to trustees for ever for the purposes of the Act, as a site for a National School, " & for no other purpose whatever "; & a National School was afterwards erected upon it. The local authority under Public Health Act, 1875 (c. 55), s. 150, made up a street on part of which the school premises abutted, & served the trustees with notice under that Act to pay the apportioned expenses:—*Held*: (1) the trustees were liable for those expenses as " owners " within the 1875 Act, & therefore the expenses were, until recovery thereof, a " charge " upon the premises under sect. 257; but (2) the local authority could not enforce the charge by an order for sale of the school premises since such an order would be in contravention of the 1841 Act.—*HORNSEY DISTRICT COUNCIL v. SMITH*, [1897] 1 Ch. 813; 66 L. J. Ch. 479; 76 L. T. 431; 45 W. R. 581; 13 T. L. R. 322; 41 Sol. Jo. 423, C. A.

*Annotations*:—*Reid*. *L. C. C. v. Wandsworth B. C.*, [1903] 1 K. B. 797; *Hackney Corp'n. v. Lee Conservancy Board*, [1904] 2 K. B. 511; *Hampstead Corp'n. v. Mid. Ry.* (1905), 92 L. T. 252.

**Grants under School Sites Acts.**—*See* Sect. 2, *ante*.

## Part XVII.—Schoolmasters and Teachers.

### SECT. 1.—CANDIDATES FOR THE TEACHING PROFESSION.

Infant candidates.—Bound by terms of Board of Education grants.]—See 1921 Act (c. 51), s. 168.

### SECT. 2.—REGISTRATION.

See Education (Administrative Provisions) Act, 1907 (c. 43), s. 16.

### SECT. 3.—SCHOOLMASTERS IN LOCO PARENTIS.

263. General rule.]—FITZGERALD v. NORTH-COTE, No. 266, *post*.

264. —.]—The duty of a schoolmaster in relation to his pupils is that of a careful father (DARLING, J.).—SHEPHERD v. ESSEX COUNTY COUNCIL (1913), 20 T. L. R. 303.

265. Breach by parent of school rules—Right of headmaster to decline to receive pupil back.]—Deft.'s son was a pupil at pltf.'s school, one of the rules of which, deft. having notice of it, was that no "exeat" or permission to leave the school & remain away for one night, was allowed during Easter term. During Easter term deft. requested that his son might be allowed to come home & remain for the night, which pltf. refused to allow; but subsequently, on deft. repeating the request & sending a servant for the boy, pltf. allowed him to go home, writing to deft. at the same time that he did so on the understanding that the boy returned the same night. On the boy reaching home, deft. telegraphed to pltf. that it was not convenient to send the boy that day, but he could return the next morning, to which pltf. telegraphed in reply, that unless deft.'s son returned that night, he should not receive him back. In consequence of the last telegram deft. did not send the boy back, & the present action was brought to recover the school fees due on the first day of Easter term, of which term less than three weeks had expired when the boy left. Deft. paid £13 into ct. with a denial of liability, & counter-claimed damages for breach of contract by pltf. :—*Held*: (1) pltf.'s contract was to board, lodge & educate deft.'s son for the term on the condition that he should be at liberty to enforce with regard to the boy the rules of the school, or such of them as were known to deft.; this condition having been broken by deft., pltf. had the right to refuse to complete his contract, & was consequently entitled to succeed in this action both on claim & counter-claim.

#### PART XVII. SECT. 1.

a. Qualifications of separate school teachers.—Identical with those of common school teachers.]—The general policy declared by later statutory enactments is to require teachers of separate schools to undergo the same examinations & receive the same certificates as common school teachers, but some persons are exempted from its immediate operation.—GRATTAN v. OTTAWA ROMAN CATHOLIC SEPARATE SCHOOL TRUSTEES (1904), 9 O. L. R. 433; 25 C. L. T. 104; 4 O. W. R. 389.—CAN.

#### PART XVII. SECT. 2.

f. Statutory classification of teachers.—Status wrongly assigned.]—Where

under Victorian Public Service Act, 1883, s. 49, every school teacher employed in a State school at the date of the Act was directed to be classified as in the Act provided, & the classifiers thereunder assigned to resp. the status of a junior assistant :—*Held*: according to the true construction of the Act, resp. not being in point of fact at the date of the Act a junior assistant, could not legally be classified as such; but having had at that time a definite status as assistant teacher, she was entitled to be classified accordingly. The term "junior assistant" was not interpreted by the Act, & did not denote any denomination of teacher existing at its date, & there was no power under the Act to apply the term

(2) The parental authority in case of conflict must of course prevail, & the father might, no doubt, have had a *habeas corpus* if the master detained his son against his wish (WILLS, J.).—PRICE v. WILKINS (1888), 58 L. T. 680; 4 T. L. R. 231.

Annotation :—As to (1) *Reid*. Wood v. Prestwich (1911), 104 L. T. 388.

Liability for negligence.]—See Sect. 8, *post*.

Punishment of pupils.]—See Sect. 4, sub-sect. 2, *post*.

Custody of children.]—See INFANTS.

### SECT. 4.—POWERS AND DUTIES.

#### SUB-SECT. 1.—EXPULSION OF PUPILS.

266. Authority of master—Must be exercised reasonably.]—(1) Although the master of a school has the same authority over the scholars as the parents would have, & therefore, may impose reasonable restraints upon their persons, either by way of prevention, or punishment of disorderly conduct, yet he has not a discretionary power of expulsion; but only for reasonable cause. In judging of the cause, however, great regard must be had to his necessary discretion as to the enforcement of discipline; & the wilful breach of its reasonable rules may be sufficient cause, & the repetition of acts of disobedience, each in itself separately insufficient, may be sufficient, as showing a persistent disregard of discipline, & a habit of disobedience. But, if the expulsion is justified on the ground of some particular act, or conduct, not only as likely to be seriously injurious to the peace & good order of the establishment, but as committed with that object, it must appear that it was of that character, or the justification would fail.

To a declaration for an assault & false imprisonment of a youth, & forcibly taking from him a pocket-book & manuscripts, deft. pleaded a special plea setting forth, in effect, that deft. was superior at a college; that pltf. was a pupil there under his charge; that a society, or combination, had been formed among the pupils for purposes subversive of the discipline of the school, & that pltf. was a member & promoter of that society; that, in order to ascertain the particulars of such society, he authorised deft. to enquire of pltf. thereon, & to detain him while so doing, & to take the pocket-book & manuscripts which contained entries relating to the society, & justifying the matters charged in the first count as necessarily done to obtain possession of the pocket-book with a view to preserve the discipline & due government of the

to resp., so as to alter her position.—MAIN v. STARK (1890), 15 App. Cas. 384.—AUS.

#### PART XVII. SECT. 4, SUB-SECT. 1.

g. Responsibility of trustees.]—(On Dec. 3, 1884, a school teacher dismissed pltf. for disobedience, etc. The matter was brought before the trustees, & on Jan. 6 they passed a resolution that the boy could return to school on his expressing regret for his misconduct. After the receipt of a soir's letter on behalf of the father, the trustees, on Feb. 10, passed a resolution that the boy could return to school after one day's suspension. On Feb. 11, another resolution was passed

school; & that having found therein proof of the conspiracy, he sentenced *pltf.* to expulsion, & confined him to his room, until he could be conveniently expelled, in order to prevent communication with the other boys. On other pleas, a similar justification was pleaded: one set of pleas averring that such a society had, in fact, been established among the pupils; another, that *deft.* had reasonable ground for believing that such was the fact. Issue being joined on these pleas:—*Held*: *deft.* having been informed that the pocket-book contained the proofs & particulars of such a conspiracy as was described, he was justified in demanding & forcibly taking it; the subsequent imprisonment could only be justified if the expulsion was justified; the expulsion could only be justified upon good & sufficient legal cause; the supposed association would afford such a justification if it had the serious object & design alleged, but not otherwise.

(2) As to going to public-houses, it is most reasonable that there should be a rule against it, & against frequenting them for purposes of diversion (*COCKBURN, C.J.*).

(3) As to pistol firing, it is most reasonable that there should be a general rule against the use of fire-arms by the boys at the school (*COCKBURN, C.J.*).

(4) It is incidental to the authority of a headmaster to expel from the school over which he presides any scholar or student whose conduct is such that he cannot any longer be permitted to remain without danger to the school. This is not a power to be exercised arbitrarily—it may be questioned; & although, no doubt, a large discretion must be allowed, it must not be exercised wantonly or capriciously (*COCKBURN, C.J.*).

(5) A parent when he places his child with a schoolmaster, delegates to him all his own authority, so far as it is necessary for the welfare of the child (*COCKBURN, C.J.*).

(6) There is an implied contract between the parent & the preceptor that the latter will continue to educate the child so long as his conduct does not warrant his expulsion from the school (*COCKBURN, C.J.*).—*FITZGERALD v. NORTHOTE* (1865), 4 F. & F. 656.

*Annotations*:—As to (1) & (4) *Consd.* *Wood v. Prestwich* (1911), 104 L. T. 388. *Reid. Hutt v. Haileybury College* (1888), 4 T. L. R. 623; *Cleary v. Booth*, [1893] 1 Q. B. 465.

**267.** ————]—*HUTT v. HAILEYBURY COLLEGE (GOVERNORS)* (1888), 4 T. L. R. 623.

*Annotation*:—*Consd.* *Wood v. Prestwich* (1911), 104 L. T. 388.

**268.** ————]—*No action maintainable—Absence of mala fides of master.*—A scheme made under Endowed Schools Act, 1869 (c. 56), with regard to an endowed school, & which by sect. 45 of the

Act had the force of a statute, provided that the headmaster should have the power of expelling a boy for any adequate cause to be judged by him. The headmaster having expelled a boy for an offence alleged against him, an action was brought by the boy's father against the headmaster claiming damages for breach of contract:—*Held*: the terms of the scheme were binding upon the boy's father, & in the absence of *mala fides* upon *deft.*'s part in expelling the boy (which was not alleged) no action was maintainable against him.—*WOOD v. PRESTWICH* (1911), 104 L. T. 388; 75 J. P. 285; 27 T. L. R. 268; 55 Sol. Jo. 292.

**269.** ————]—*Statutory power—Parent bound by.*—*WOOD v. PRESTWICH*, No. 268, *ante*.

**270.** By school manager—*Forcible ejection—Assault.*—A certain school was, prior to Education Act, 1902 (c. 42), an elementary school provided & maintained by Roman Catholics for the education of Roman Catholics children, & it has since been managed by managers appointed in accordance with that Act, & *applt.*, a Roman Catholic priest, was the chairman of the managers. Owing to some disturbance in the school he had given order that a certain girl, a pupil in the school, should not return to the school. *Applt.* again came to the school during the time for religious instruction & seeing the girl present told her to leave the school, but the girl, who had been told by the headmistress not to leave, refused to leave, & thereupon *applt.* caught hold of her & forcibly pulled her out of her seat & pushed her out on to the highway. *Applt.*, having been summoned for assault, contended that as school manager & priest he had a right to order any child's name to be struck off the register, & was justified in ejecting the girl, & further set up that there was a *bona fide* claim of title to be decided, which ousted the jurisdiction:—*Held*: (the justices having convicted) there was no such title to land or interest in land involved as would oust the jurisdiction of the justices under Offences against the Person Act, 1861 (c. 100), s. 46, & there was nothing on the facts as found to oust their jurisdiction.—*LUCAN v. BARRETT* (1915), 84 L. J. K. B. 2130; 113 L. T. 737; 70 J. P. 463; 31 T. L. R. 508; 13 L. G. R. 1361; 25 Cox, C. C. 103, D. C.

#### \* SUB-SECT. 2. PUNISHMENT OF PUPILS.

**271.** Corporal punishment—*Moderate & reasonable.*—A schoolmaster who, on the second day after a boy's return to school, wrote to the parent proposing to beat him severely to subdue his alleged obstinacy, & on receiving the father's reply, assenting, beat the boy for two hours & a half secretly, in the night, & with a thick stick, until

reinstating the resolution of Jan. 6. The father was not notified nor was he present at the meetings of Jan. 6 & Feb. 11; but he was notified of, & was present at, the meeting of Feb. 10. The boy returned to school, but, relying on the resolution of Feb. 10, made no apology, & remained there for several days, but was not interfered with by the teacher, who, however, would give him no instruction. In an action against the teacher & trustees for an alleged wrongful dismissal:—*Held*: the action must be dismissed against the trustees; it was not their act, but that of the teacher, that caused the boy's removal; the passing of the resolution as to apologising was not an expulsion; the teacher in not instructing the boy was not acting under the trustees' direction; & they were not liable for not compelling her to give the

instruction.—*MCINTYRE v. BLANCHARD SCHOOL TRUSTEES* (1886), 11 O. R. 439.—*CAN.*

*b. Discretion of trustees & master.*—A pupil at a public school having injured the top of a school desk by cutting it, he was ordered by the schoolmaster to replace the top with his own hands, & was suspended till he should do so. The suspension was on Feb. 20, 1888, & on May 7, 1889, notice of motion was served by the father of the pupil for a *warrant* to compel the trustees to re-admit the son. In the meantime appeals had been made by the father to three of the trustees to the public school board, & to the annual school meeting, on all of which applications the action of the teacher was sustained. During this time the pupil attended another public school:—

*Held*: the discretion exercised by the master & trustees should not be interfered with, especially after the delay & change in the position of affairs.—*Re McCallum & Brant School Trustees* (1889), 17 O. R. 451. *CAN.*

#### PART XVII. SECT. 4. SUB-SECT. 2.

*k. Corporal punishment.*—A teacher in one of the public schools, was charged before the magistrate, for assaulting, beating & ill-using J., one of the pupils under his care, & was acquitted on the ground that there was not evidence of malice on the part of *deft.* or of permanent injury to the child:—*Held*: the only question properly before the stipendiary magistrate was whether the punishment was reasonable under the circumstances, or, in other words, whether there was

**Sect. 4.—Powers and duties: Sub-sect. 2. Sect. 5.]**

he died:—*Held*: (1) liable to a charge of manslaughter.

(2) A parent or a schoolmaster (who for this purpose represents the parent & has the parental authority delegated to him), may for the purpose of correcting what is evil in the child inflict moderate & reasonable corporal punishment, always, however, with this condition, that it is moderate & reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate & excessive in its nature or degree, or if it be protracted beyond the child's powers of endurance, or with an instrument unfitted for the purpose & calculated to produce danger to life or limb; in all such cases the punishment is excessive, the violence is unlawful, & if evil consequences to life or limb ensue, then the person inflicting it is answerable to the law, & if death ensues it will be manslaughter (COCKBURN, C.J.).

(3) It is true that the father authorised the chastisement, but he did not, & no law could, authorise an excessive chastisement (COCKBURN, C.J.).—*R. v. HOPLEY* (1860), 2 F. & F. 202.

*Annotation*: As to (2) *Held*. *Cleary v. Booth*, [1893] 1 Q. B. 465.

**272. — Delegation to monitors.**—*Re BASTINGSTOCK SCHOOL* (1877), 41 J. P. Jo. 118.

**273. — Delegation to assistant teacher—Forbidden by school regulations—Liability for assault.**—An assistant teacher in a public elementary school has authority to inflict corporal punishment on a pupil if the punishment inflicted is moderate, is not dictated by any bad motive, is such as is usual in the school, & such as the parent of the child might expect that the child would receive if it did wrong; & the fact that by the regulations of the school assistant teachers are forbidden to inflict corporal punishment will not of itself render the assistant teacher liable in an action by the pupil for assault. —*MANSSELL v. GRIFFIN*, [1908] 1 K. B. 947; 77 L. J. K. B. 676; 99 L. T. 132; 72 J. P. 179; 21 T. L. R. 431; 52 Sol. Jo. 376; 6 L. G. R. 548, C. A.

**274. — What is proper method—Caning on hand.**—A magistrate, being of opinion that caning on the hand was attended by risk of serious injury, convicted a board schoolmaster of an assault for giving a pupil four strokes, though the boy deserved corporal punishment, & the caning was inflicted unobjectionably & did not cause serious injury:—*Held*: the magistrate was wrong in his reasons & the conviction must be quashed. *GARDNER v. BYGRAVE* (1889), 53 J. P. 743; 6 T. L. R. 23, D. C.

**275. — For misconduct, outside school premises.**—The authority delegated by the parent of a pupil to a schoolmaster to punish a pupil is not limited to offences committed by the pupil

excess. — *R. v. GAUL* (1901), 36 N. S. R. 504.—**CAN.**

**1. — CAN.**—*R. v. ZINCK* (1910), 8 E. L. R. 178.—**CAN.**

**m. — Petty corrections.**—It is within the powers of the head of a school to inflict moderate & reasonable punishment on a boy, such as a couple of smacks on the cheek, for correcting unruly conduct or breaches of discipline.

The education rules which provide that "corporal punishment shall not be inflicted except in the case of moral delinquency or flagrant insubordination & shall be limited to six cuts on the hand" do not prohibit or regulate the petty corrections such as that in question which are necessary for maintaining the ordinary discipline of

a school. — *SANKUNNI v. SWAMEYATHA PATTAI* (1922), 1 L. R. 45 Mad. 548.—**IND.**

**n. — Authority of master.**—The authority of a schoolmaster to correct his pupil by corporal punishment arises not out of any supposed delegation of the parents' authority, but out of the relation of master & pupil & the necessities of the case; & the master of a public school under Education Act, 1877, has authority to administer such correction notwithstanding that that Act makes attendance at school compulsory. The principle adopted is that, in determining whether a punishment administered by a master was reasonable & for a sufficient cause, considerable allowance should be made to him by way of pro-

tection him in the exercise of his discretion, & if there is a reasonable doubt whether the punishment was excessive he should have the benefit of the doubt. The master's own word must have great weight when a question arises whether a pupil's failure to do his work arose from stubbornness or inattention, or other conduct deserving correction. — *HANSEN v. COLE* (1891), 9 N. Z. L. R. 272.—**N.Z.**

**276. — Pupil leaving school on threat of punishment—Right of master to determine whether offence serious.**—*GOLDNEY v. KING* (1910), *Times*, Feb. 7.

**277. — Cathedral music master—No right to punish chorister.**—A music-master of a cathedral is not justified in even moderately beating a chorister for singing at a catch club, though that might be injurious to his performing in the cathedral. Evidence of the practice of other cathedrals not admissible. — *NEWMAN v. BENNETT* (1819), 2 Chit. 195.

**278. Detention at school—Action for false imprisonment—Knowledge of infant necessary.**—An infant cannot maintain an action for assault & false imprisonment against a schoolmaster, who has improperly refused to deliver him up to his mother, without evidence that he knew of such refusal, and of some actual restraint upon him. — *HERRING v. BOYLE* (1834), 1 Cr. M. & R. 377; 6 C. & P. 406; 4 Tyr. 801; 3 L. J. Ex. 344; 140 E. R. 1120.

**279. — Reasonable restraint.**—*FITZGERALD v. NORTHCOTE*, No. 266, *ante*.

**280. — To learn home lessons—Whether assault on child.**—*R. v. WATSON* (1884), 48 J. P. Jo. 149.

**281. — For not doing home lessons—Liability for assault.**—Elementary Education Acts, 1870 (c. 75), & 1876 (c. 79), do not authorise the setting of lessons to be prepared at home by children attending a board school. The detention at school after school hours of a child for not doing home lessons is therefore unlawful, & renders the master who detains the child liable to be convicted for an assault. — *HUNTER v. JOHNSON* (1884), 13 Q. B. 11, 225; 53 L. J. M. C. 182; 51 L. T. 791; 48 J. P. 603; 32 W. R. 857; 15 Cox, C. C. 600, D. C.

*Annotations*: **Mentd.** *R. v. Linsberg & Leles* (1905), 69 J. P. 107; *Cleary v. Booth*, [1893] 1 Q. B. 465.

**282. — Parents' right to habeas corpus.**—*PRICE v. WILKINS*, No. 265, *ante*.

**Schoolmaster in loco parentis.**—*See Sect. 3, sub-sect. 1, ante.*

**SECT. 5.—REMUNERATION.**

**283. School closed by sanitary authority—Liability for loss of fees.**—The urban sanitary authority, owing to an attack of measles, ordered the board school to be closed for a fortnight,

teaching him in the exercise of his discretion, & if there is a reasonable doubt whether the punishment was excessive he should have the benefit of the doubt. The master's own word must have great weight when a question arises whether a pupil's failure to do his work arose from stubbornness or inattention, or other conduct deserving correction. — *HANSEN v. COLE* (1891), 9 N. Z. L. R. 272.—**N.Z.**

**PART XVII. SECT. 5.**

**o. Teachers' salary—Payment by municipality.**—A provincial enactment providing that a certain proportion of the salaries of public school teachers in a municipality shall be paid by the municipality is *intra vires*.—*A.G. v.*

whereby the master lost his fees, amounting to 30s. per week. He claimed compensation under the Public Health Act, 1875 (c. 55), s. 308 :—*Held* : no claim was competent, the power to close being given by the Education Code, 1886, s. 98, & not by the above Act.—**ROBERTS v. FALMOUTH SANITARY AUTHORITY** (1888), 52 J. P. 741; 4 T. L. R. 294.

**284. Superannuation fund—Right to return of contributions—After resignation.]**—A school board established & managed a superannuation fund for the payment of allowances to their officers & teachers upon their superannuation. This fund was provided by annual deductions from the salaries of the officers & teachers, made in pursuance of contracts between them & the board :—*Held* : the officers & teachers could not recover back the amount of the deductions from their salaries, for (a) even if it was *ultra vires* for the board to pay the expenses of managing the fund out of the school rates, it was no part of the contract between the board & the officers & teachers that this should be done, & the making of the contract was therefore not *ultra vires*; (b) assuming that the board could not undertake the management of the fund, in the absence of power under the Elementary Education Acts to do so, the money having been applied to the purposes for which it was subscribed, & the subscribers having had the right to participate in the benefits of the fund, there had been no failure of consideration. —**PHILLIPS v. LONDON SCHOOL BOARD, COCKERTON v. SAME**, [1898] 2 Q. B. 447; 67 L. J. Q. B. 874; 70 L. T. 50; 46 W. R. 658; 14 T. L. R. 501, C. A. *Annotatum* :—**Mentd.** *Sinclair v. Brougham*, [1914] A. C. 398.

**285. Absence through illness—What constitutes.]**—Pltf. was appointed headmistress in a board school in 1900 by the predecessors of defts. at a salary of £60 a year, which subsequently rose to £120. There was no formal contract between the parties. In 1901 she was married, & in 1902 her first child was born, in consequence of which she was absent from duty for a month on full pay. In 1903 a second child was born, & pltf. sent a substitute to do her work while she was absent from duty. In 1904 defts. became the local education authority, & pltf. retained her position as headmistress on the old terms. It was an express or implied term of the employment that she should be entitled to one month's pay during illness, & that she should be entitled to three months' notice to determine her employment.

In Aug. 1906, she was delivered of a third child; but as the confinement took place during vacation no question arose. In Sept. 1910, pltf. was expecting another child, & in compliance with a request of defts. she remained away from work until the end of the year. Her child was born on Jan. 5, & she returned to her duties on Feb. 5. Her salary being only paid for Sept. & for one month in addition, she brought the present action for £32 8s. 9d., being arrears of salary. Defts. contended that it was their duty to determine what was "illness," & that in the circumstances they were entitled to regard pltf. as having been absent through illness between Sept. & Jan. :—*Held* : (1) "absence through illness" was not confined to absence through actual illness, but includes absence reasonably caused through illness, & covers the period of convalescence & also absence occasioned by approaching illness; (2) the absence of pltf. from Sept. to Dec. was absence, not through illness, but at the request of defts., & defts. were liable for her salary during that time.—**DAVIES v. EBBW VALE URBAN DISTRICT COUNCIL** (1911), 75 J. P. 533; 27 T. L. R. 543; 9 L. G. R. 1226.

**286. — At request of local authority—Liability for salary.]**—**DAVIES v. EBBW VALE URBAN DISTRICT COUNCIL**, No. 285, *ante*.

**287. Increase of salary—Share in supplementary grant—Discretion of education authority.]**—It is not *ultra vires* for an education authority in their discretion to impose upon teachers a condition that they shall not be entitled to a share in the supplementary grant given to the authority for educational purposes in a particular year unless they have been in the service of the authority on a certain date.—**GLASSON v. ESSEX COUNTY COUNCIL** (1910), 88 L. J. Ch. 439; 121 L. T. 59; 83 J. P. 153; 35 T. L. R. 478; 63 Sol. Jo. 516.

**288. — Above Burnham scale of pay—Special contract.]**—Pltf. was engaged by defts., in 1900, as an uncertificated teacher in a special day school, under a contract whereby she was to receive £10 a year more than an ordinary uncertificated teacher in an ordinary school of similar standing from time to time. In 1921 the Burnham scale of pay was adopted by deft. authority. The maximum allowed under this scale was £182, & pltf. claimed arrears of salary on the footing that she was entitled, under her special contract, to receive £10 a year in excess of that maximum. The county ct. judge decided in her favour, but the Div. Ct. reversed that decision, holding that there was no evidence of any special contract of

**BRITISH COLUMBIA v. VICTORIA CITY CORPN.** (1890), 2 B. C. R. 1.—**CAN.**

**p. — Attachment for debt—Whether exempt.]**—The contract of a teacher in the common schools for the performance of his duties being made with the trustees of the action in which he is employed, his salary is not exempted from attachment for debt under the principle of cases applicable to officers employed in the public services, but as the amount coming to such a teacher for salary cannot be reached by ordinary legal execution or garnishee process, a receiver will be appointed where necessary by way of equitable execution.—**FISHER v. COOK** (1899), 32 N. S. R. 226.—**CAN.**

**q. — Unlicensed teacher—Liability of trustees.]**—Pltf., an unlicensed teacher, was employed to teach in a school district for one term under a written contract purporting to be made by defts., who are school trustees, incorporated under Schools' Act, C. C. 1903, c. 50. The contract was signed by two out of the three trustees but the corporate seal was not affixed to it &

no meeting of the trustees was held to authorise the contract. Under this contract pltf. taught for one full term. In an action to recover the amount agreed to be paid to her :—

*Held* : the contract was made by the school trustees as a *corpus*, & not as individuals; the contract is unenforceable because under the above Act, it is *ultra vires* of the school trustees to employ an unlicensed teacher; defts. are not liable on a *quantum meruit* for the services of pltf. because the employment of pltf. was *ultra vires* & there was no completed work which the trustees could accept or reject.—**BRIGHT SCHOOL DISTRICT No. 74, TRUSTEES v. YERXA** (1910), 40 N. B. R. 351; 10 E. L. R. 1.—**CAN.**

**r. Arrears of salary—Remedies for recovery.]**—The ct. refused a *mandamus* to compel school trustees to pay a sum awarded to a teacher for arrears of salary observing that there were other remedies open.—**Re O'LEARY & BLANDFORD SCHOOL TRUSTEES** (1860), 19 U. C. R. 556.—**CAN.**

**s. Provision of board & lodging.]**—

School trustees have no power under School Act, 9 Vict. c. 20, to make an agreement for providing the teacher with board & lodging.—**QUINN v. SCHOOL TRUSTEES** (1850), 7 U. C. R. 139; *constr.* **WRIGHT STEPHEN SCHOOL TRUSTEES**, 32 U. C. R. 541.—**CAN.**

**t. Provision of fuel—Special agreement.]**—Pltf., a teacher, sued upon a special agreement stated to have been made by defts. as trustees, to furnish him with fuel when required, under 9 Vict. c. 20. Defts. demurred, because no request with time & place had been alleged to furnish fuel, & because defts. were charged as individuals :—*Held* : declaration had on both grounds.—**ANDERSON v. VANSITTART** (1849), 5 U. C. R. 335.—**CAN.**

**u. Claim for extra work done—Absence of formal agreement.]** Public Schools Act, R. S. M. 1913, c. 165, s. 159, under which no agreement not under the corporate seal & signed by the parties is of any validity whatever :—*Held* : to bar the right of a teacher to recover from the school district extra remuneration for certain

*Sect. 7.—Dismissal and resignation.]*

The committee, with great reluctance & under protest, to effect economy, decided to dismiss teachers sixty years of age & upwards entitled to a pension who were of lesser efficiency, & following on a report on that matter more than half of the 71 head teachers were given notices of dismissal, purporting to be given on educational grounds in pursuance of 1921 Act (c. 51), s. 29 (2) (a). As no part of the expense of pensions came from ratepayers, & the younger teachers appointed to the positions of the dismissed teachers would receive considerably less salary, the dismissals would save ratepayers. The managers of plffs.' schools having refused to comply with the direction for dismissal given by the local education authority, that authority, in accordance with the power given them by the above sub-sect., themselves gave notices of dismissal to plffs., purporting to be given on the ground that they would not be able to perform their duties as efficiently as younger teachers, or to do full justice to their pupils. No complaints as to the efficiency of plffs. had been received prior to the report being drawn up as to which of the teachers of sixty years & upwards were less efficient, & it was agreed by education authorities in general that the teachers who had reached the age for pensions were among the wisest & most efficient of the staff. It having been decided on the evidence that the real & only grounds for dismissal were financial, the educational grounds given being merely colourable:—*Held*: (1) the notices were invalid & inoperative, as the mere desire to economise was not an educational ground for dismissal within the sub-sect.; (2) if *bona fide* educational grounds had existed for the dismissals, as the reasons would then have consisted of mixed financial & educational grounds, the notices were invalid, having regard to the above sub-sect. & sect. 29 (6) of the Act, which require that the grounds for dismissal by the local education authority shall be educational only; (3) as the power given to the local education authority, by sect. 29 (2) (a) of the Act, to dismiss teachers on educational grounds was a discretionary power, it was not well exercised if any other grounds for the dismissal were taken into consideration.—*SADLER v. SHEFFIELD CORPN., DYSON v. SHEFFIELD CORPN.*, [1924] 1 Ch. 483; 93 L. J. Ch. 209; 88 J. P. 45; 40 T. L. R. 259.

**300. — Appointment during pleasure.—***Failure to comply with regulations.*—Where a person has been appointed head teacher of a public elementary school by a county council, during

board to consult with the committee before removing, suspending, or dismissing a teacher, is a condition precedent to the right to dismiss, & an injunction will be granted restraining a Board from dismissing a teacher without such consultation. Such consultation should be a *bona fide* asking of advice with a view to obtaining it, & the Board should lay before the Committee all the material necessary to enable it to give such advice.—*WILKINSON v. OTAGO EDUCATION BOARD* (1888), 6 N. Z. L. R. 307.—N.Z.

*n.* ———.—Education Act, 1877, s. 47, gives or preserves to an education board a power of peremptorily dismissing a teacher which is distinct from the power of dismissal given by sect. 45, & can be exercised by the Board without consulting the School Committee.—*WILSON v. HAWKES BAY EDUCATION BOARD* (1891), 9 N. Z. L. R. 257.—N.Z.

*o.* ———.—"Gross misbehaviour"—

*Question for jury.*—Plff., a schoolmaster, sued defts. for wrongful dismissal. Defts. justified the dismissal on the ground that plff. had been guilty of "gross misbehaviour." In support of this plea defts. put in evidence certain offensive letters written by plff. to defts. & their secretary. Education Act, 1877, authorises defts. to dismiss any school-teacher in their district for "immoral conduct or gross misbehaviour," but it does not define the duty of the teacher towards defts. At the trial the judge directed the jury that one of the letters put in evidence was an act of insubordination, & left it to them to say whether it amounted to gross misbehaviour. The jury found for plff. Defts. then obtained a rule nisi to set aside the verdict on the ground that the judge should have directed the jury that the facts amounted to "gross misbehaviour" within Education Act, 1877, s. 47:—*Held*: it was properly left to the jury

their pleasure, & subject to their regulations & to the Code of Regulations for Public Elementary Schools in Wales, s. 15 (a) (1), he can be dismissed for non-compliance with a regulation that head teachers should live within a specified distance of their schools.—*WILLIAMS v. GLAMORGAN COUNTY COUNCIL* (1910), 85 L. J. Ch. 752; 32 T. L. R. 532; 14 L. G. R. 741.

**301. — Contract to pay during military service.—Absence of consideration.—Effect of Local Government (Emergency Provisions) Act, 1916 (c. 12), s. 1.**—Plff. was in June, 1914, appointed by defts., a local education authority, assistant master in a school, & his duties were to begin on Aug. 1914, the appointment to be terminable by a month's notice. Plff. was at the time a member of the Territorial Forces, & after the outbreak of war in Aug. 1914, his unit was mobilised. In Nov. 1914, the secretary of defts.' Education Committee wrote to plff. that the education committee had passed a resolution that defts.' employees who were called up for military duty should be paid their usual salary less the amount received from the Army. In Nov. 1916, the secretary of the Education Committee wrote to plff. that his employment was determined. In an action for a declaration that plff. was still in the employment of defts.:—*Held*: (1) there was no contract by defts. to keep plff. in their employment for the duration of the war; (2) there was no consideration for defts.' alleged promise as plff. was already in the Territorial Army & would have remained there whether any promise was given or not; (3) the absence of consideration was not remedied by above sect., as a promise which was not binding on a private employer was not by that sect. made binding on a local authority.—*SANDERSON v. WORKINGTON BOROUGH COUNCIL* (1918), 34 T. L. R. 386; 62 Sol. Jo. 535.

**302. — Acting within statutory powers.—Jurisdiction of court.**—Plff. was a married woman teacher suing on behalf of 57 other married women teachers in the district of deft. council, who were employed under contracts entered into on Apr. 1, 1919. On Dec. 3, 1919, the Education Committee of deft. council unanimously passed a resolution that the engagements of married women teachers under their authority be terminated, provided that teachers who had not completed the minimum period of recorded service prescribed by School Teachers (Superannuation) Act, 1918 (c. 55), should be allowed to continue up to the date of such period of recorded service; & notice was accordingly given to the teachers affected by the resolution to terminate their engagements on

to say whether the facts amounted to gross misbehaviour.—*DOHERTY v. WELLINGTON DISTRICT EDUCATION BOARD*, 4 J. R. N. S. 78.—N.Z.

*p.* *Dismissal by school board.—Decision irregular.*—Plff. was the master of a public school. The contract between him & the school board gave either party the right to terminate it on one month's notice. There were eight members of the school board, & at a meeting on Feb. 19, a resolution was passed instructing the secretary to notify plff. that the contract between him & the board should cease on Mar. 31, which he accordingly did. The notice of the meeting given to the members of the board did not state that the matter of determining plff.'s contract was to be considered, & some of the members had no knowledge of this fact, nor had plff. any knowledge or notice of the meeting. Only six members of the board attended the meeting, of whom four voted in favour



a. Power of dismissal in trustees only.—Exclusion by inhabitants of school district. A licensed school teacher employed by the inhabitants of a school district, with the assent of the trustees, under Parish School Act, I Rev. Stat., c. 49, can only be dismissed during his term of engagement by the trustees; & if the inhabitants exclude him from the school, whereby he is prevented from obtaining the provincial allowance under the Act, they are liable in an

**Sect. 7.—Dismissal and resignation. Sects. 8, 9 & 10: Sub-sects. 1, 2 & 3.]**

education authority had not been obtained by defts. to the dismissal of pltf. On Nov. 30, 1911, the notice expired & pltf. left. Pltf. brought the present action for an injunction to restrain defts. from acting on the notice of Oct. 28, 1911, & for a declaration that she was still entitled to exercise the duties of the office of teacher, & moved for an interim order. At the hearing of the motion it appeared from the evidence of defts. that their real ground for dismissing pltf. was that in their opinion she had ceased to be a member of the Church of England. This pltf. denied:—*Held*: (1) under Education Act, 1902 (c. 42), s. 7, the position of pltf. was not merely that of a servant who had entered into a contract of employment with a master, a term of which was that she should not be dismissed except upon his compliance with certain conditions, but that she had a statutory right to the position which she had acquired under the Act, unless & until the requirements of the Act with regard to her dismissal had been complied with; (2) the ground of dismissal appearing by the evidence was not a ground "connected with the giving of religious instruction in the school" within the meaning of sect. 7 (1) (c) & therefore the consent of the local education authority to the pltf.'s dismissal was necessary; (3) pltf. was entitled to the injunction & declaration she asked.

(4) In order to render a dismissal without the consent of the local education authority a valid dismissal under sect. 7 (1) (c) of the Act, it is necessary not merely that the managers should in their own minds consider that a ground for dismissal connected with the giving of religious instruction exists, but that the ground should in fact exist.—*SMITH v. MACNALLY*, [1912] 1 Ch. 816; 81 L. J. Ch. 483; 106 L. T. 915; 76 J. P. 406; 28 T. L. R. 332; 50 Sol. Jo. 397; 10 L. G. R. 434.

*Annotations*:—*As to* (1) *Consd. Blanchard v. Dunlop*, [1917] 1 Ch. 165. *As to* (2) *Apld. Mitchell v. East Sussex County Council* (1913), 109 L. T. 778. *As to* (4) *N.F. Harries v. Crawford*, [1918] 2 Ch. 158. *Consd. Martin v. Eccles Corp'n.*, [1919] 1 Ch. 387. *Reid. Harries v. Crawford*, [1919] A. C. 717; *Hanson v. Radcliffe U. C.*, [1922] 2 Ch. 490.

**306.** ————]—*HARRIES v. CRAWFURD*, No. 45, *ante*.

**307.** ———— **Power of court to grant injunction.**—The managers of a non-provided public elementary school passed resolution to terminate the headmaster's agreement with them, & sent him three months' notice in writing; but there was considerable doubt whether the notice was valid, & if it was valid, whether it required the consent of the local education authority:—*Held*:

action on the case.—*CONNOR v. Wiggins* (1862), 5 All. 185.—*CAN.*

**b. Wrongful dismissal.—Arbitration.**—The wrongful dismissal of a teacher is a matter "connected with his duty," within Manitoba School Act, s. 93, & consequently not the subject of an action, but of arbitration only.—*PEARSON v. ST. JEAN BAPTISTE CATHOLIC SCHOOL TRUSTEES* (1885), 2 Man. L. R. 161.—*CAN.*

**c. Separate school board.—Delegation of powers to chairman.—Ultra vires.**—Where a Separate School board passes a resolution authorising their chairman to appoint & dismiss teachers, it is *ultra vires*.—*MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES* (1915), 24 D. L. R. 476; 34 O. L. R. 335.—*CAN.*

**d. Dismissal by education department.—Civil servant.**—In Mar. 1913,

pltf. was appointed teacher of a school under defts. administration, upon terms that the appointment should be subject to three months' notice on either side & subject also to transfer at any time to another part of Rhodesia. In consequence of certain complaints received from parents the Education Dept. without formulating any charge against pltf. directed an inspector to hold an inquiry & on the receipt of his report offered pltf. another post, & on his failure to accept it paid him four months' salary in lieu of notice & terminated his services. In an action brought by pltf. in 1919 for a declaration that the enquiry was irregular & illegal the Trial Ct. found that though pltf. was a member of the Rhodesian Civil Service & therefore came under the disciplinary regulations affecting such members, yet as he had not been punished under the regulations but

the ct. had power to grant an interim injunction against the managers.—*CRISP v. HOLDEN* (1910), 54 Sol. Jo. 784.

**308.** ———— **Confirmation by local authority.**—*YOUNG v. CUTHBERT*, No. 13, *ante*.

**309.** ————]—*BLANCHARD v. DUNLOP*, No. 48, *ante*.

**310.** ———— **Irregularly elected—Education Act, 1902 (c. 42), sched. I., B. (3).**—*MEYERS v. HENNELL*, No. 39, *ante*.

**311.** ————]—*HARRIES v. CRAWFURD*, No. 45, *ante*.

**312. Compensation on dismissal.**—*Re ALLEYN'S COLLEGE, DULWICH*, No. 200, *ante*.

**313. Resignation.—Period of notice agreed upon.—Whether extended to include vacation.**—A teacher of the Science, Art & Technical schools of the local education authority of a county borough had in Jan. 1909, been appointed by the education committee at a yearly salary payable, & paid, monthly; & his engagement was subject to three months' notice, which could be given at any time by either party. The annual session of the schools closed at the end of July. Owing to a reorganisation of the staff the teacher was asked to send in his resignation. He did so on Mar. 22, 1909, adding to the notice of resignation that it was to take effect on Aug. 31, 1909. The Education Committee, however, gave a counter-notice to terminate his services on July 31, 1909, when the holidays began:—*Held*: the teacher could not maintain an action for a month's salary for the month ending Aug. 31.—*HANN v. PLYMOUTH CORPN.* (1910), 9 L. G. R. 61, D. C.

**Local education authority.**—*See* Part II., Sect. 2, *ante*.

**School managers.**—*See* Part IV., Sect. 4, *ante*.

**SECT. 8.—LIABILITY FOR NEGLIGENCE.**

**314. Injury to pupil.—Allowed to use fireworks.**—A schoolmaster who permits an infant pupil under his care to make use of fireworks, is responsible in an action for the mischief which ensues.—*KING v. FORD* (1816), 1 Stark. 421, N. P.

**315.** ———— **Allowed access to dangerous substance.**—*WILLIAMS v. EADY* (1893), 10 T. L. R. 41, Q. A.

*Annotation*:—*Mentd. Latham v. Johnson & Nephew*, [1913] 1 K. B. 398.

**316.** ———— **Whether headmaster liable for negligence of assistant master.**—*BAXTER v. BARKER* (1903), *Times*, Nov. 13, Q. A.

**317.** ———— **Acting for teacher's convenience.—Joint liability of teacher & education authority.**—

dealt with under his contract, & his engagement legally terminated the ct. had no jurisdiction to grant relief.—*MONCKTON v. MONCKTON* (1920), App. D. 324.—*S. AF.*

**e. Reasonable notice.**—*G.* was appointed a teacher of the Armenian College, Calcutta, for a period of three years from Mar. 1, 1912. After the expiry of the period he continued in the employ of the College until July, 1916, when he received notice terminating his services as from Aug. 1, & in lieu of a month's notice, was paid a month's salary & a certain sum of money for a month's board & lodging:—*Held*: he was entitled to a reasonable notice & in such a case, in the absence of misconduct, either three months' notice or a term's notice would be reasonable notice.—*WITTENBAKER v. CALSTAN* (1917), 1 L. L. R. 44 Cal. 917.—*IND.*

**SMITH v. MARTIN & KINGSTON-UPON-HULL CORPN.,** No. 22, *ante*.

**Liability of Education Authority.]—***See* Part II., Sect. 2, sub-sect. 4, *ante*.

**Liability of managers.]—***See* Part IV., Sect. 4, sub-sect. 2, B., *ante*.

**Schoolmaster in loco parentis.]—***See* Sect. 3, sub-sect. 1, *ante*.

#### SECT. 9.—EFFECT OF RELATIONSHIP BETWEEN LOCAL EDUCATION AUTHORITY AND MANAGERS.

*See* Nos. 13, 45, 47, 48, *ante*.

#### SECT. 10.—SCHOOLMASTERS AS OFFICERS OF CHARITIES.

##### SUB-SECT. 1.—APPOINTMENT TO OFFICE.

**318. Right to nominate—Given to vicar & churchwardens—Exercisable by majority.]—**A power to appoint a schoolmaster to an ancient foundation given to the vicar & churchwardens & in case of their neglect in appointing, then to devolve to two corporate bodies in succession, & to result in the *dernier resort* to the same vicar & churchwardens to whom also the general power of managing the trust was committed, is well executed by the vicar & a majority of the churchwardens: especially if such an election be supported by usage.—**WITHELL v. GARTHAM** (1795), 6 Term Rep. 388; 101 E. R. 610.

*Annotations:—***Apld.** **Wilkinson v. Mallin** (1832), 2 Cr. & J. 636. **Held.** **Blacket v. Blizard** (1829), 9 B. & C. 851. **Mentd.** **Grindley v. Barker** (1798), 1 Bos. & P. 229; **R. v. Mashiter** (1837), 6 Ad. & El. 153; **Fell v. Charity Lands, Official Trustee**, [1898] 2 Ch. 44.

**319. ——— Controlled by lord of manor—Appointment to lord invalid.]—**Where a controlling power of assenting to, or dissenting from, the appointment of a master of a free school, is given to the lord of the manor, such lord cannot himself be master.

If he is appointed master, he may be removed, upon an application by petition in the Ct. of Ch. — **Re RISLEY SCHOOL** (1830), 8 L. J. O. S. Ch. 129, 1 L. C.

**320. ——— Whether alienable.]—**A grammar school was founded & endowed by virtue of letters patent which ordained that the school should be altogether of the patronage & disposition of the founder & his heirs by whom the schoolmasters & guardians should be nominated for ever:—**Held:** such right of nomination might lawfully be aliened.—**A.-G. v. BRENTWOOD SCHOOL** (1832), 3 B. & Ad. 59; 1 L. J. K. B. 57; 110 E. R. 23.

*Annotation:—***Held.** **A.-G. v. Boucherett** (1858), 25 Beav. 116.

**321. ———.]—**A testator bequeathed a sum to A. upon trust to lay it out in lands, for the endowment of a school, & he appointed that A. & his heirs should be feoffees in trust & patrons & protectors of the school for the electing a fit & sufficient schoolmaster:—**Held:** the right of patronage was alienable.—**A.-G. v. BOUCHERETT** (1858), 25 Beav. 116; 23 J. P. 600; 53 E. R. 580.

**322. ——— Additional master—Whether vested in party appointing headmaster.]—****STRATFORD GRAMMAR SCHOOL** (1843), 1 L. T. O. S. 286.

**323. Appointment by heirs of founders or chief inhabitants—Failure of heirs of founders—Whether appointment in visitor.]—**Petition to the Lord Chancellor, as visitor in right of the Crown,

of the free school of W., two persons having been elected, the right of election being in the chief inhabitants, & the chief inhabitants at the time of the foundation, & the heir of the survivor, not to be discovered. *Qu.*: whether the visitor can appoint a master.—**A.-G. v. BLACK** (1805), 11 Ves. 191; 32 E. R. 1001, L. C.

##### SUB-SECT. 2.—TENURE OF OFFICE.

**324. Grammar school—Whether estate of freehold.]—**The master of a free school has an estate of freehold in his office, & is not removable at the pleasure of the patrons of the school.—**Re CHIPPING SODBURY GRAMMAR-SCHOOL** (1829), 8 L. J. O. S. Ch. 13, L. C.

*Annotation:—***Held.** **A.-G. v. Bristol Corpn.** (1845), 14 Sim. 648.

**325. ——— Or during pleasure.]—****R. v. DARLINGTON SCHOOL (GOVERNORS), No. 330, post.**

**326. ——— Subject to alteration of scheme.]—**The revenues of a charity grammar school having increased tenfold, the ct., on a vacancy, restrained the appointment of a new master, until something had been settled as to a new scheme. Subsequently, liberty was given to appoint a new master, he taking his office subject to any future alterations to be directed by the ct. — **A.-G. v. LOUTH FREE SCHOOL (WARDEN, ETC.)** (1851), 11 Beav. 201; 51 E. R. 263.

**327. Charity school—During good conduct.]—****Re PHILLIPS' CHARITIES, No. 315, post.**

##### SUB-SECT. 3.—REMOVAL FROM OFFICE.

**328. By trustees—Power of majority.]—**The appointment of a schoolmaster, elected by a majority of the trustees at a meeting assembled for the purpose of the election, need not be in writing, nor can he be dismissed, except by a majority of the trustees at a similar meeting.—**WILKINSON v. MALIN** (1832), 2 Cr. & J. 636; 2 Tyr. 544; 1 L. J. Ex. 234; 140 E. R. 268.

*Annotations:—***Mentd.** **Smith v. Keating** (1848), 6 C. B. 136; **Perry v. Shipway** (1859), 1 Off. L.; **Re Camden Charities** (1881), 18 Ch. D. 310; **Re Whiteley, London, Bp. v. Whiteley**, [1910] 1 Ch. 600.

**329. ———.]—**Certain property was devised upon trust, that trustees, with the consent of the parishioners, should provide a schoolmaster to teach thirty poor scholars. One of the bye-laws of the trustees was, that the majority of the trustees present at any meeting shall, by their vote, bind the minority then present, as well as the absent trustees. Pltf. succeeded to the office of schoolmaster in 1851, by appointment of a vestry meeting of the parishioners, on the recommendation of the trustees. In 1854 the majority of the trustees at a meeting carried a resolution to dismiss pltf., & notice, purporting to come from a majority of the trustees only, was accordingly given to that effect to pltf.:—**Held:** the trustees were to be considered the appointing parties, & not the parishioners, & the notice of dismissal by the majority of trustees was binding.—**RYAN v. JENKINSON** (1855), **Saund. & M.** 98; 25 L. J. Q. B. 11; 25 L. T. O. S. 268; 20 J. P. 38.

**330. ——— Exercise of discretion—Jurisdiction of court.]—****A.-G. v. BEDFORD CORPN., No. 220, ante.**

**331. ———.]—**By the Bedford Charity Act, the trustees of the charity, who are a body corporate, are empowered to remove the master of the English school, for just & reasonable

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cause; & it is provided that if any trustee or trustees should misdemean himself or themselves, in any manner relating to the charity, it should be lawful for any person to prefer a petition to the Lord Chancellor against any such trustee or trustees, & with or without making all or any of the other trustees parties thereto, if such person should so think fit; & the Lord Chancellor is authorised to cause the person or persons against whom the petition should be preferred, to be examined, in such manner as should be thought fit, for the discovery of the truth of the matter alleged against him. One of the masters who had been dismissed by the trustees, presented a petition against them, complaining that he had been dismissed irregularly & not for good & reasonable cause:—*Held*: the ct. had no jurisdiction to entertain the petition.—*Re BEDFORD CHARITY* (1833), 5 Sim. 578; 58 E. R. 456.

**332.** ———— .]—Where trustees have power to displace a schoolmaster upon any neglect or misbehaviour in such schoolmaster, & they, upon legitimate materials which might possibly have satisfied a reasonable man desirous of doing justice, come to a certain conclusion upon a point of fact as to such neglect or misbehaviour, it is not the office of the ct. to interfere with it.—*Re FREMINGTON SCHOOL, Ex p. WARD* (1847), 9 L. T. O. S. 333; 11 Jur. 421; *previous proceedings* (1846), 7 L. T. O. S. 319.

*Annotations*:—*Consd.* *Wills v. Child* (1851), 13 Beav. 117; *Hayman v. Rugby School* (1874), L. R. 18 Eq. 28. *Mentd.* *Smith v. R.* (1878), 3 App. Cas. 614.

**333.** ———— .]—By a scheme of the ct. for the regulation of a grammar school authority was given to the trustees "upon such grounds as they should, at their discretion, in the due exercise & execution of the powers & trusts reposed in them, deem just," to remove the master at one & confirm it at a subsequent special meeting. The trustees having grounds of complaint against the master, they, without his knowledge, referred the matter to a committee, who investigated the case in his absence & without his knowledge, & reported against him. The trustees, without communicating the report or hearing him, confirmed it in his absence, & resolved to remove him; & they summoned a second meeting to confirm the resolution. The master then attended & was heard, & the removal was confirmed without any other hearing or inquiry in his presence:—*Held*: (1) the regulation did not confer upon the trustees an arbitrary power to dismiss the master, upon any grounds which they might deem just, free from any control of the ct.; (2) the master had had no proper opportunity afforded him of defending himself, no sufficient means of explanation & no means of proving his defence, & on motion, the trustees were restrained from enforcing the dismissal & ejecting the master.—*WILLS v. CHILDE* (1851), 13 Beav. 117; 20 L. J. Ch. 113; 17 L. T. O. S. 12; 15 Jur. 303; 51 E. R. 46; *previous proceedings*, *Doe d. Childs v. Willis* (1850), 5 Exch. 894.

*Annotations*:—*Generally, Consd.* *Hayman v. Rugby School* (1874), L. R. 18 Eq. 28. *Mentd.* *Wood v. Prestwich* (1911), 104 L. T. 388.

**334.** ———— .]—**Reasons need not be assigned.**—Where trustees of a foundation school have power to remove the master at their discretion, they are at liberty to remove him, without assigning a reason, if they do not act corruptly or from improper motives.—*Re BRXTON SCHOOL, Ex p. HOLLAND* (1847), 8 L. T. O. S. 464; 11 Jur. 581.

**335. By court—Not where misunderstanding of duty.**—With regard to that part of the prayer of this information, which relates to the removal of the master, it is not the habit of this ct. to remove, where there has been any misunderstanding as to the duty; but when that duty is prescribed, the master must determine either to hold the situation, doing the duty, or to discharge himself (*LORD ELDON, C.*)—*A. (G. v. COOPERS' Co.* (1812), 19 Ves. 187; 34 E. R. 488, L. C.

*Annotation*:—*Mentd.* *A. G. v. Stamford* (1842), 1 Ph. 737.

**336. By governors—Discretionary power—Validity of bye-law.**—To a *mandamus* by the upper master of a grammar school to the governors to restore him to his office, the return set forth the charter of foundation, by which the governors were empowered to appoint & remove the master, "according to their sound discretion" & of appointing other in his stead. The return then alleged specific instances of misconduct in prosecutor, who being called on to answer, & having a reasonable opportunity, & failing to do so, was, in the exercise of their best discretion, & they deeming him an unfit person, removed him from his office. The pleas severally traversed the alleged instances of misconduct, & set forth a power given by the charter to the governors to make bye-laws for the government of the master, etc., & that by a bye-law of 1748, made by the governors no master should be removed, unless a sufficient cause of complaint was made in writing against him, & allowed to be sufficient. The plea then averred that no such sufficient cause was made in writing against prosecutor before his removal, & allowed as sufficient. On this allegation, as on the traverses of misconduct, issues were joined, & all the findings were in favour of prosecutor:—*Held*: (1) defendants were entitled to judgment *non obstante veredicto*; (2) the office of upper master at the school was not a freehold, but held *ad libitum* only, & as such he was removable without summons or hearing; (3) as the return contained an express allegation that the governors, in the exercise of their best discretion, & deeming him unfit, did remove the prosecutor, which was not traversed, the issues raised were immaterial, & the return was substantially good; (4) the bye-law was invalid, as restraining & limiting the powers originally conferred on the governors.—*R. v. DARLINGTON SCHOOL (GOVERNORS)* (1844), 6 Q. B. 682; 14 L. J. Q. B. 67; 4 L. T. O. S. 175; 9 Jur. 21; 115 E. R. 257, Ex. Ch.

*Annotations*:—*As to (1) Consd.* *Wildes v. Russell* (1866), L. R. 1 C. P. 722. *As to (2) & (3) Consd.* *Osgood v. Nelson* (1869), 10 H. & S. 119; *Hayman v. Rugby School* (1874), L. R. 18 Eq. 28. *Reid.* *R. v. Smith* (1844), 5 Q. B. 614; *R. v. St. Stephen's, Coleman St.* (1844), 14 L. J. Q. B. 34; *Re Fremington School, Ex p. Ward* (1846), 10 J. P. 438; *Doe d. Child v. Willis* (1850), 5 Exch. 894; *R. v. Owen* (1850), 15 Q. B. 476; *Ex p. Teather* (1850), 1 L. M. & P. 7; *Wills v. Child* (1851), 13 Beav. 117; *R. v. Manchester, etc. Ry.* (1854), 4 E. & B. 88; *Wildes v. Russell* (1866), L. R. 1 C. P. 722; *Dean v. Bennett* (1870), 6 Ch. App. 489; *Re Alcey's College, Dulwich* (1875), 1 App. Cas. 68. *Generally, Mentd.* *Abergavenny v. Landaff Bp.* (1888), 20 Q. B. D. 460.

—**Public schools.**—See Part XIV., Sect. 3, ante.

**337. By committee of management—Improperly constituted under trust deed—Master's right to be heard.**—A trust deed of a school, dated in 1857, provided that its conduct & the appointment & dismissal of the teachers should be managed by a committee of the vicar, curate, & churchwardens, & five lay members possessing certain property qualifications, & that vacancies should be filled by nomination on the part of subscribers, but that no default of election nor any vacancy during any current year should prevent

the continuing members from acting meanwhile. Pltf. was appointed schoolmaster in 1861. Deft. became vicar in 1888. At that time all the original lay members' places had become vacant, & had not been filled up, & the school was managed by the *ex-officio* members. At Easter, 1891, a vicar's churchwarden was elected, but not a people's churchwarden. In Sept. 1891, a committee meeting was held by the vicar, his curate, & churchwarden, there being present also one or both of the sidesmen, who, though not members of the committee, had been in the habit of attending the meetings, & a resolution was passed to dismiss pltf. & the other teachers. One of the sidesmen voted for the resolution. The people's churchwarden of the previous year had no notice of the meeting, & did not attend. The resolution was on the ground that owing to the financial position of the school it was desirable to rearrange the staff of teachers. Pltf. was not invited to attend the meeting:—*Held*: (1) the resolution was invalid, because of the unauthorised addition to the committee & because notice of the meeting had not been given to the people's churchwarden; (2) the remaining members of the committee could act although there had been default in previous years to elect, the judge being of opinion also that this would have been so independently of special provision.

(3) The judge stated that he knew of no authority that pltf. was entitled to be heard at the meeting, the resolution being on such grounds as above stated.—*LANE v. NORMAN* (1891), 61 L. J. Ch. 149; 66 L. T. 83; 40 W. R. 268.

*Annotations*:—As to (1) *Distd.* Pottle v. Sharp (1896), 65 L. J. Ch. 908. *Consd.* Harries v. Crawford (1919), 83 J. P. 197. *Reid.* Meyers v. Hennell, [1912] 2 Ch. 256.

**338.** ——— *Right to injunction.*—Where pltf., a schoolmistress of a public elementary school established under a deed of trust, had been dismissed from her employment by an irregularly constituted committee of management by whom she was appointed, instead of by the trustees of the school:—*Held*: she had no right to an injunction to restrain the committee from so dismissing her, notwithstanding the terms of the deed.—*POTTE v. SHARP* (1896), 65 L. J. Ch. 908; 75 L. T. 265; 41 Sol. Jo. 11, C. A.

*See, also*, No. 45, *ante*.

**339.** *Master of grammar school - Whether removable at pleasure.*—*Re CHIPPING SODBURY GRAMMAR SCHOOL*, No. 324, *ante*.

**340.** ——— *Without summons or hearing.*—*R. v. DARLINGTON SCHOOL (GOVERNORS)*, No. 336, *ante*.

**341.** ——— *Power of trustees to stipulate for notice to quit.*—The trustees of a free grammar school, whose origin did not appear, held property "to the use of the school." Having elected a schoolmaster, they obliged him to enter into a bond & agreement, stipulating that he should not have or claim a freehold in the school, or estates; & should quit at six months' notice, & should not intermeddle with the estates, & certain other stipulations as to the government & management of the school:—*Held*: the trustees had exceeded their powers.—*Re ROYSTON SCHOOL* (1839), 2 Beav. 228; 48 E. R. 1167.

**342.** ——— *Attached to cathedral Summary dismissal by dean & chapter.*—The relationship in the ordinary case of trustee & *cetui que trust* does not exist between the dean & chapter of a cathedral church & the headmaster of the grammar school attached to it, where both the cathedral & school are governed by the statutes of the

founder & subject to the jurisdiction of a special visitor, & where the headmaster is paid out of the common funds of the endowment. Where the dean & chapter of the cathedral church of R., in exercise of a power vested in them by one of the statutes of the founder, summarily dismissed the headmaster of the grammar school attached to the cathedral from his office without hearing him in his defence, the ct. refused to interfere by injunction, either *durante lite* or otherwise, to restrain the dean & chapter from removing him from his office or appointing another headmaster in his stead.—*WHISTON v. ROCHESTER (DEAN & CHAPTER)* (1849), 7 Ilac. 532; 18 L. J. Ch. 473; 13 Jur. 694; 68 E. R. 220.

**343.** *Agreement to resign at request—Enforcement of bond.*—A bond given by a schoolmaster of an ancient public school, who had a freehold in his office, to resign at the request of his patron, is good at law; but equity will restrain him from improper use of it by the patron.—*LEIGH v. LEWIS* (1801), 1 East, 391; 102 E. R. 151; *affd. sub nom. LEWIS v. LEIGH* (1802), 3 Bos. & P. 231, Ex. Ch.

*Annotations*:—*Reid.* Fletcher v. Soudes (1827), 1 Bl. N. S. 144. *Mentd.* Kirkcubright v. Kirkcubright (1802), 8 Ves. 51; Harnett v. Bates (1847), 8 L. T. O. S. 345.

**344.** *Grounds for dismissal - Neglect of scholars.*—*DOE d. COYLE v. COLE*, No. 358, *post*.

**345.** *Dismissal on charge of misconduct - Necessity for charges to be communicated to master—In writing.*—B. having been declared entitled to hold the office of schoolmaster, & to the emoluments thereof so long as he should well conduct himself, & be competent to the duties thereof:—*Held*: the trustees of the charity were not warranted in dismissing him for alleged misconduct in a summary manner, but were bound in the first instance to reduce into writing the charges against him, & cause such charges to be communicated to him, in order that he might be enabled to meet them by evidence or otherwise.—*Re PHILLIPS' CHARITIES* (1845), 9 J. P. 741; *sub nom. Re PHILLIPS' CHARITY, Ex p. NEWMAN*, 9 Jur. 959.

*Annotation*:—*Mentd.* Smith v. R. (1878), 3 App. Cas. 614.

**346.** *Whether opportunity for defence must be afforded.*—To enable the visitors & feoffees of a free grammar school to bring an ejectment for the recovery of the possession of the schoolhouse, etc., against a schoolmaster dismissed for misconduct, his interest must be shown to have been terminated in a regular manner. In order to effect this, he should, before dismissal, be summoned & heard in answer to the charges forming the ground of such dismissal.—*DOE d. THANET (EARL) v. GARTHAM* (1823), 1 Bing. 357; 8 Moore, C. P. 368; 2 L. J. O. S. C. P. 17; 130 E. R. 144.

*Annotations*:—*Reid.* R. v. Smith (1844), 5 Q. B. 614. *Mentd.* Donahoo v. L. G. Board (1882), 46 L. T. 300.

**347.** ———]—*R. v. DARLINGTON SCHOOL (GOVERNORS)*, No. 336, *ante*.

**348.** ———]—*Re PHILLIPS' CHARITIES*, No. 345, *ante*.

**349.** ———]—*WILLIS v. CHILDE*, No. 333, *ante*.

**350.** ———]—*LANE v. NORMAN*, No. 337, *ante*.

**351.** ———]—The deed of trust establishing an endowed school provided that the master of the school should be appointed by the vicars of three specified parishes, & power was given to the three vicars to remove the master for certain specified causes. Pltf. was appointed master of the school in Apr. 1890, & in Dec. 1890, two of the vicars served on him a notice of dismissal, signed by themselves, which stated certain reasons for his dismissal. No meeting of the vicars had been summoned to consider the question of pltf.'s

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dismissal, & he had not had any opportunity of being heard in his defence. There was no evidence that the third vicar had been consulted. Pltf. commenced an action against the two vicars who had signed the notice, & moved for an interlocutory injunction to restrain them from removing, or purporting to remove, him from his office until after the holding of a meeting of the vicars, & until he should have had an opportunity of being heard at such a meeting in reply to any charges made against him:—*Held*: (1) defts. could not remove pltf. without first affording him an opportunity of being heard in his own defence at a properly constituted meeting of the vicars, & he was entitled to the injunction; (2) for the purpose of obtaining this relief it was not necessary, under Charitable Trusts Act, 1853 (c. 137), s. 17, to obtain the consent of the Charity Comrs. to the bringing of the action.—*FISHER v. JACKSON*, [1891] 2 Ch. 84; 60 L. J. Ch. 482; 64 L. T. 782; 7 T. L. R. 358.

*Annotations*:—*Consd.* *Harries v. Crawford* (1919), 83 J. P. 197. *Mentd.* *Silver v. Gatti* (1893), 37 Sol. Jo. 776.

**352. Injunction to restrain master from teaching—Whether consent of charity commissioners necessary.]**—An action in the Ch. Div. by the governors of an endowed school against the master, whom they had dismissed, claiming an injunction to restrain him from teaching in the school & from remaining in occupation of the schoolhouse & land belonging thereto, is not a "suit or other proceeding" within Charitable Trusts Act, 1853 (c. 137), s. 17, so as to require the previous consent of the charity comrs. to its being instituted.—*HOLME v. GUY* (1877), 5 Ch. D. 901; 40 L. J. Ch. 648; 36 L. T. 600; 25 W. R. 547, C. A.

*Annotations*:—*Consd.* *Randall v. Blair* (1890), 45 Ch. D. 139. *Refd.* *A. G. v. Manchester* (1881), 18 Ch. D. 596; *Glen v. Gregg* (1882), 21 Ch. D. 513; *Benthall v. Kilmoray* (1883), 25 Ch. D. 39; *Alexander v. Drewett* (1886), 2 T. L. R. 762; *Rooke v. Dawson*, [1895] 1 Ch. 480.

**353. Injunction to restrain removal—Whether consent of charity commissioners necessary.]**—Pltf. brought an action claiming an injunction to restrain the trustees of a national school founded under School Sites Act, 1841 (c. 38), from removing or dismissing him from his office of headmaster of the school, & from electing or appointing any other person to the said office, & from ejecting him from the schoolhouse or premises occupied by him in virtue of his office, on the ground that the trustees were not duly appointed. Defts. objected that pltf. could not sue for the relief claimed without previously obtaining the consent of the charity comrs., as required by Charitable Trusts Act, 1853 (c. 137), s. 17:—*Held*: the sect. relates exclusively to the administration of trusts, & does not apply to common law rights, legal or equitable modes of enforcing common law rights, or any individual equitable right not relating to the administration of a trust, & as pltf.'s claim was based on contract, & so far as could be seen at the present state of the action, did not involve the administration of the trust, the consent of the comrs. was unnecessary.—*RENDALL v. BLAIR* (1890), 45 Ch. D. 139; 59 L. J. Ch. 641; 63 L. T. 265; 38 W. R. 689; 6 T. L. R. 386, C. A.

*Annotations*:—*Fold.* *Fisher v. Jackson*, [1891] 2 Ch. 84. *Refd.* *Rooke v. Dawson*, [1895] 1 Ch. 480. *Mentd.* *Llanbadarnaw School Board v. Charitable Funds Official Trustees* (1900), 45 Sol. Jo. 45.

**354. ———.]**—*FISHER v. JACKSON*, No. 351, *ante*.

**355. Action for damages proper remedy.]**—*BOWERS v. YOUNG* (1904), 48 Sol. Jo. 733.

**SUB-SECT. 4.—EJECTMENT FROM SCHOOL PREMISES.**

**356. Grounds for removal from office—Need not be proved.]**—In ejectment against a schoolmaster who has been removed by sentence of the trustees of the school for misbehaviour, it is not necessary for the lessors of pltf. to prove the grounds of the sentence, nor can defts. disprove them.—*DOE d. DAVY v. HADDON* (1783), 3 Doug. K. B. 310; 99 E. R. 669.

*Annotations*:—*Refd.* *Wildes v. Russell* (1866), L. R. 1 C. P. 722. *Mentd.* *Hayman v. Rugby School* (1874), L. R. 18 Eq. 28.

**357. Dismissal of schoolmaster—Condition precedent to ejectment.]**—*DOE d. THANET (EARL) v. GARTHAM*, No. 346, *ante*.

**358. ———.]**—The master of an ancient endowed school is entitled to the schoolhouse, unless he has been in due manner removed from his office by those having authority to do so. The neglecting of the scholars would be a good ground of amotion.—*DOE d. COYLE v. COLE* (1834), 6 C. & P. 359, N. P.

**359. Who is entitled to oust master—Endowed school.]**—Under a will declaring that if the curate of a parish for the time being shall take the trouble to keep a school created by the will, he shall have the preference, the curate of such parish having been so for fourteen years without interfering with the school is not at liberty to oust a schoolmaster who had been duly appointed, & held the office several years.—*WILLIAMS v. HUGHES* (1843), 2 L. T. O. S. 208; 8 J. P. 470.

**SUB-SECT. 5.—COMPENSATION FOR COMPULSORY ACQUISITION OF SCHOOL PREMISES.**

**360. How determined—Tenancy for a year or from year to year—Lands Clauses Act, 1845 (c. 18), s. 121.]**—*R. v. MANCHESTER, ETC. RY. CO.*, No. 224, *ante*.

**Acquisition, appropriation, & alienation of land.]**—*See* Part X., *ante*.

**SECT. 11.—CONTRACT TO EDUCATE.**

**SUB-SECT. 1.—IN GENERAL.**

**361. School prospectus—As evidence—Stamp.]**—Where the agreement on which the action is brought is contained in a prospectus of terms delivered by pltf. to deft., it is necessary to get that identical copy stamped which has been delivered, & it is not sufficient to get another copy stamped.—*WILLIAMS v. STOUGHTON* (1817), 2 Stark. 202, N. P.

*Annotations*:—*Refd.* *Chadwicke v. Clarke* (1845), 1 C. B. 700; *Clay v. Crofts* (1851), 20 L. J. Ex. 361.

—*See, further*, *CONTRACT*, Vol. XII., p. 56, No. 315.

**362. ——— Proposal not contract—Stamp.]**—In an action by a schoolmaster for a sum of money in lieu of three months' notice of the removal of applt.'s (deft.'s) sons from school, it appeared that applt.'s agent having expressed a wish to place applt.'s sons under resp.'s (pltf.'s) care, received from the latter a prospectus, which stated that the terms were sixty guineas per annum, & that three months' notice or payment was required previously to the removal of the pupil. Resp., at the time of delivering the prospectus, agreed, verbally, that the boys should be charged for at the rate of fifty guineas per annum each. The boys were, thereupon, sent to resp.'s school, & were taken away without the stipulated notice:—*Held*: the



prospectus was a proposal, & not an agreement, & no stamp was necessary.—*CLAY v. CROFTS* (1851), 20 L. J. Ex. 361; 17 L. T. O. S. 231.

*Annotation:—Reid. Carill v. Carbolic Smoke Ball Co.* (1892), 87 L. T. 837.

**363. Letter embodying agreement—Stamp.]—**

(1) Where to *assumpsit* by a schoolmaster, for the board & education of deft.'s sons, deft. pleads that pltf. did not furnish his sons with proper instruction, board, & lodging, & that he therefore removed them from the school, he must confine himself to evidence as to the treatment of his own sons, & cannot go either into general evidence of pltf.'s mode of conducting the school, or into evidence of his conduct with reference to other particular boys.

(2) Where a letter, written by pltf. to deft., containing terms of agreement, is called for by him at the trial, & produced on notice by deft., it is in the custody of the ct.; & if it appears not to be stamped, the judge will permit pltf. to send a person with it to the Stamp Office, accompanied by an officer of the ct.—*CLEMENTS v. MAY* (1836), 7 C. & P. 678, N. P.

**364. Delivery & acceptance of bill—Evidence of liability—Statute of Frauds.]—**A mother took her son to school, & saw the master, but no evidence was given of what passed at that time. Afterwards, a bill was delivered to the boy's uncle, who said it was quite right to deliver the bill to him, for he was answerable:—*Held*: Stat. Frauds did not apply, & it was proper to leave it to the jury to say under those circumstances, whether the original credit was not given to the uncle.—*DARNELL v. TRATT* (1825), 2 C. & P. 82.

**365. Implied contract—To educate pupil—While conduct does not warrant expulsion.]—***FITZGERALD v. NORTHCOTE*, No. 266, *ante*.

**366. Tuition by correspondence—Refusal of pupil to receive instruction—Right of teacher to recover fees.]—**Deft. entered into an agreement with pltf., who carried on a system of tuition by correspondence, for a course of instruction in telephone engineering. By the terms of the agreement it was provided that the fee to be paid by deft. was to cover all instruction until deft. was qualified for a diploma, provided he completed the course of instruction in five years. Deft. agreed to pay a fee of £14 10s. for the course, 10s. at the time of signing the application form, & the remainder by instalments of 10s. a month. Deft. paid the 10s. deposit & one subsequent instalment of 10s., & shortly afterwards gave notice to pltf. that he did not propose to continue the course. Pltf. brought an action to recover £5, being the amount of the instalments due at the time of the commencement of the action. The learned judge held that pltf. were not entitled to recover the whole fee agreed to be paid, but could only claim such instalments as had accrued due down to the time when deft. broke his contract & declined to continue the course, & damages for breach of

contract. He found that the contract was broken after one instalment had fallen due, & gave judgment for pltf. for 10s.:—*Held*: the decision of the learned judge was wrong, & pltf. having always been ready & willing to give the instruction contracted for, deft. had received the consideration for which he had bargained—namely, the right to receive instruction—& consequently pltf. were entitled to sue for the instalments as they became due, whether deft. refused to receive the instruction or not.—*INTERNATIONAL CORRESPONDENCE SCHOOLS, LTD. v. AYRES* (1912), 106 L. T. 845; 28 T. L. R. 408, D. C.

**367. Breach of contract—Admissibility of evidence.]—***CLEMENTS v. MAY*, No. 363, *ante*.

**SUB-SECT. 2.—REMOVAL OF PUPIL BY PARENT.**

**368. Removal without notice—Term fees in lieu.]—***Indebitatus assumpsit* for board, schooling, clothes, etc., with a count on a *quantum meruit* for the same, & also a count stating that in consideration that pltf. had taken J. as a scholar into an academy kept by him, & that he had left it without having given due notice, deft. promised to pay so much as pltf. reasonably deserved to have:—*Held*: under these counts pltf. was entitled to recover for a quarter over the time which J. stayed, on the ground of a quarter's notice not having been given, that being one of the terms upon which he was taken.—*EARDLY v. PRICE* (1806), 2 Bos. & P. N. R. 333; 127 E. R. 655.

*Annotation:—Mentl. Fewings v. Tisdal* (1847), 1 Exch. 295.

**369. ———— Liquidated amount — Not penalty.]—**The judge should have directed the jury that the amount to be recovered should have been the amount claimed. The test whether it is a penalty is, if there were several things to be done & a sum named in case they were not done—that would be a penalty. This is a sum payable for non-performance of the terms of a contract (*MATTHEW, J.*)—*JENNSEN v. THORNTON* (1887), 3 T. L. R. 657, D. C.

*Annotation:—Reid. Jones v. Turner* (1891), 7 T. L. R. 421.

**370. ———— ] JONES v. TURNER** (1891), 7 T. L. R. 421, D. C.

**371. ———— Not enforceable for temporary removal.]—**Deft. sent his son to pltf.'s school, on the terms that when he removed him from the school he would either give pltf. a term's notice or pay him an equivalent in money. In an action against deft. for removing his son without giving such notice or paying the equivalent:—*Held*: it was a good defence to show that the removal was only a temporary one, whilst the son was unable from illness to return to the school.—*SIMEON v. WATSON* (1877), 46 L. J. Q. B. 679.

*Annotation:—Distl. Denman v. Winstanley* (1887), 4 T. L. R. 127.

**PART XVII. SECT. 11, SUB-SECT. 2.**

**368 I. Removal without notice—Term's fees in lieu.]—**Resp. took applt.'s sons into his school boarding-house in return for a quarterly fee, & after three quarters applt. removed them without notice. No condition had been originally made as to notice, but three quarterly accounts had been rendered to applt. containing prominently on the face of them a statement that in lieu of notice one quarter's fee must be paid. This statement had not come to applt.'s knowledge, but it came to the knowledge of his wife, who acted in this business for him:—*Held*: the

notice was sufficient; the quarter's fee must be taken as liquidated damages; & the magistrate's judgment in favour of the respondent was correct.—*SMITH v. CARSON* (1916), 8 D. L. 26.—S. AF.

**368 II. ———— ]—**A child was placed in a boarding-school at an inclusive fee of £31 10s. per term for board & tuition. One of the conditions of the contract was that a term's notice of removal should be given or a term's fees paid in lieu of notice:—*Held*: where the child was wrongfully removed from the school without notice, a full term's fees were

payable notwithstanding that no actual damages were proved.—*OLWIK v. HILDE COLLEGE*, [1922] T. P. D. 402.—S. AF.

**I. Removal before end of term—Unfounded allegations of improper treatment—Liability for fees.]—**Where a father sent his son to a school, & the agreement was that payments were to be made quarterly & the engagements were quarterly, & soon after the beginning of a term the father withdrew the boy on the ground that he had not been properly treated at school:—*Held*: the father was liable for the quarter's fees, his action not being



*Sect. 11.—Contract to educate: Sub-sects. 2 & 3. Part XVIII.]*

**372.** ——— **No provision for fees in lieu—Damages only.]**—DENMAN *v.* WINSTANLEY (1887), 4 T. L. R. 127, D. C.

*Annotation:—Distd. Jones v. Turner (1891), 7 T. L. R. 421.*

**373.** ——— **Quarter fees.]—Pltf.** kept a day-school, at which deft.'s child was a boarder. Payments had previously been made quarterly, but there was no express quarterly contract. The child being taken ill at the commencement of the midsummer quarter, was sent home, & did not return to the school:—*Held*: deft. was liable for the entire quarter.—COLLINS *v.* PRICE (1828), 5 Bing. 132; 2 Moo. & P. 233; 6 L. J. O. S. C. P. 244; 130 E. R. 1011.

*Annotations:—Distd. Denman v. Winstanley (1887), 4 T. L. R. 127. Mentd. Smith v. Hayward (1837), 7 Ad. & El. 344.*

**374.** ——— **Removal of school.]—**DRAKE *v.* BLEW (1853), 22 L. T. O. S. 88, 121.

**375.** ——— **Terms of contract—Admissibility of evidence.]**—In an action for a quarter's salary, for taking away a child from a school without a quarter's notice, evidence was given on the part of pltf., that a prospectus was given to deft. when he came to inquire the terms of the school, & that it was usual to send a prospectus of the terms of the school with each child who went home for the holidays; & it was proposed, on the part of deft., to call a witness to prove that she had taken her children from pltf.'s school without notice, & without being called on for the quarter's salary:—*Held*: this evidence was not admissible; but the witness might be asked, whether she had

ever received any prospectus when her children came home for the holidays.—DELAMOTTE *v.* LANE (1840), 9 C. & P. 261.

**376.** ——— **Effect of parent's bankruptcy.]—**A schoolmaster took the son of B. to board for half a year, ending June 24; the son was taken home for the holidays on (June) 18; B. became bankrupt on the 20th:—*Held*: the half-year's board was not a debt provable under the commission against B. & therefore not barred by his certificate.—PARSLOW *v.* DEARLOVE (1804), 4 East, 438; 1 Smith, K. B. 281; 102 E. R. 898. *Annotations:—Mentd. Hoskins v. Duperoy (1808), 9 East, 498; Ex p. White (1814), 3 Ves. & B. 128.*

**377.** ——— **Bankruptcy during the currency of a quarter (& subsequent certificate) is no bar to an action by a schoolmaster for board & tuition of the bankrupt's son under a quarterly contract—the demand not being a debt “not payable at the time of the bankruptcy,” within 12 & 13 Vict. c. 106, s. 172, or “a liability to pay money upon a contingency,” within sect. 178.**—HOPKINS *v.* THOMAS (1860), 7 C. B. N. S. 711; 141 E. R. 995; *sub nom.* THOMAS *v.* HOPKINS, 29 L. J. C. P. 187; 6 Jur. N. S. 301; 8 W. R. 202.

**SUB-SECT. 3.—CLOTHING, ETC., SUPPLIED TO CHILD.**

**378. Clothing for pupil—No right to charge for—Without express or implied sanction.]—**A schoolmaster has no right to charge for wearing apparel which he has caused to be supplied to a scholar without the sanction, express or implied, of the parent or guardian of such scholar.—CLEMENTS *v.* WILLIAMS (1837), 8 C. & P. 58.

## Part XVIII.—Legal Proceedings.

*See 1921 Act, ss. 130–147.*

**To enforce school attendance.]—See Part IV., Sect. 1, sub-sect. 2, ante.**

*Justified:—Durr v. Schumann (1910), 27 S. C. 21.—S. AF.*

**1. “Quarter’s notice”—Definition.]**—The prospectus of the C. school contained a list of boarding fees at so much per quarter & stipulated that a quarter’s notice should be given before the removal of a pupil:—*Held*: the notice required was of one school quarter & not of one quarter of the year.—HAHT *v.* FORMAN (1905), 22 S. C. 284.—S. AF.

### PART XVIII.

**h. School trustees—Action for trespass.]—**Under 7 Vict. c. 29, s. 44, the trustees of the school (& not the school master) should sue for a trespass to the school house, unless it can be shown that the trustees have given the school master a particular interest in the building beyond the mere liberty of occupying it during the day for the purpose of teaching.—MONAGHAN *v.* FERGUSON (1847), 3 U. C. R. 484.—CAN.

**k. —Refusal to act—Enforcement of liability.]—**Where school

trustees become personally responsible under 13 & 14 Vict. c. 48, s. 2 (16), for refusing to exercise their corporate powers, before such liability can be enforced by the warrant of arbitrators under 16 Vict. c. 185, s. 15, it is necessary to show that there has been some adjudication of the fact of wilful refusal, to justify such warrant.—RANNEY *v.* MACKLEM (1859), 9 C. P. 192; *consd.* GRAHAM *v.* HUNGERFORD, 29 U. C. R. 239.—CAN.

**l. —Notice of action—Act done in corporate capacity.]—Held**: a school trustee who is sued for any act done in his corporate capacity is entitled to notice of action, & the action must be brought within six months. A school trustee, acting in the discharge of his duty as such, is entitled to the protection of, & comes within, 16 Vict. c. 180, notwithstanding he should have signed a warrant individually instead of in his corporate capacity.—SRYR *v.* MUMBY (1862), 11 C. P. 285.—CAN.

**m. ——— Service on secretary.]—**A notice of action against

school trustees in their corporate capacity may be served on their secretary.—ROBERTS *v.* SHEDIAK DISTRICT SCHOOL TRUSTEES (1887), 26 N. B. R. 360.—CAN.

**n. School Board—Contract with teacher—Liability.]—**In an action by a school teacher against the School Board who had hired him, the latter set up as a defence that they were acting in a public capacity, & as such were not personally liable:—*Held*: defts., being parties to the contract, were liable.—FOX *v.* CARFAGNINI (1874), 6 Nfld. L. R. 24.—CAN.

**o. ——— School committee not consulted—Remedy.]—**Where an Education Board appointed two teachers to a new school in a school district without consulting the School Committee of the district:—*Held*: the proper remedy of the School Committee was to move the ct. for an injunction to compel the Board to cancel the appointments.—LESSINGTON *v.* WELLINGTON EDUCATION BOARD (1907), 26 N. Z. L. R. 244.—N.Z.

## EELS.

*See* FISHERIES.

## EJECTMENT.

*See* COUNTY COURTS; LANDLORD AND TENANT; MORTGAGE; REAL PROPERTY AND CHATTELS REAL.

## ELDEST SON.

*See* DESCENT AND DISTRIBUTION; SETTLEMENTS; WILLS.

## ELECTION, DOCTRINE OF.

*See* EQUITY; WILLS.

END OF VOL. XIX.



